

HJR 48/49: Child Protective Services

The Right to Parent

Prepared for the Children, Families, Health, and Human Services Interim Committee
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A component of the House Joint Resolution 48 study includes examining the right to parent. This paper examines the right to parent in the context of child abuse and neglect proceedings.

The Right to Parent

The right to parent – to make decisions concerning the care, custody, and control of one’s child – is a fundamental liberty interest protected by Article II, section 17, of the Montana Constitution and by the due process clause of the 14th amendment to the U.S. Constitution.¹ The right to parent “may be limited by the [s]tate’s responsibility to protect the welfare of children”² and is inferior to the best interests of the child in a parental rights termination proceeding³. Montana’s child abuse and neglect statutes⁴ provide the statutory framework for state infringement on the right to parent in order to protect the welfare of children.⁵ Because a fundamental liberty interest is implicated in child abuse and neglect proceedings, the state must adhere to all statutory requirements and must provide fundamentally fair procedures at all stages of the proceedings⁶ to ensure that a parent is not placed at an unfair disadvantage⁷.

Fundamentally Fair Procedures

The Montana Supreme Court has held that a fundamentally fair procedure includes the following components:

1. *Notice of the proceedings and an opportunity to be heard.*⁸
2. *Appointment of counsel:* Due process considerations and 41-3-425, MCA, give a parent involved in a child abuse and neglect petition the right to counsel in all proceedings held pursuant to the petition. The District Court is required to appoint the Office of State Public Defender to assign counsel for an indigent parent having legal custody of a child in a removal, placement, or termination proceeding pursuant to 41-3-422, MCA, pending a determination of eligibility.

¹ *In re A.J.C.*, 2018 MT 234, ¶ 31, 393 Mont. 9, 427 P.3d 59; *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000).

² *Id.* at ¶ 32.

³ *In re M.A.L.*, 2006 MT 299, ¶ 26, 334 Mont. 436, 148 P.3d 606.

⁴ Title 41, chapter 3, MCA.

⁵ *In re A.J.C.*, ¶ 32.

⁶ *In re C.J.*, 2010 MT 179, ¶ 26, 357 Mont. 219, 237 P.3d 1282; *In re S.R.*, 2019 MT 47, ¶ 12, 394 Mont. 362, 436 P.3d 696.

⁷ *In re T.S.B.*, 2008 MT 23, ¶ 30, 341 Mont. 204, 177 P.3d 429.

⁸ *In re C.J.*, ¶ 27.

3. *Effective assistance by counsel*: A parent has a due process right to effective assistance of counsel. In determining whether counsel was effective, the Montana Supreme Court reviews counsel’s training, experience, and advocacy.⁹ Ineffective assistance results in reversal only if a parent suffers prejudice.¹⁰ “A parent cannot establish [ineffective assistance of counsel] through [the parent’s] own failure to contact and engage with counsel.”¹¹

4. *Burden of proof – clear and convincing evidence – statutory criteria*: Under 41-3-604, MCA, if a child has been in foster care for 15 months out of the most recent 22 months, it is presumed that termination of parental rights is in the child’s best interest, and a petition to terminate parental rights must be filed unless the child is in the care of relative, the Department has not provided necessary services to return the child home, or the Department documents a compelling reason for not filing a termination petition. The presumption does not eliminate the substantive requirements of 41-3-609, MCA,¹² and before terminating parental rights, the District Court “must adequately address each applicable statutory requirement to determine if it has been established, and the burden is on the party seeking termination to demonstrate by clear and convincing evidence¹³ that every requirement set forth in the statute has been satisfied”.¹⁴ Section 41-3-609(1), MCA, sets forth the criteria for termination of parental rights:

(1) The court may order a termination of the parent-child legal relationship upon a finding established by clear and convincing evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that any of the following circumstances exist:

- (a) the parents have relinquished the child pursuant to 42-2-402 and 42-2-412;
- (b) the child has been abandoned by the parents;
- (c) the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born;
- (d) the parent has subjected a child to any of the circumstances listed in 41-3-423(2)(a) through (2)(e);
- (e) the putative father meets any of the criteria listed in 41-3-423(3)(a) through (3)(c); or

⁹ *In re E.Y.R.*, 2019 MT 189, ¶ 22, 396 Mont. 515, 446 P.3d 1117.

¹⁰ *Id.*

¹¹ *In re B.J.J.*, 2019 MT 129, ¶ 18, 396 Mont. 108, 443 P.3d 488.

¹² *In re D.B.*, 2007 MT 246, ¶ 23, 339 Mont. 240, 168 P.3d 691.

¹³ Note: The federal Indian Child Welfare Act provides additional requirements, including requiring a heightened burden of proof for termination of parental rights.

¹⁴ *In re F.M.*, 2002 MT 180, ¶ 48, 311 Mont. 35, 53 P.3d 368.

(f) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

5. *Good faith efforts:*

Under 41-3-609(1)(f), MCA, which protects a parent's right to parent¹⁵, the District Court may terminate parental rights if the child is adjudicated a youth in need of care and: (1) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful and (2) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

In construing the appropriateness of a treatment plan, the Montana Supreme Court has held that the state must prove the appropriateness of the treatment plan by clear and convincing evidence. In addition, the state has a duty to act in good faith in developing and executing a treatment plan, and due process requires that the treatment plan include a timeline for completion of goals and tasks.¹⁶

In determining whether the conduct or condition rendering a parent unfit, unwilling, or unable to parent is unlikely to change within a reasonable time, a predicate finding that the District Court must make is whether the state made reasonable efforts to prevent the necessity of removal of the child from the home and to reunify families that have been separated by the state, as required under 41-3-423(1), MCA.¹⁷ To meet this requirement, the state "must in good faith develop and implement voluntary services plans and treatment plans designed to preserve the parent-child relationship and the family unit and must assist parents in completing services and treatment plans."¹⁸ "[R]easonable efforts do not require herculean efforts" but do require something more than "merely suggesting services to a parent and waiting for the parent to then arrange those services for herself."¹⁹ A parent has a corresponding obligation to contact and engage with the state.²⁰

¹⁵*In re R.J.F.*, 2019 MT 113, ¶ 24, 395 Mont. 454, 443 P.3d 387.

¹⁶*In re D.B.*, ¶¶ 33-37.

¹⁷*In re R.J.F.*, ¶¶ 25-26.

¹⁸*Id.* at ¶ 28 (internal quotations omitted).

¹⁹*Id.* at ¶ 37.

²⁰*In re C.J.*, ¶ 24.

6. *No right to jury trial*: Section 41-3-607(5) provides “there is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship”. The constitutionality of this statute has been upheld by the Montana Supreme Court.²¹

²¹ See *In re M.H. & G.H.*, 2006 MT 208, 333 Mont. 286, 143 P.3d 103; *In re C.L.A. & J.A.*, 211 Mont. 393, 685 P.2d 931.