

1 HOUSE BILL NO. 59

2 INTRODUCED BY K. DUDIK

3 BY REQUEST OF THE TASK FORCE ON STATE PUBLIC DEFENDER OPERATIONS

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT LIMITING THE APPOINTMENT OF COUNSEL TO A PUTATIVE
6 FATHER WHERE CHILD IS SUBJECT TO AN ABUSE AND NEGLECT PETITION; AMENDING SECTIONS
7 41-3-422 AND 41-3-425, MCA."

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9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 **Section 1.** Section 41-3-422, MCA, is amended to read:

12 **"41-3-422. Abuse and neglect petitions -- burden of proof.** (1) (a) Proceedings under this chapter
13 must be initiated by the filing of a petition. A petition may request the following relief:

14 (i) immediate protection and emergency protective services, as provided in 41-3-427;

15 (ii) temporary investigative authority, as provided in 41-3-433;

16 (iii) temporary legal custody, as provided in 41-3-442;

17 (iv) long-term custody, as provided in 41-3-445;

18 (v) termination of the parent-child legal relationship, as provided in 41-3-607;

19 (vi) appointment of a guardian pursuant to 41-3-444;

20 (vii) a determination that preservation or reunification services need not be provided; or

21 (viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that
22 may be required for the best interests of the child.

23 (b) The petition may be modified for different relief at any time within the discretion of the court.

24 (c) A petition for temporary legal custody may be the initial petition filed in a case.

25 (d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in
26 a case if a request for a determination that preservation or reunification services need not be provided is made
27 in the petition.

28 (2) The county attorney, attorney general, or an attorney hired by the county shall file all petitions under
29 this chapter. A petition filed by the county attorney, attorney general, or an attorney hired by the county must be
30 accompanied by:

- 1 (a) an affidavit by the department alleging that the child appears to have been abused or neglected and
2 stating the basis for the petition; and
- 3 (b) a separate notice to the court stating any statutory time deadline for a hearing.
- 4 (3) Abuse and neglect petitions must be given highest preference by the court in setting hearing dates.
- 5 (4) An abuse and neglect petition is a civil action brought in the name of the state of Montana. The
6 Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter.
7 Proceedings under a petition are not a bar to criminal prosecution.
- 8 (5) (a) Except as provided in subsection (5)(b), the person filing the abuse and neglect petition has the
9 burden of presenting evidence required to justify the relief requested and establishing:
- 10 (i) probable cause for the issuance of an order for immediate protection and emergency protective
11 services or an order for temporary investigative authority;
- 12 (ii) a preponderance of the evidence for an order of adjudication or temporary legal custody;
- 13 (iii) a preponderance of the evidence for an order of long-term custody; or
- 14 (iv) clear and convincing evidence for an order terminating the parent-child legal relationship.
- 15 (b) If a proceeding under this chapter involves an Indian child, as defined in the federal Indian Child
16 Welfare Act, 25 U.S.C. 1901, et seq., the standards of proof required for legal relief under the federal Indian Child
17 Welfare Act apply.
- 18 (6) (a) Except as provided in the federal Indian Child Welfare Act, if applicable, the parents or parent,
19 guardian, or other person or agency having legal custody of the child named in the petition, if residing in the state,
20 must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal
21 relationship at least 5 days before the date set for hearing. If the person or agency cannot be served personally,
22 the person or agency may be served by publication as provided in 41-3-428 and 41-3-429.
- 23 (b) Copies of all other petitions must be served upon the person or the person's attorney of record by
24 certified mail, by personal service, or by publication as provided in 41-3-428 and 41-3-429. If service is by certified
25 mail, the department must receive a return receipt signed by the person to whom the notice was mailed for the
26 service to be effective. Service of the notice is considered to be effective if, in the absence of a return receipt, the
27 person to whom the notice was mailed appears at the hearing.
- 28 (7) If personal service cannot be made upon the parents or parent, guardian, or other person or agency
29 having legal custody, the court shall immediately provide for the appointment or assignment of an attorney as
30 provided for in 41-3-425 to represent the unavailable party when, in the opinion of the court, the interests of

1 justice require. If personal service cannot be made upon a putative father, the court may not provide for the
2 appointment or assignment of counsel as provided for in 41-3-425 to represent the father unless, in the opinion
3 of the court, the interests of justice require counsel to be appointed or assigned.

4 (8) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian, and
5 if there is no guardian, the court shall appoint one.

6 (9) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent,
7 preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition of
8 all judicial hearings for the child and has the right to be heard. The right to appear or to be heard does not make
9 that person a party to the action. Any foster parent, preadoptive parent, or relative caring for the child must be
10 given notice of all reviews by the reviewing body.

11 (b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child
12 who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section
13 may be allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented
14 on those subjects provided for in 41-3-437(4), determines that the intervention of the person is in the best
15 interests of the child. A person granted intervention pursuant to this subsection is entitled to participate in the
16 adjudicatory hearing held pursuant to 41-3-437 and to notice and participation in subsequent proceedings held
17 pursuant to this chapter involving the custody of the child.

18 (10) An abuse and neglect petition must:

19 (a) state the nature of the alleged abuse or neglect and of the relief requested;

20 (b) state the full name, age, and address of the child and the name and address of the child's parents
21 or guardian or person having legal custody of the child;

22 (c) state the names, addresses, and relationship to the child of all persons who are necessary parties
23 to the action.

24 (11) Any party in a proceeding pursuant to this section is entitled to counsel as provided in 41-3-425.

25 (12) At any stage of the proceedings considered appropriate by the court, the court may order an
26 alternative dispute resolution proceeding or the parties may voluntarily participate in an alternative dispute
27 resolution proceeding. An alternative dispute resolution proceeding under this chapter may include a family group
28 decisionmaking meeting, mediation, or a settlement conference. If a court orders an alternative dispute resolution
29 proceeding, a party who does not wish to participate may file a motion objecting to the order. If the department
30 is a party to the original proceeding, a representative of the department who has complete authority to settle the

1 issue or issues in the original proceeding must be present at any alternative dispute resolution proceeding.

2 (13) Service of a petition under this section must be accompanied by a written notice advising the child's
3 parent, guardian, or other person having physical or legal custody of the child of the:

4 (a) right, pursuant to 41-3-425, to appointment or assignment of counsel if the person is indigent or if
5 appointment or assignment of counsel is required under the federal Indian Child Welfare Act, if applicable;

6 (b) right to contest the allegations in the petition; and

7 (c) timelines for hearings and determinations required under this chapter.

8 (14) If appropriate, orders issued under this chapter must contain a notice provision advising a child's
9 parent, guardian, or other person having physical or legal custody of the child that:

10 (a) the court is required by federal and state laws to hold a permanency hearing to determine the
11 permanent placement of a child no later than 12 months after a judge determines that the child has been abused
12 or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

13 (b) if a child has been in foster care for 15 of the last 22 months, state law presumes that termination of
14 parental rights is in the best interests of the child and the state is required to file a petition to terminate parental
15 rights; and

16 (c) completion of a treatment plan does not guarantee the return of a child.

17 (15) A court may appoint a standing master to conduct hearings and propose decisions and orders to
18 the court for court consideration and action. A standing master may not conduct a proceeding to terminate
19 parental rights. A standing master must be a member of the state bar of Montana and must be knowledgeable
20 in the area of child abuse and neglect laws."

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22 **Section 2.** Section 41-3-425, MCA, is amended to read:

23 **"41-3-425. Right to counsel.** (1) Any party involved in a petition filed pursuant to 41-3-422 has the right
24 to counsel in all proceedings held pursuant to the petition.

25 (2) Except as provided in subsections (3) ~~and (4)~~ through (5), the court shall immediately appoint the
26 office of state public defender to assign counsel for:

27 (a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal,
28 placement, or termination proceeding pursuant to 41-3-422, pending a determination of eligibility pursuant to
29 47-1-111;

30 (b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a

1 guardian ad litem is not appointed for the child or youth; and

2 (c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.

3 (3) When appropriate, the court may appoint the office of state public defender to assign counsel for any
4 child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is
5 appointed for the child or youth.

6 (4) When appropriate and in accordance with judicial branch policy, the court may assign counsel at the
7 court's expense for a guardian ad litem or a court-appointed special advocate involved in a proceeding under a
8 petition filed pursuant to 41-3-422.

9 (5) Except as provided in the federal Indian Child Welfare Act, a court may not appoint a public defender
10 to a putative father, as defined in 42-2-201, of a child or youth in a removal, placement, or termination proceeding
11 pursuant to 41-3-422 until:

12 (a) the putative father is successfully served notice of a petition filed pursuant to 41-3-422; and

13 (b) the putative father makes a request to the court in writing to appoint the office of state public defender
14 to assign counsel."

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