



Children, Families, Health, and Human Services Interim Committee

67th Montana Legislature

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To: House Bill 39 Working Group
From: Alexis Sandru, CFHHS Staff Attorney
Re: Applicability of SB 400 (2021) in Child Abuse and Neglect Proceedings

At the working group's November 2021 meeting, the working group requested that staff provide additional information regarding the applicability of SB 400 (2021), now codified as 40-6-701, MCA, to child abuse and neglect proceedings. Specifically, the working group asked whether SB 400 provided a parent with continued decisionmaking authority over a child when the Department of Public Health and Human Services (Department) exercises emergency protective services.

Section 40-6-701, MCA, provides as follows:

40-6-701. Interference with fundamental parental rights restricted — cause of action. (1) A governmental entity may not interfere with the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children unless the governmental entity demonstrates that the interference:

(a) furthers a compelling governmental interest; and
(b) is narrowly tailored and is the least restrictive means available for the furthering of the compelling governmental interest.

(2) *This section may not be construed as invalidating the provisions of Title 41, chapter 3, or modifying the burden of proof at any stage of the proceedings under Title 41, chapter 3.*

(3) When a parent's fundamental rights protected by this section are violated, a parent may assert that violation as a claim or defense in a judicial proceeding and may obtain appropriate relief against the governmental entity. The prevailing party in an action filed pursuant to this section is entitled to reasonable attorney fees and costs.

(4) As used in this section, "governmental entity" has the meaning provided in 2-9-101.

(Italics added.)

In enacting 40-6-701(1), MCA, the 2021 Legislature essentially codified the fundamental right of parents, protected by the U.S. Constitution and Montana Constitution, to make decisions concerning the care, custody, and control of their children.¹ However, this right is not absolute, and as the Montana Supreme Court has noted, "[t]he constitutional protection surrounding family rights is tempered by the [s]tate's *parens patriae* responsibility to protect the welfare of

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).

children."² Montana's child abuse and neglect statutes, Title 41, chapter 3, MCA, provide the statutory framework for state infringement on the right to parent in order to protect the welfare of children. The Legislature, in subsection (2) of 40-6-701, MCA, similarly recognized that parental rights are not absolute and provided that 40-6-701, MCA, does not invalidate Montana's existing child abuse and neglect statutes. Therefore, because 40-6-701, MCA, did not disturb Title 41, chapter 3, MCA, the status quo has not changed.

² *In re M.A.L.*, 2006 MT 299, ¶ 26, 334 Mont. 436, 148 P.3d 606.