

1 SENATE BILL NO. 368

2 INTRODUCED BY J. TREBAS

3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO MINORS;  
5 REQUIRING INTERVIEWS OF A CHILD IN PARENTING PLAN PROCEEDINGS; PROVIDING ADDITIONAL  
6 RIGHTS FOR CHILDREN IN PARENTING PLAN PROCEEDINGS AND CHILD ABUSE AND NEGLECT  
7 PROCEEDINGS; REVISING THE DEFINITION OF "BEST INTERESTS OF THE CHILD" IN CHILD ABUSE  
8 AND NEGLECT PROCEEDINGS; PROVIDING AN EXCEPTION AND ADDITIONAL PENALTIES IN  
9 PARENTING INTERFERENCE CASES; AND AMENDING SECTIONS 40-4-205, 40-4-212, 40-4-214, 40-4-  
10 227, 41-3-102, ~~41-3-437~~, 41-3-440, AND 45-5-634, MCA."

11  
12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

13  
14 **Section 1.** Section 40-4-205, MCA, is amended to read:

15 **"40-4-205. Guardian ad litem or legal representative.** (1) The court may appoint a guardian ad  
16 litem or legal representative to represent ~~the best interests of~~ a minor dependent child with respect to the child's  
17 support, parenting, and parental contact under the standards provided in 40-4-212. The guardian ad litem may  
18 be an attorney. The county attorney, a deputy county attorney, if any, or the department of public health and  
19 human services or any of its staff may not be appointed for this purpose. The guardian ad litem cannot serve as  
20 the child's attorney on the same case.

21 (2) The guardian ad litem or legal representative has the following general duties:

22 (a) to conduct investigations that the guardian ad litem or legal representative considers necessary  
23 to ascertain the facts related to the child's support, parenting, and parental contact;

24 (b) to interview or observe the child who is the subject of the proceeding;

25 (c) to make written reports to the court concerning the child's support, parenting, and parental  
26 contact;

27 (d) to appear and participate in all proceedings to the degree necessary to adequately represent  
28 the child and make recommendations to the court concerning the child's support, parenting, and parental

1 contact; and

2 (e) to perform other duties as directed by the court.

3 (3) The guardian ad litem or legal representative has access to court, medical, psychological, law  
4 enforcement, social services, and school records pertaining to the child and the child's siblings and parents or  
5 caretakers.

6 (4) The court shall enter an order for costs and fees in favor of the child's guardian ad litem or legal  
7 representative. The order must be made against either or both parents, except that if the responsible party is  
8 indigent, the costs must be waived.

9 (5) The guardian ad litem or legal representative shall mail the report to counsel and to any party  
10 not represented by counsel at least 10 days prior to the hearing."

11

12 **Section 2.** Section 40-4-212, MCA, is amended to read:

13 **"40-4-212. Best interest of child.** (1) The court shall determine the parenting plan in accordance with  
14 the best interest of the child. The court shall consider all relevant parenting factors, which may include but are  
15 not limited to:

16 (a) ~~the wishes of the child's parent or parents~~ the wishes of the child;

17 (b) ~~the wishes of the child~~ the wishes of the child's parent or parents;

18 (c) the interaction and interrelationship of the child with the child's parent or parents and siblings  
19 and with any other person who significantly affects the child's best interest;

20 (d) the child's adjustment to home, school, and community;

21 (e) the mental and physical health of all individuals involved;

22 (f) physical abuse or threat of physical abuse by one parent against the other parent or the child;

23 (g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent;

24 (h) continuity and stability of care;

25 (i) developmental needs of the child;

26 (j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay,  
27 which is considered to be not in the child's best interests;

28 (k) whether a parent has knowingly failed to financially support a child that the parent is able to

1 support, which is considered to be not in the child's best interests;

2 (l) whether the child has frequent and continuing contact with both parents, which is considered to  
3 be in the child's best interests unless the court determines, after a hearing at which evidence is presented and  
4 considered, that contact with a parent would be detrimental to the child's best interests. In making that  
5 determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent  
6 against the other parent or the child, including but not limited to whether a parent or other person residing in  
7 that parent's household has been convicted of any of the crimes enumerated in 40-4-219(8)(b).

8 (m) adverse effects on the child resulting from continuous and vexatious parenting plan  
9 amendment actions.

10 (2) When determining the best interest of the child of a parent in military service, the court shall  
11 consider all relevant parenting factors provided in subsection (1) and may not determine the best interest of the  
12 child based only upon the parent's military service.

13 (3) A de facto parenting arrangement, in the absence of a prior parenting decree, does not require  
14 the child's parent or parents to prove the factors set forth in 40-4-219.

15 (4) The following are rebuttable presumptions and apply unless contrary to the best interest of the  
16 child:

17 (a) A parenting plan action brought by a parent within 6 months after a child support action against  
18 that parent is vexatious.

19 (b) ~~A Absent verifiable child abuse arising following issuance of the final parenting plan, a motion~~  
20 to amend a final parenting plan pursuant to 40-4-219 is vexatious if a parent seeks to amend a final parenting  
21 plan without making a good faith effort to comply with the provisions of the parenting plan or with dispute  
22 resolution provisions of the final parenting plan."

23

24 **Section 3.** Section 40-4-214, MCA, is amended to read:

25 "**40-4-214. Interviews.** (1) ~~The In consideration of the family dynamics and safety impacts to the~~  
26 ~~child, the~~ court ~~may~~ shall make every effort to interview the each child ~~in chambers~~ in chambers to ascertain the  
27 child's wishes as to residence and parental contact. ~~The If the child has counsel, the~~ court ~~may~~ shall permit  
28 counsel for the child, if any, to be present at the interview. The court shall cause a ~~an audio or video~~ a record of

1 the interview to be made and to be part of the record in the case and to be made available to the child's  
2 counsel.

3 (2) The court may seek the advice of professional personnel, whether or not employed by the court  
4 on a regular basis. The advice given must be in writing and made available by the court to counsel upon  
5 request. Counsel may examine as a witness any professional personnel consulted by the court."  
6

7 **Section 4.** Section 40-4-227, MCA, is amended to read:

8 **"40-4-227. Rights of parents and children -- policy -- findings.** (1) It is the policy of the state of  
9 Montana:

10 (a) to recognize the constitutionally protected rights of parents and the integrity of the family unit;

11 (b) to recognize a child's constitutionally protected rights, including all fundamental rights unless  
12 those rights are specifically precluded by laws that enhance their protection; and, The state recognizes a child's  
13 constitutionally protected right to be heard and the right to legal representation, which includes the legal  
14 obligation to represent the child's wishes if the child is able to express the child's wishes, specifically to  
15 enhance the protection of children.

16 (c) to allow a child to state the child's opinion as to whom the child feels safe with and wants to  
17 spend time with in custody matters and proceedings, including under Title 41, chapter 3;

18 (d) to recognize that a child has a right to refuse a relationship with an unsafe parent;

19 (e)(e) to ensure that the wishes of the child and the best interests of the child as described in 40-4-  
20 212 are met represented in parenting proceedings and in proceedings under Title 41, chapter 3;

21 (f) to recognize that a child has a right to refuse a relationship with an unsafe sibling or extended  
22 family member;

23 (g) to recognize that a child has a right to be protected from unsafe foster parents and unsafe  
24 institutional settings in which they have been placed by the state.

25 (2) The legislature finds:

26 (a) that while it is in the best interests of a child to maintain a relationship with a natural parent, a  
27 natural parent's inchoate interest in the child requires constitutional protection only when the parent has  
28 demonstrated a timely commitment to the responsibilities of parenthood; and

1 (b) that a parent's constitutionally protected interest in the parental control of a child should yield to  
2 the best interests of the child when the parent's conduct is contrary to the child-parent relationship."

3

4 **Section 5.** Section 41-3-102, MCA, is amended to read:

5 **"41-3-102. Definitions.** As used in this chapter, the following definitions apply:

6 (1) (a) "Abandon", "abandoned", and "abandonment" mean:

7 (i) leaving a child under circumstances that make reasonable the belief that the parent does not  
8 intend to resume care of the child in the future;

9 (ii) willfully surrendering physical custody for a period of 6 months and during that period not  
10 manifesting to the child and the person having physical custody of the child a firm intention to resume physical  
11 custody or to make permanent legal arrangements for the care of the child;

12 (iii) that the parent is unknown and has been unknown for a period of 90 days and that reasonable  
13 efforts to identify and locate the parent have failed; or

14 (iv) the voluntary surrender, as defined in 40-6-402, by a parent of a newborn who is no more than  
15 30 days old to an emergency services provider, as defined in 40-6-402.

16 (b) The terms do not include the voluntary surrender of a child to the department solely because of  
17 parental inability to access publicly funded services.

18 (2) "A person responsible for a child's welfare" means:

19 (a) the child's parent, guardian, or foster parent or an adult who resides in the same home in which  
20 the child resides;

21 (b) a person providing care in a day-care facility;

22 (c) an employee of a public or private residential institution, facility, home, or agency; or

23 (d) any other person responsible for the child's welfare in a residential setting.

24 (3) "Abused or neglected" means the state or condition of a child who has suffered child abuse or  
25 neglect.

26 (4) (a) "Adequate health care" means any medical care or nonmedical remedial health care  
27 recognized by an insurer licensed to provide disability insurance under Title 33, including the prevention of the  
28 withholding of medically indicated treatment or medically indicated psychological care permitted or authorized

1 regarding medical neglect of children 1 year of age or older.

2 (35) "Youth in need of care" means a youth who has been adjudicated or determined, after a  
3 hearing, to be or to have been abused, neglected, or abandoned."

4

5 **Section 6.** Section 41-3-437, MCA, is amended to read:

6 ~~"41-3-437. Adjudication -- temporary disposition -- findings -- order. (1) Upon the filing of an  
7 appropriate petition, an adjudicatory hearing must be held within 90 days of a show cause hearing under 41-3-  
8 432. Adjudication may take place at the show cause hearing if the requirements of subsection (2) are met or  
9 may be made by prior stipulation of the parties pursuant to 41-3-434 and order of the court. Exceptions to the  
10 time limit may be allowed only in cases involving newly discovered evidence, unavoidable delays, stipulation by  
11 the parties pursuant to 41-3-434, and unforeseen personal emergencies.~~

12 ~~(2) The court may make an adjudication on a petition under 41-3-422 if the court determines by a  
13 preponderance of the evidence, except as provided in the federal Indian Child Welfare Act, if applicable, that  
14 the child is a youth in need of care. Except as otherwise provided in this part, the Montana Rules of Civil  
15 Procedure and the Montana Rules of Evidence apply to adjudication and to an adjudicatory hearing.  
16 Adjudication must determine the nature of the abuse and neglect and establish facts that resulted in state  
17 intervention and upon which disposition, case work, court review, and possible termination are based.~~

18 ~~(3) The court shall hear evidence regarding the residence of the child, paternity, if in question, the  
19 whereabouts of the parents, guardian, or nearest adult relative, and any other matters the court considers  
20 relevant in determining the status of the child. Hearsay evidence of statements made by the affected youth  
21 during a forensic interview is admissible according to the Montana Rules of Evidence.~~

22 ~~(4) In a case in which abandonment has been alleged by the county attorney, the attorney general,  
23 or an attorney hired by the county, the court shall hear offered evidence, including evidence offered by a person  
24 appearing pursuant to 41-3-422(9)(a) or (9)(b), regarding any of the following subjects:~~

25 ~~(a) the extent to which the child has been cared for, nurtured, or supported by a person other than  
26 the child's parents; and~~

27 ~~(b) whether the child was placed or allowed to remain by the parents with another person for the  
28 care of the child, and, if so, then the court shall accept evidence regarding:~~

- 1           ~~(i) — the intent of the parents in placing the child or allowing the child to remain with that person;~~
- 2           ~~(ii) — the continuity of care the person has offered the child by providing permanency or stability in~~
- 3 ~~residence, schooling, and activities outside of the home; and~~
- 4           ~~(iii) — the circumstances under which the child was placed or allowed to remain with that other~~
- 5 ~~person, including:~~
- 6           ~~(A) — whether a parent requesting return of the child was previously prevented from doing so as a~~
- 7 ~~result of an order issued pursuant to Title 40, chapter 15, part 2, or of a conviction pursuant to 45-5-206; and~~
- 8           ~~(B) — whether the child was originally placed with the other person to allow the parent to seek~~
- 9 ~~employment or attend school.~~
- 10          ~~(5) — In all civil and criminal proceedings relating to abuse or neglect, the privileges related to the~~
- 11 ~~examination or treatment of the child do not apply, except the attorney-client privilege granted by 26-1-803 and~~
- 12 ~~the mediation privilege granted by 26-1-813.~~
- 13          ~~(6) — (a) If the court determines that the child is not an abused or neglected child, the petition must~~
- 14 ~~be dismissed and any order made pursuant to 41-3-427 or 41-3-432 must be vacated.~~
- 15          ~~(b) — If the child is adjudicated a youth in need of care, the court shall set a date for a dispositional~~
- 16 ~~hearing to be conducted within 20 days, as provided in 41-3-438(1), and order any necessary or required~~
- 17 ~~investigations. The court may issue a temporary dispositional order pending the dispositional hearing. The~~
- 18 ~~temporary dispositional order may provide for any of the forms of relief listed in 41-3-427(2).~~
- 19          ~~(7) — (a) Before making an adjudication, the court may make oral findings, and following the~~
- 20 ~~adjudicatory hearing, the court shall make written findings on issues, including but not limited to the following:~~
- 21           ~~(i) — which allegations of the petition have been proved or admitted, if any;~~
- 22           ~~(ii) — whether there is a legal basis for continued court and department intervention; and~~
- 23           ~~(iii) — whether the department has made reasonable efforts to avoid protective placement of the child~~
- 24 ~~or to make it possible to safely return the child to the child's home.~~
- 25          ~~(b) — The court may order:~~
- 26           ~~(i) — terms for visitation, support, and other intrafamily communication pending disposition if the~~
- 27 ~~child is to be placed or to remain in temporary out-of-home care prior to disposition;~~
- 28           ~~(ii) — examinations, evaluations, or counseling of the child or parents in preparation for the~~

**Amendment - 1st Reading-white - Requested by: Jeremy Trebas - (S) Judiciary**

- 2023

68th Legislature 2023

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SB0368.001.001

~~disposition hearing that does not require an expenditure of money by the department unless the court finds after notice and a hearing that the expenditure is reasonable and that resources are available for payment. The department is the payor of last resort after all family, insurance, and other resources have been examined.~~

~~(iii) — the department to evaluate the noncustodial parent or relatives as possible caretakers, if not already done;~~

~~(iv) — the perpetrator of the alleged child abuse or neglect to be removed from the home to allow the child to remain in the home; and~~

~~(v) — the department to continue efforts to notify noncustodial parents.~~

~~(8) — If a proceeding under this chapter involves an Indian child and is subject to the federal Indian Child Welfare Act, a qualified expert witness is required to testify that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."~~

**Section 6.** Section 41-3-440, MCA, is amended to read:

**"41-3-440. Limitation on placement.** (1) Except as provided in 41-3-301(1) and in the absence of a dispute between the parties to the action regarding the appropriate placement, the department shall determine the appropriate placement for a child alleged to be or adjudicated as a youth in need of care. The court shall settle any dispute between the parties to an action regarding the appropriate placement. The child may not be placed in a youth assessment center, youth detention facility, detention center, or other facility intended or used for the confinement of adults or youth accused or convicted of criminal offenses.

(2) A child placed by the department pursuant to this section must have access to private interviews or conversations with a trusted adult outside of the presence of a foster parent or staff of a youth care facility as defined in 52-2-602 to address safety concerns without fear of retaliation, coercion, or manipulation. If the child raises safety concerns with the trusted adult, the trusted adult may object to the placement of the child under this section and the court may order the child to be moved to a new placement."

**Section 7.** Section 45-5-634, MCA, is amended to read:

**"45-5-634. Parenting interference.** (1) A Except as provided in subsection (2), a person commits the offense of parenting interference if, ~~knowing that the person has no legal right to do so,~~ the person: