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Children, Families, Health, and Human Services Interim Committee
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HJR 45: CHILD REMOVAL/REUNIFICATION TERMINOLOGY AND LEGAL STANDARDS

INTRODUCTION

When investigating suspected child abuse or neglect and when filing cases in court, child protective services workers, law enforcement officials, and county attorneys must meet standards set out in statute. Likewise, district court judges must base their decisions on various standards of proof as required by law.

This briefing paper provides some of the key statutory definitions used in abuse and neglect cases and discusses the elements required for the various standards of proof that the cases must meet.

DEFINITIONS: ABUSE AND NEGLECT CASES

Definitions contained in 41-3-102, MCA, govern the handling of child abuse and neglect cases, from the time a complaint is filed until it's resolved. Key definitions include:

- **Best interests of the child:** The physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child.
- **Child abuse or neglect:** Actual physical or psychological harm, substantial risk of physical or psychological harm, or abandonment. The term includes: acts or omissions by a parent; any instances in which a child is exposed to criminal distribution of drugs, criminal manufacture or production of drugs, or operation of a clandestine laboratory; and any form of child sex trafficking or human trafficking.

State law and legal standards set requirements that must be met in abuse and neglect cases.

- **Permanent placement:** Any of the following: reunification of the child with the child's parent; adoption; placement with a legal guardian; placement with a fit and willing relative; or placement in another planned, permanent living arrangement until the child reaches the age of 18.
- **Physical abuse:** An intentional act, an intentional omission, or gross negligence resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily organ or function, or death.
- **Physical neglect:** Failure to provide basic necessities, including but not limited to appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general supervision, or both, or exposing or allowing the child to be exposed to an unreasonable physical or psychological risk.
- **Physical or psychological harm:** Harm caused by the infliction of physical, physical neglect, or psychological abuse or neglect; sexual abuse or exploitation; inducement to give untrue testimony about abuse or neglect; malnutrition, failure to thrive, or otherwise failing to supply adequate food, clothing, shelter, education or health care; exposure to unreasonable risk to health or welfare; or abandonment.
- **Protective services:** Services provided by the Department of Public Health and Human Services (DPHHS) to allow a child to remain safely in the home, return to the home, or achieve permanency for a youth in need of care. Includes emergency protective services provided pursuant to 41-3-301, MCA, voluntary protective services provided pursuant to 41-3-302, MCA, and court-ordered protective services provided pursuant to Title 41, Chapter 3, Parts 4 and 6.
- **Psychological abuse or neglect:** Severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including acts of violence against another person living in the home.
- **Reasonable cause to suspect:** Cause that would lead a reasonable person to believe that child abuse or neglect may have occurred or is occurring, based on all the facts and circumstances known to the person.
- **Residential setting:** Any out-of-home placement where a child lives for longer than 30 days, in order to receive food, shelter, security, guidance, and if necessary, treatment.
- **Safety and risk assessment:** An evaluation by a caseworker to assess existing threats to a child's safety, the degree to which a child may be vulnerable and a parent is able to keep the child safe, the need for any interventions, and the likelihood of future physical or psychological harm to the child.
- **Youth in need of care:** A youth who has been adjudicated or determined, after a hearing, to be or to have been abused, neglected, or abandoned.

DEFINITIONS: OUT-OF-HOME PLACEMENTS

The laws regulating out-of-home care for children who have been removed from their homes are contained in Title 52, Chapter 2, Part 6, and are governed by definitions in 52-2-602, MCA. Key definitions include:

- **Kinship foster home:** A youth care facility in which substitute care is provided to one to six children other than the kinship parent's own children and care is provided by: a member of the extended family or tribe, the child's godparents or stepparents, or a person to whom is ascribed a family relationship and with whom the child has a significant emotional tie that existed prior to department's involvement with child or family.
- **Substitute care:** Full-time care of a youth in a residential setting when youth is placed by DPHHS, another state agency or a licensed child-placing agency; does not apply to temporary situations.
- **Youth care facility:** A facility providing substitute care to youth. The term includes foster homes, kinship foster homes, group homes, youth shelter care facilities, child-care agencies, transitional living programs, and youth assessment centers.
- **Youth foster home:** Substitute care provided to one to six children other than the foster parent's own children.
- **Youth group home:** Substitute care provided to seven to 12 youth.
- **Youth shelter care facility:** A facility that regularly receives children under temporary conditions until a court, probation office, DPHHS, or another agency has made other provisions for a child's care.

LEGAL STANDARDS OF PROOF

If the Department of Public Health and Human Services removes a child from a home and files to provide protective services or take other actions regarding the child, the agency must be able to prove that the action is necessary. Different actions require different standards of proof. Following is a summary of the generally accepted meaning of those standards, from the lowest burden of proof to the highest.

- **Probable cause** means reasonable grounds exist to suspect that a child is abused or neglected or is in danger of being abused or neglected.¹ This standard is required for:
 - an order for immediate protection and emergency protective services; or
 - an order for temporary investigative authority.²

¹ See e.g., *Black's Law Dictionary* (Bryan A. Garner ed., 3rd pocket ed., Thomsen West 2006); 41-3-427.

² 41-3-422(5)(a)(i). Note: clear and convincing evidence is required if the child is an Indian child.

- **Preponderance of evidence** means that an issue is more likely true than not. The standard is satisfied when the party with the burden of proof demonstrates “its claims to a level of confidence that is at least barely more than a perfect balance of the evidence”.³ This standard is required for orders involving:
 - adjudication of the youth as a youth in need of care;
 - temporary legal custody; or
 - long-term custody.⁴

- **Clear and convincing evidence** means "a preponderance of the evidence must be definite or that a particular issue must be established by a clear preponderance of proof. This standard does not call for unanswerable or conclusive evidence."⁵ Clear and convincing evidence requires more than a preponderance of the evidence but requires less than beyond a reasonable doubt.⁶ This standard is required for:
 - an order terminating the parent-child legal relationship;⁷ or
 - a judicial finding that preservation or reunification services are not necessary under 41-3-423.

- **Beyond a reasonable doubt** means “proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt.”⁸

This standard is required for an order terminating the parent-child legal relationship under the federal Indian Child Welfare Act.⁹

³ *The Wolters Kluwer Bouvier Law Dictionary* (Stephen Sheppard ed., Desk ed., Wolters Kluwer Law & Business 2012).

⁴ 41-3-422(5)(a)(ii) and (iii).

⁵ In re T.D.H., 2015 MT 244, p 28, 380 Mont. 401, 410, 356 P.3d 457, 464. (Internal quotations omitted.)

⁶ In re M.A.L., 2006 MT 299, p 52, 334 Mont. 436, 454, 148 P.3d 606, 617.

⁷ 41-3-422(5)(a)(iv).

⁸ Montana Model Criminal Jury Instruction 1-104 (2009).

⁹ 25 U.S.C. 1912.