

## Child and Family Services Policy Manual: Legal Procedure Required Judicial Hearings

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<b>Background</b>	<p>During the dependency of a child abuse and neglect proceeding, four types of hearings are required: show cause, adjudicatory, dispositional, and permanency hearing. Each hearing must be held within a prescribed time frame. Specific judicial findings are required at the conclusion of each hearing. The hearings can be combined if the requirements of each are met during the combined hearing.</p> <p><b>NOTE:</b> For every judicial hearing, ICWA cases must include testimony by a qualified expert witness.</p>
<b>Show Cause Hearing</b>	<p>The show cause hearing is the first or initial hearing held on a child abuse and neglect petition. The show cause hearing must be conducted within <b>20 days</b>, including weekends and holidays, of the filing of an <b>initial</b> child abuse and neglect petition unless:</p> <ul style="list-style-type: none"> <li>• otherwise stipulated by the parties pursuant to Mont. Code Ann. § 41-3-434; or</li> <li>• an extension of time is granted by the court upon a showing of substantial injustice.</li> </ul> <p>Note: If the parents, parent, guardian, person having physical or legal custody of the child, or attorney for the child disputes the material issues of fact contained in the affidavit or the veracity of the affidavit, the person may request a contested show cause hearing pursuant to Mont. Code Ann. § 41/3/402 within 10 days following service of the petition and affidavit.</p> <p><b>NOTE:</b> The initial hearing for an ICWA case may not be held prior to 10 days after receipt of the notice of the hearing and ICWA provides for an extension of an additional 20 days upon request by the parent or the tribe.</p>
<b>Evidentiary Standards</b>	<p>During the hearing, the person filing the petition has the burden of presenting evidence required to support the relief requested in the petition and establishing:</p> <ul style="list-style-type: none"> <li>• probable cause for the issuance of an order for immediate protection and emergency services;</li> <li>• probable cause for an order for Temporary Investigative Authority;</li> </ul>

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- preponderance of the evidence for an order of adjudication;
- preponderance of the evidence for an order for Temporary Legal Custody;
- preponderance of evidence for order for long term custody;
- clear and convincing evidence for a determination that preservation or reunification services need not be provided;
- clear and convincing evidence for an order terminating the parent-child legal relationship.

**NOTE:** If a contested show cause hearing is requested pursuant to Mont. Code Ann. § 41-3-427, based upon a disputed issue of the material fact or a dispute regarding the veracity of the affidavit of the department, the court may consider all evidence and shall provide an opportunity for a parent, guardian, or other person having physical or legal custody of the child to provide testimony regarding the disputed evidence.

**NOTE:** If the child who is the subject of the hearing is an Indian child as defined by ICWA, the ICWA evidentiary standards must be met. Those standards are:

- for a foster care placement, the court must make a determination, supported by clear and convincing evidence and the testimony of a qualified expert witness that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child; and
- for termination of the parent-child relationship, the court must make a determination, supported by evidence beyond a reasonable doubt and the testimony of a qualified expert witness that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

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<b>Evidence Presented</b>	At the show cause hearing, the court may consider all evidence. The parents must be provided an opportunity to provide testimony. Hearsay evidence of statements made by the child who is the subject of the proceeding is admissible at the show cause hearing. The court may permit testimony by telephone, videoconference, or other audio/audiovisual means at any time during an abuse/neglect proceeding.
<b>Appointment of Counsel</b>	The court must appoint council for the parent during the show cause hearing, if the parent is indigent and requests appointment of council. For ICWA cases, indigent parents have an absolute right to appointment of counsel.
<b>Show Cause Requirements</b>	<p>At the show cause hearing, the court must explain the procedures to be followed in the case and explain the parties' rights, including</p> <ul style="list-style-type: none"> <li>• the right to appointment of counsel if indigent or if appointment of counsel is required under ICWA; and</li> <li>• the right to challenge the allegations.</li> </ul> <p>The parent, guardian, or other person having physical or legal custody of the child must be given the opportunity to admit or deny the allegations; and</p> <p>Inquiry must be made to determine whether or not the notice requirements of ICWA have been met, if applicable.</p>
<b>Conclusion of the Show Cause Hearing</b>	<p>At the conclusion of the show cause hearing, the court must make specific required written findings including, but not limited to, the following:</p> <ol style="list-style-type: none"> <li>a) whether the child should be returned home immediately if there has been an emergency removal <b>OR</b> whether the child should remain in temporary out-of-home care <b>OR</b> whether the child should be removed from the home;</li> <li>b) if removal is ordered or continuation of removal is ordered, why continuation of the child in the parents' home would be contrary to the child's best interests and welfare;</li> <li>c) whether the Division has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home;</li> </ol>

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- d) financial support of the child, including inquiry into the financial ability of the parents, guardian, or other person having physical or legal custody of the child to contribute to the costs for the care, custody, and treatment of the child and requirements of a contribution for those costs; and
- e) whether another hearing is needed and, if so, the date and time of the next hearing.

In making his/her findings, the court may consider the following:

- a) terms and conditions for parental visitation; and
- b) whether orders for examinations, evaluations, counseling, immediate services, or protection are needed.

Following the show cause hearing, the court may enter an order for the relief requested or amend a previous order for immediate protection of the child, if one has been entered. The order after the show cause hearing must be in writing.

### Adjudicatory Hearing

The adjudicatory hearing is the hearing at which evidence is presented to establish that the child has actually been abused, neglected, or abandoned. An adjudicatory hearing **MUST** be held prior to the adjudication of the child as a youth in need of care. In In the Matter of T.C. and W.C., Youths In Need of Care, 2001 MT 264, 37 P.3d 70 (2002), the Montana Supreme Court stated that a court may only make the finding that a child is a youth in need of care through an adjudicatory hearing as mandated by Mont. Code Ann. § 41-3-437.

Adjudication of a child as a youth in need of care may be made at the show cause hearing if the requirements for adjudication have been met or if the parent(s), by prior stipulation, have agreed that the child meets the definition of "youth in need of care" by a preponderance of the evidence.

At the conclusion of the adjudicatory hearing, the court makes a determination of whether or not the child is a "youth in need of care." The adjudicatory hearing may be combined with the show cause hearing if all the requirements of both hearings are met.

Upon the filing of an appropriate petition, an adjudicatory

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hearing must be held within **90 days** of a show cause hearing. Exceptions to the time limit may be allowed only in cases involving newly discovered evidence, unavoidable delays in the notification of parties, and unforeseen personal emergencies.

### Evidentiary Standard

The court may make an adjudication on any abuse/neglect petition if the court determines by a preponderance of the evidence that the child is a youth in need of care.

For ICWA cases involving the foster care placement of an Indian child, the court must make a determination, supported by clear and convincing evidence and the testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

For ICWA cases involving the termination of the parent-child relationship, the court must make a determination, supported by evidence beyond a reasonable doubt and the testimony of a qualified expert witness that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

### Abandoned Children

In a case in which abandonment has been alleged, specific statutory requirements must be met. If a child is alleged to be abandoned, a foster parent, prospective adoptive-parent, or relative of the child who is caring for, or a relative of the child who has cared for, the child who is the subject of the proceeding may appear at the adjudicatory hearing.

These persons may be allowed to intervene in the case to become a party to the action. The court may allow these persons to intervene if, after a pre-hearing during which the required evidence discussed below is presented, the court determines that the requested intervention is in the best interests of the child. If the intervention is granted, the intervening person(s) become intervenors in the proceeding. As an intervenor, they may participate in the adjudicatory hearing as well as receive notice and participate in all subsequent hearings.

During the adjudicatory hearing on a child alleged to be abandoned, the court shall hear offered evidence, including evidence offered by an intervenor, regarding any of the following:

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- a) the extent to which the child has been cared for, nurtured, or supported by a person other than the child's parents; and
- b) whether the child was placed by the parents with another person so that person provided care for the child; or
- c) whether the parents allowed the child to remain with another person who provided care for the child.

If the child was placed by the parents with another person or the parents allowed the child to remain with another person, the court must hear evidence regarding:

- a) the intent of the parents in placing the child or allowing the child to remain with that person;
- b) the circumstances under which the child was placed or allowed to remain with that other person including:
  - i) whether a parent requesting return of the child was previously prevented from doing so as a result of an order of protection or a conviction for partner or family member assault; and
  - ii) whether the child was originally placed with the other person to allow the parent to seek employment or attend school.

**Evidence Presented**

During the adjudicatory hearing, the county attorney must present the facts which establish that the child has been abused, neglected, or abandoned and upon which the request for adjudication is based. The court must also hear evidence regarding the residence of the child, paternity (if in question), the whereabouts of the parents, guardian, or nearest adult relative, and any other matters the court considers relevant in determining the status of the child.

The court may permit testimony by telephone, videoconference, or other audio/visual means at any time during an abuse/neglect proceeding.

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Hearsay evidence of statements made by the youth is admissible according to the Montana Rules of Evidence (Title 25).	
<b>Adjudication Requirements</b>	Adjudication must determine the nature of the abuse and neglect. Adjudication must also establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based.
<b>Required Findings</b>	<p>Before making an adjudication, the court may make oral findings, and following the adjudicatory hearing, the court must make specific written required findings on issues including, but not limited to:</p> <ul style="list-style-type: none"> <li>a) which allegations of the petition have been proved or admitted, if any;</li> <li>b) whether there is a legal basis for continued court and Division intervention; and</li> <li>c) whether the Division has made reasonable efforts to avoid protective placement of the child or to make it possible to safely return the child to the child's home.</li> </ul>
<b>Discretionary Findings</b>	<p>The court may also order:</p> <ul style="list-style-type: none"> <li>a) terms for visitation, support and other intra-family communication pending disposition if the child is to be placed or to remain in temporary out-of-home care prior to disposition;</li> <li>b) examinations, evaluations, or counseling of the child or parents in preparation for the disposition hearing;</li> <li>c) the Division to evaluate the non-custodial parent or relatives as possible caretakers, if not already done;</li> <li>d) the perpetrator of the alleged child abuse or neglect to be removed from the home to allow the child to remain in the home;</li> <li>e) the Division to continue efforts to notify non-custodial parent.</li> </ul>

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### Dispositional Hearing

The dispositional hearing must be discrete from the adjudicatory hearing. A dispositional order must be made after a dispositional hearing. The dispositional hearing **must** be separate from the adjudicatory hearing. The hearing process must be scheduled and structured so that dispositional issues are specifically addressed apart from adjudicatory issues.

The dispositional hearing is held after the adjudication and is the hearing at which the court listens to testimony regarding the plan and placement for the child. The dispositional hearing may be held prior to the entry of written findings of adjudication. At the end of the dispositional hearing, the court determines whether to grant the relief requested in the petition.

A dispositional hearing must be held on every child abuse/neglect petition filed within 20 days after an adjudicatory hearing has been entered unless:

- a petition is dismissed; or
- the parties have stipulated to the proposed disposition; or
- an extension has been ordered by the court.

Exceptions to the time limit may be allowed only in cases involving newly discovered evidence, unavoidable delays in the notification of parties, and unforeseen personal emergencies.

### Dispositional Hearing immediately following the Adjudicatory Hearing

A dispositional hearing may follow an adjudicatory hearing in a bifurcated manner immediately after the adjudicatory phase of the proceedings if:

- a) all required reports are available and have been received by all parties or their attorneys at least 5 working days in advance of the hearing; and
- b) the judge has an opportunity to review the reports after the adjudication.

**NOTE:** The Child Protection Specialist should work with his/her county attorney to identify the required reports for each case. The required reports include, at a minimum, the Child Protection Specialist's affidavit and the guardian ad litem's report.

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<b>Relative Request for Placement</b>	<p>If an extended family member requests custody of a child at the dispositional hearing or during the permanency hearing and, after investigation conducted in accordance with Policy 402-4, the Child Protection Specialist does not recommend placement with a relative, the Division must provide the reasons in writing to the court.</p>
<b>Evidence</b>	<p>The court may permit testimony by telephone, videoconference, or other audio/audiovisual means at any time during an abuse/neglect proceeding.</p> <p>Hearsay evidence is admissible at the dispositional hearing.</p>
<b>Disposition</b>	<p>If the child is adjudicated a youth in need of care, the court may enter its judgment, making any of the following dispositions to protect the welfare of the child:</p> <ol style="list-style-type: none"><li>a) permit the child to remain with the child's custodial parent or guardian, subject to those conditions and limitations the court may prescribe;</li><li>b) order evaluation of the non-custodial parent as a possible caretaker;</li><li>c) order placement of the child with the non-custodial parent on a temporary basis while the custodial parent works his/her treatment plan;</li><li>d) order the placement of the child with the non-custodial parent, superseding any existing custodial order, and dismiss the proceeding with no further obligation on the part of the Child Protection Specialist to provide services to the parent with whom the child is placed or to work toward reunification of the child with the parent or guardian from whom the child was removed in the initial proceeding;</li><li>e) order placement of the child with the non-custodial parent at the extension of temporary legal custody and/or as a permanency option;</li><li>f) grant an order of limited emancipation to a youth who is 16 years of age or older;</li><li>g) transfer temporary custody to any of the following:</li></ol>

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- i) the Division;
  - ii) a licensed child-placing agency that is willing and able to assume responsibility for the education, care, and maintenance of the child and that is licensed or otherwise authorized by law to receive and provide care for the child; or
  - iii) a non-parent relative or other individual who has been evaluated and recommended by the Division or a licensed child-placing agency designated by the court and who is found by the court to be qualified to receive and care for the child (see Abandoned Children below).
- h) order a party to the action to do what is necessary to give effect to the final disposition, including under taking medical and psychological evaluations, treatment, and counseling that does not require an expenditure of money by the Division unless the it **consents and informs the court that resources are available for payment;**
- i) order further care and treatment as the court considers the best interests of the child that does not require an expenditure of money by the Division unless the **consents and informs the court that resources are available for the proposed care and treatment.**

### Reasonable Efforts

The court will hear testimony during the dispositional hearing regarding the reasonable efforts made by the Child Protection Specialist to either prevent the out-of-home placement or to reunify the child with his/her parent(s). If the court finds that reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with permanency for the child, the Child Protection Specialist must make reasonable efforts to place the child in a timely manner in accordance with the child's permanent plan. The Child Protection Specialist must also complete whatever steps are necessary to finalize the permanent plan of the child.

### Abandoned Children

If the court awards Temporary Legal Custody **of an abandoned child** to someone other than the Division or a non-custodial parent, the court shall award Temporary Legal Custody to a member of the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, if:

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- a) placement with the child's extended family member is in the child's best interests;
- b) the extended family member requests that the child be placed with the family member; and
- c) the extended family member is found by the court to be qualified to receive and care for the child.

If more than one extended family member satisfies the requirements above, the court may award custody to the extended family member who can best meet the child's needs.

If a member of the child's extended family requests that custody be awarded to them, the Division shall investigate and determine if awarding custody of the child to the family members is in the best interests of the child. If the Division determines that the request for custody should be denied, the reasons for the denial must be provided to the court.

### Permanency Hearing

The purpose of the permanency hearing is to present to the court the permanent plan for the child and receive judicial approval of the plan.

A permanency hearing must be held by the court or the foster care review committee, within the following time frames:

- a) within 30 days of a determination that reasonable efforts to provide preservation or reunification services are not necessary;
- b) no later than 12 months after an initial court finding that the child has been subjected to abuse or neglect or 12 months after the child's first 60 days of removal from the home, whichever comes first; and
- c) within 12 months of the initial hearing and every 12 months thereafter until the child is permanently placed in either an adoptive or guardianship placement. During this hearing, the court shall make a finding whether the Division has made reasonable efforts to finalize the permanency plan for the child.

### Hearing Required

A hearing must be held for the initial permanency hearing and

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any subsequent permanency hearing. Both Montana Code Annotated and the Adoption and Safe Families Act of 1997 require an **actual** hearing. Paper reviews, *ex parte* hearings, agreed orders, or other actions or hearings which are not open to the participation of the parents of the child, the child (if of appropriate age), and foster parents or preadoptive parents (if any) are not permanency hearings.

### Required Report

At least five working days prior to the hearing, the Division must submit a report to the court detailing the permanency plan for the child. The report must:

- a) address the Child Protection Specialist's efforts to effectuate the permanency plan for the child;
- b) address the options for the child's permanent placement;
- c) examine the reasons for excluding higher priority options; and
- d) set forth the proposed plan to carry out the placement decision, including specific times for achieving the plan.

### Discretionary Report

At least three working days prior to the permanency hearing, the guardian ad litem, an attorney or advocate for a parent or guardian may submit an informational report to the court for review.

### Court Action

The court's order must be issued within 20 days after the permanency hearing if the court conducts the permanency hearing or within 10 days of receipt of recommendations if the foster care review committee conducts the hearing. The judge will review the plan and make findings on whether the plan is in the child's best interests and whether the Child Protection Specialist has made reasonable efforts to finalize the plan. The court will order the Division to take whatever steps are necessary to effectuate the plan.

**Note:** In the permanency plan order, the court must also indicate whether the child has been consulted, in an age-appropriate manner, by the court regarding the proposed permanency or transition plan and may also note whether an out-of-state placement (if applicable) is appropriate and in the best interests of the child.

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In its discretion, the court may enter any other order that it determines to be in the best interests of the child that does not conflict with statutory permanency options. The court may order placement of the child with the noncustodial parent as a permanency option. The court may not order any service that requires an expenditure of money by the Division unless the court finds after notice and a hearing that the expenditure are reasonable and that the resources are available for payment.

### Statutory Permanency Options

Statutory permanency options include:

- a) reunification of the child with the child's parent or guardian;
- b) adoption;
- c) appointment of a guardian; or
- d) long-term custody if the child is in a planned permanent living arrangement (See Section 302-5, Long Term Custody for specific requirements).

### Combine with Other Hearings

A permanency hearing may be combined with another hearing, such as a hearing for termination of parental rights if held within the time limits of the other hearing. The requirements for the other hearing must be met in addition to the requirements for a permanency hearing.

### IV-E Eligibility

If a permanency hearing is not held within 12 months from the month the child is considered to have entered foster care and every 12 months thereafter, the child loses Title IV-E eligibility for the period of time between when the permanency hearing should have been held until and when the permanency hearing is actually held.

### Federal Requirements

The Adoption and Safe Families Act of 1997 contains requirements for the permanency hearing which are not codified into the Montana Code Annotated. The Child Protection Specialist should include a discussion of these requirements in the report submitted to the court prior to the permanency hearing. The Adoption and Safe Families Act requires that the court determine the permanency plan for the child that includes whether and when, if applicable:

- the child will be returned to the parent; or

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- the child will be placed for adoption, and the Division will file a petition for termination of parental rights; or
- a petition will be filed for legal guardianship; or
- the child will be placed in another permanent living arrangement (in cases where the Child Protection Specialist has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian); **and**
- if the child has been placed in foster care outside the State in which the home of the parents is located, whether the placement continues to be appropriate and in the best interests of the child; **and**
- if the child has attained age 16, the services needed to assist the child to make the transition from foster care to independent living.

### **CAPS** Indian Child

If there is a reasonable belief the child may be an Indian child, the ICWA policy must be followed. The tribe must be notified of the pending legal proceedings. Use DocGen D200, Request for Verification of Status to request enrollment information, and DocGen D105, Notification of Judicial Proceedings to notify the child's tribe of pending court action. See Section 305-1, Indian Child Welfare Act.

### **CAPS**

To ensure compliance with state and federal requirements mandating certain reviews and hearings within strict time frames after court determinations, after a court hearing has been held, the Child Protection Specialist should enter court detail on CRTD. The Child Protection Specialist should enter petition date, court hearing date, begin and end dates of court order, type of hearing (court event), reliefs granted (court disposition, including determinations issued from the bench prior to receipt of the written court order), parties to the hearing, and whether or not the court order has been received. Use "PPH" for the court event of permanency hearing. Once a disposition has been entered and confirmed (SHIFT F4), the event, disposition, and dates are not modifiable. The Child Protection Specialist should also enter the review date, as CAPS will alert in advance of that date. CAPS will also alert in

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advance of the expiration date of the court order, if the end date of the court order has been entered.

**References**

Mont. Code Ann. § 41-3-432  
Mont. Code Ann. § 41-3-437  
Mont. Code Ann. § 41-3-438  
Mont. Code Ann. § 41-3-445  
Mont. Code Ann. § 41-3-439  
Indian Child Welfare Act, 25 U.S.C. 1901 et seq.  
42 U.S.C. 670 et seq.  
45 CFR 1356.21