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COMMENT

MONTANA'S CHILD NEGLECT LAW — A NEED FOR REVISION

The power of the state to regulate the relationship between parents and their children can be traced back to the ancient common law doctrine of parens patriae, which declares the state to be the ultimate guardian of every child with a vested interest in his well-being. The doctrine is based upon the concept of a direct relationship between the welfare of the child and the welfare of the state. It imposes upon the state not only the right but also the duty to establish standards for child protection.¹

Although at common law the courts had this power to modify or even terminate the relationship between parent and child it was rarely exercised. Legislatures neglected their duty to establish standards for child protection. Prior 1900 statutory regulation over parental authority and care of children was virtually nonexistent and in Montana the first state agency established to deal with problems of child neglect and abuse was the "state bureau of child and animal protection."²

Most of Montana’s child protection laws were first enacted in 1907 but, as in many other states, such important legislation as the child abuse reporting statutes were not enacted until after 1960.³

The Montana Legislature, like legislatures in other states, has used three approaches in dealing with the problems presented by those children who are not properly cared for by their parents or guardians. The earliest approach was through the use of regulatory statutes. These statutes, which are still in effect today, include child labor laws,⁴ compulsory school attendance laws,⁵ child support laws,⁶ statutes prohibiting the admission of children to certain places,⁷ and contributing to the delinquency of minors statutes.⁸

A second approach has been to provide assistance to children and their parents through social welfare legislation such as Aid to Dependent Children⁹ and child welfare services.¹⁰

The third approach is in the dependent and neglected children statutes found in Title 10, Chapter 5 of the Revised Codes of Montana,

¹See generally, 47 Am. Jur. 2d Juvenile Courts § 15 and cases cited therein.
²Sec. 1, Ch. 115, Laws 1903.
³R.C.M.1947, Tit. 10, Ch. 9; enacted Sec. 1, Ch. 178, Laws 1965.
⁴R.C.M.1947, Tit. 10, Ch. 2.
⁵R.C.M.1947, Tit. 75, Ch. 29.
⁶R.C.M.1947, §§10-511, 10-616, Tit. 94, Ch. 3.
⁷R.C.M.1947, § 94-35-137 (houses of prostitution); § 94-35-138 (dance-halls); § 94-4004 (pool halls).
⁸R.C.M.1947, § 10-617.
⁹R.C.M.1947, Tit. 71, Ch. 5.
¹⁰R.C.M.1947, Tit. 71, Ch. 7.
1947. These statutes allow a court to use a combination of the first two methods by regulating the conduct of either child or parent, by providing child and family welfare services, and, when necessary, by terminating either temporarily or permanently the parent-child relationship. The purpose of this article is to provide a critical analysis of the provisions in this chapter and to offer new legislation.

The Child Neglect Case

The child neglect case is divisible into two distinct parts. First, a court must determine whether or not a particular child is neglected. Secondly, if the court finds that a child is neglected it must then determine what action or "disposition," if any, it should take.

Although neglect statutes vary markedly from state to state, they are all broadly drawn. They are generally intended to cover such diverse situations as the physically abused or battered child, the child who needs special medical care and whose parents refuse to provide it or allow the child to accept it from other sources, the abandoned child, the child whose parents refuse to allow him to attend acceptable schools, the child of an unwed mother who wishes to give it up for adoption, and the situation where there is such a parent-child conflict within the home that the parent wishes to be rid of the child and the child himself is willing to try life on his own or with another family.

In almost every case the matter is either first brought to the attention of the children's division of the county welfare department or referred there by the court before any legal action is commenced. The vast majority of child neglect cases never involve legal proceedings. They are handled entirely by trained social workers who may on a voluntary basis, provide the same supervision and assistance to the home that a court may order. Social workers have found that once a parent recognizes his problems and establishes a confidence in the social worker he will generally make an honest effort at trying to solve the problems even to the extent of giving up the custody of his child.

Whenever these voluntary agreements effect a permanent change of a legal nature in the parent-child relationship, the parties must go through formal procedures for legal recognition of the change. Aside from these procedures it is only when effective treatment has proved to be impossible and the parent has refused to cooperate that the courts are resorted to. Prior to the filing of a formal complaint the usual practice is for the judge involved to make his own study of the case and then to meet informally with the parents. It is only at this point, then, when a judge agrees that some type of action is needed and the parents still refuse to cooperate, that formal legal action is usually initiated.

Thus it is that legal action takes place only in a small minority of child neglect cases and then involves a very intense dispute between
the State and the parents on the one hand or merely formalization of a voluntary agreement on the other. Child neglect legislation must therefore accomplish two things. First it must provide a procedure for formalization of voluntary modification or termination of the parent-child relationship. Secondly it must provide clear standards and a thoroughly fair judicial procedure to be applied in disputed cases.

In most states child neglect statutes are a part of the state's Juvenile Court Act. In a few states, including Montana, they are a separate act. Regardless of this distinction all child neglect legislation is divisible into three parts: the definitional or jurisdictional provisions, the procedural provisions, and the dispositional provisions. The discussion below will look at each of these sections separately. Under each section the existing Montana statutes and case law interpreting them will be discussed, and new statutory language will be offered. A complete Child Protective Act is provided in the appendix.

Statutory Definition of Neglect

The most difficult legal question in a child neglect case is often whether or not the particular child is neglected. Although both courts and legislatures have attempted to formulate a legal definition of neglect, no one has yet come forth with a simple and accurate set of legal rules by which a court may determine with complete confidence whether a particular child is neglected.

The present Montana definition of a "dependent" or "neglected" child was enacted in 1907 and is currently codified in R.C.M. 1947, section 10-501. It states:

For the purposes of this act, the words "dependent child" or "neglected child" shall mean any child of the age of sixteen years, or under that age, who is dependent upon the public for support, and who is destitute, homeless, or dependent, or who has no proper parental care or guardianship, or who habitually begs or receives alms, or who is found living in any house, of ill-fame, or in any house of prostitution, or whose home, by reason of neglect, cruelty, or depravity on the part of its parents, guardian, or other person in whose care it may be, is an unfit place for such child, or whose environment is such as to warrant the state, in the interest of the child, to assume its guardianship or support.

Although this statute is more than sixty years old, it has been construed by the Montana Supreme Court only three times. These cases, however, have all been decided in the last seven years.

In In Re Phelps, the Montana Supreme Court upheld a district court order permanently depriving the adoptive parents of two minor children, a boy age eleven and a girl age four, of their custody. Although the evidence appears to have consisted of substantial physical abuse of the boy but none towards the girl, the court agreed that both
were dependent and neglected under the terms of 10-501. The important point to note from the case is the broad language in 10-501 which the court relied upon to find the girl as well as the boy to be neglected. That language was:

the words . . . 'neglected child' shall mean any child . . . who has no proper parental care . . . or whose home, by reason of neglect, cruelty, or depravity on the part of its parents . . . is an unfit place for such child, or whose environment is such as to warrant the state, in the interest of the child, to assume its guardianship or support.\(^{13}\)

A 1966 case, *In Re Sheriff*,\(^ {14}\) involved four minor children, two boys and two girls. The father had divorced the mother of the boys and his second wife, the mother of the girls, had died. The Supreme Court upheld a district court order that the two girls were dependent and neglected and awarding permanent custody to the welfare department.\(^ {15}\)

The following factual conclusions were noted by the court in support of their finding that the two girls were dependent and neglected: (1) The father was never affluent enough to make possible the necessities of life at all times for his family. (2) He seemed imbued with ideas relating to the rearing of small children that are not given either approval or cognizance by doctors and other juvenile authorities. (3) The multitude of his problems were such as to make his temper erratic and to cause profanity not conducive to correctly guiding young, impressionable girls toward an adult life.\(^ {16}\)

The court went on to state that in these cases its primary obligation and paramount consideration is for the welfare of the children.\(^ {17}\)

In the most recent case, *In Re Vikse*,\(^ {18}\) the court, finding no abuse, abandonment, or depravity, felt it important to distinguish between a "dependent child" and a "neglected child." The court stated:

Although the statute seems to make the words "dependent child" and "neglected child" synonymous, such would not seem to be the technical sense of the terms, since "neglected child" is a broader term than "dependent child." The former describes a parental failure to exercise the degree of care demanded by the family circumstances. It concerns disregard of parental duty whether intentional or unintentional. A "dependent child" is one who must be supported by others than its natural or legal guardians.\(^ {19}\)

The Court added that determination of whether a child is or is not a dependent and neglected child according to 10-501 is geared to present

\(^{13}\) Mont. at 561.
\(^{15}\) The petition requested such an order as to all the children.
\(^{16}\) Mont. at 261.
\(^{17}\) Id.
\(^{18}\) Mont. 417, 413 P.2d 876 (1966). The mother of the child sought to be declared dependent and neglected was confined in the State Mental Hospital at Warm Springs. After the mother’s commitment the father had placed the child first with relatives, then with friends, and finally in a foster home arranged for by the Welfare Department. Because of his wife’s condition and only part time employment the father was not always able to adequately provide for the child.
\(^{19}\) Mont. at 420.
circumstances more than past history when the issue is one of dependency. Since the parent had become able to support the child by the time of the hearing the Court reversed the decision of the lower court and returned custody of the child to the parent, thus concluding that the child was neither neglected nor dependent.\(^{20}\)

These then are the legal principles which social workers, attorneys, judges and parents in Montana have to work with in determining when the State may legally intervene in the parent-child relationship. Clearly, they do not constitute a simple and accurate set of legal rules by which a court may determine whether a particular child is neglected or by which an attorney may confidently advise his client.

Such standards as "proper parental care" or "environment such as to warrant the state, in the interest of the child, to assume its guardianship" do no more than import vague subjective tests into a legal criterion. In discussing this dilemma one writer has said:

Commentators on the juvenile court generally agree that protection from this vagueness must be found in the wisdom of judges rather than in the detail of statute. But they also recognize that the vagueness "enables judges to conceal any kind of result behind . . . pious intonation(s) . . ." and "encourages slipshod decisions which stop short of workmanlike analysis and the decision of important legal issues."\(^{21}\)

More important however is the failure of an outdated statute like section 10-501 to recognize modern areas of child protection. The basic goal of modern neglect law must be to prevent the psychological as well as social and physical deterioration of children. It must recognize the right of a child to medical care including surgery and psychiatric services when required. It must make it clear that the welfare of the child is the only consideration and the existence or nonexistence of parental fault not a consideration, in deciding the initial question of whether the child is in fact dependent or neglected.

Only through statutory enactment can such expanding concepts of child protection be made obligatory and enforceable by all social workers and judges.

With these purposes in mind but still recognizing that neglect is a concept "which permits no degree of certainty, either in legal definition or social application,"\(^{22}\) the following definitions are offered:

(1) "child" means a person under the age of eighteen years;

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\(^{20}\)The analysis presented in the opinion is quite unacceptable because of its failure to distinguish between the question of whether the child was a dependent or neglected child and thus within the court's jurisdiction and the separate question of what was the proper disposition.

(2) "dependent child" includes:

(i) a child who is without a parent, guardian, or other custodian;

(ii) a child whose parent, guardian, or other custodian for good cause desires to be relieved of his care and custody;

(3) "neglected child" includes:

(i) a child who is without proper parental care or control, subsistence, education as required by law, or medical care, including surgery or psychiatric services when required, or any other care necessary for his health, morals or well-being;

(ii) a child whose parent, guardian, or custodian has abandoned him or subjected him to mistreatment or abuse;

(iii) a child whose occupation, behavior, condition, environment or associations are such as to be injurious or dangerous to himself or others;

(iv) a child who has been placed for care or adoption in violation of law.

The most noticeable change from the existing statute is of course the separation of conditions of neglect from conditions of dependency. A few states still combine the two definitions but most of the newer statutes separate them.

Under this definition the situation of a dependent child is that either there is no one responsible for the child's condition or the responsible person has good cause to be relieved of this responsibility. Paragraph (i) is intended primarily to cover the situation where both parents are dead and no one has been made legally responsible for the child. Paragraph (ii) is designed to give legal recognition to a parent's voluntary relinquishment of the custody of his child. It would be under this provision that an unwed mother could relinquish the custody of her child and have it placed for adoption. Another common situation which would come within this provision would be where the parent and child have become so incompatable that it is in the best interests of both not to have to live in the same home with the other. There are of course many other situations in which a parent or guardian could be found to have good cause to be relived of parental responsibilities, either temporarily or permanently.

The definition of neglect is intended to cover every possible situation harmful to a child which may be reached by law through a statute of
this type. For all practical purposes it is as broad as the present Montana definition. In addition, however, it sets forth particular types of neglect not specifically stated in 10-501.

Paragraph (i) is the broadest provision and gives the court the discretion which it must have. The court may give protection to any child who is without “proper parental care or control . . . or any other care necessary for his health, morals or well-being.” But it is also under this paragraph that it is made clear that a child has a legal right to proper subsistence, education as required by law, and medical care, including surgery or psychiatric services when required.

Paragraph (ii) is a rather narrow one since abandonment and abuse are terms with reasonably well-defined meaning.24

Paragraph (iii) covers a middle ground between neglect and delinquency. This area is presently touched upon by 10-501 and by the definition of a delinquent child in 10-602. By covering such situations in both delinquency and neglect statutes the court is given greater freedom in finding the best possible solution. It is also easier to find a placement for a child who has been adjudged dependent or neglected than for one who has been adjudged a delinquent.

Paragraph (iv) is a fairly broad provision affording an opportunity for protective action in a wide variety of situations. It covers “black market” adoptions by giving the court clear jurisdiction over a child who is the subject of such an arrangement. Similarly, it would plug a loophole in the present foster home licensing law, which provides only a fine for an unlicensed facility and says nothing about the child.25

Many of the older neglect statutes covered only those children whose condition was the result of parental fault. Some of the newer statutes sought to remedy this by defining a neglected child as one whose condition was the result of parental fault and a dependent child as one whose condition was not the result of parent fault but providing protective services in both cases. That distinction seemed to be the goal of the Montana Supreme Court in the Vikse case. The definition of neglect provided here is intended to put the focus of concern upon the needs of the child regardless of parental fault.26

Simply stated, the purpose of this definition is to bring within the court’s jurisdiction those children who are not properly cared for by their parents or guardian without regard to the reason for the lack of

24Many statutes contain a statutory definition of these terms and it may be desirable to include them in any new legislation in Montana.
26These provisions are very similar to those set forth in the definition of a “deprived child” in the recently promulgated Uniform Juvenile Court Act. The same intention is stated in the comments to that definition.
care. Once the child is within the court's jurisdiction, the court may then consider the existence or nonexistence of parental fault in determining the proper disposition of the case.

**Procedural Provisions**

Under the present procedural provisions the district courts have original jurisdiction in all cases coming within the terms of the act but all cases are to be "known as 'juvenile causes'." Any officer of the state department of public welfare or any person who is a resident of the county, having knowledge of a child in his county who appears to be a dependent or neglected child may file a petition with the district court. The petition must set forth the facts which constitute the child dependent or neglected and must be verified by an affidavit of the petitioner.

Upon filing of the petition the court must set the time for the hearing of the petition and the parents must be given notice of the time and place of the hearing. The parents must then appear and show cause why the child should not be adjudged a dependent or neglected child.

Whenever a petition is filed the clerk of the court must give notice of the action to the county welfare board which must "make an investigation for the purpose of ascertaining whether the parents . . . live within such county and the financial ability of such parents . . . to pay the cost of taking care of such child in a foster home. . . ." A written report of the investigation must be filed with the clerk before the time fixed for the hearing. If the court does place the child in a foster home and finds that the parents are able to pay part or all of the cost of such foster case it may order them to pay such amount as the court deems proper but only if the above procedure was strictly complied with. It is the duty of the county attorney to file petitions and conduct the necessary proceedings.

The above procedures of course get most of the job done in most of the cases. They are incomplete and inadequate however in several respects. They are misleading in that they do not reflect the actual practices necessarily used in most if not all cases. A specific example is the failure to provide statutory recognition and control of informal conferences leading to adjustment or disposition of a case prior to the

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29 Id.
30 R.C.M.1947, § 10-504.
31 Id.
32 R.C.M.1947, § 10-506.
33 Id.
34 R.C.M.1947, § 10-507.
35 In re Phelps, supra note 11.
filing of a petition. There is a very real danger of compulsion in such conferences and because of their frequent use, provisions should be made to avoid possible abuse of these otherwise desirable efforts.

Another inadequacy of the present Act is the failure to provide for continuing jurisdiction over children who have been provided for under the act. Once a child reaches seventeen years of age he is no longer within the jurisdiction of the court. This limits the court’s power to provide complete protective services, and therefore nearly all states provide for such continuing jurisdiction until age 20 or 21.

Although there is an appeal from the district court’s decision in child neglect cases it is not so provided in the act. Nor is there any provision for the recording of the proceedings. Since appeals are to the state supreme court without trial de novo, there is a very real necessity for an adequate record.

The procedural provisions in the proposed act in the appendix are taken from the newly promulgated Uniform Juvenile Court Act and the recently enacted Idaho Child Protective Act. These provisions are intended to correct the inadequacies of the existing Montana statutes and provide greater overall clarity in the procedural provisions.

Under the proposed act jurisdiction is continued in the district courts. As noted above in the definitions, the age of a child coming within the act is increased from “sixteen or under” to “under eighteen.” Section 4 provides that once jurisdiction is obtained by the court it “shall be retained until the child becomes twenty years of age, unless terminated prior thereto.”

Section 5 of the act gives the court greater power over the filing of petitions and requires that it order a preliminary investigation concerning the child by the county welfare department before it “may authorize” the filing of a petition. Subsection (c) requires that if permanent custody—now termed termination of parental rights—is sought it must be so stated in the petition. The purpose for this is to insure adequate notice to the parties of the seriousness of the matter.

Private conferences leading to informal dispositions are given legal recognition in section 6 and certain limitations are placed upon their use.

It is provided that proceedings may be commenced in the county in which the child resides or in any county in which he is present. In the latter situation the court may, under section 8, transfer the case to the county in which the child resides. There is no limitation upon who may file a petition other than that the court authorize the filing.

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[Handbook of The National Conference of Commissioners on Uniform State Laws, 246 (1968).]

[I.C.A., Tit. 16, Ch. 16.]
Issuance of the summons is provided for in section 9. Where it appears that the child is in such condition or surroundings that his welfare requires he be taken into custody, the court under this section may so order by endorsement upon the summons.

Section 10 provides for the taking of a child into custody without any process. This may be done only when the child "is seriously endangered in his surroundings and prompt removal appears to be necessary for his immediate protection." The following section provides for notice to the parents or guardian of their right to counsel. This right includes the right to appointed counsel at state expense where the parent or guardian is financially unable to employ their own counsel.

Section 12 deals with the conduct of hearings under the act. The hearings are to be informal, without a jury, and the general public is to be excluded. As under the present procedure the county attorney is designated to present the evidence in support of the petition and conduct the proceedings on behalf of the state. It is also under this section that provisions is made for recording of the proceedings when ordered by the court.

A written report of the investigation by the county welfare department is required by section 13 before any final decree or other final disposition can be entered. Subsection (b) of this section provides for examinations of a child by physicians and psychologists. It also states that a court may order

medical or surgical treatment of a child who is suffering from a serious physical condition or illness which in the opinion of a licensed physician requires prompt treatment, even if the parent, guardian, or other custodian has not been given notice of a hearing, is not available, or without good cause informs the court of his refusal to consent to the treatment.

This provision is taken verbatim from the Uniform Juvenile Court Act. A similar statutory provision was sustained in a recent case. 39

Sections 14 through 18 contain the provisions for disposition. The various orders which the court may make are set out in section 14. Before the court may make an order of disposition it must enter a decree that the child has been found to be dependent or neglected and in its decree make a finding of the facts and conclusions of law upon which it exercises jurisdiction over the child. 40

The effect of an order terminating parental rights is clearly stated in section 15 and further disposition of the child upon termination of

40 The purpose of this provision is to require separate consideration of whether a child is or is not within the jurisdiction of the court and if he is, what the proper disposition of the child should be. As pointed out in footnote 19, the Montana Supreme Court failed to do this in the Vikse case. This provision also insures a more adequate record in the event of an appeal.
parental rights is provided for in section 16. The subsequent sections set forth certain time limitations on the orders of disposition and the grounds upon which such orders can be modified or vacated.

Section 19 provides for the appointment of a guardian ad litem where a child has no parent, guardian, or custodian appearing on his behalf or their interests conflict with his or in any other case in which his interests so require. This provision is simply intended to provide a complete and separate representation of the child's interests.

Allocation of the costs of the proceedings and expenses for the care of the child is made in section 20. It is provided that such costs and expenses are a charge upon the county except to the extent that the court finds the parents able to pay and orders them to do so.

Section 21 provides for a “protective order” which the court may make restraining or otherwise controlling the conduct of a person when such conduct is or may be harmful to the child and will tend to defeat an order of disposition. This provision is intended to replace the present provisions in 10-511 through 10-515 which make it a misdemeanor to cause or contribute to the neglect or dependency of a child and provide punishment therefor. The protective order may be enforced through the court’s contempt power.

Limitations on the inspection of court files and records is provided in section 22.

The final section sets forth the right to appeal and makes it available to both sides. The appeal is to the supreme court and is upon the files, records, and minutes or transcripts of the evidence of the district court.

Disposition

The present statutory sections containing the dispositions available to the court are R.C.M. 1947, 10-509 and 10-510. The first of these provides that a child found to be dependent or neglected may be committed to the Montana Children’s Center or “if it shall appear to be to the best interest of said child, the court may make such disposition of said child as seems best for its social and physical welfare.” Section 10-510 is a long narrative statute which implies that the court may award a child to the “care and custody of an association or individual” as a ward and with the court’s consent such association or individual may assent to the child’s adoption. It further provides that the court may allow the child to remain in its own home under control of its parents but subject to the direction of the court and visitations by officers of the court.

The most striking failure of these provisions is the failure to distinguish between what constitutes a temporary taking of custody and a permanent taking. Although in actual practice the petition will ask for either temporary or permanent custody there appears to be nothing
preventing the court from ordering that permanent custody be taken even though only temporary custody was originally sought. Similarly, neither these sections nor any others in the present act explain what conditions of neglect or dependency should result in a permanent deprivation of custody and which should result only in the taking of temporary custody. Few states have statutes so vague.

Sections 14, 15, and 16 of the proposed statute are modifications of provisions in the Uniform Juvenile Court Act and are intended to correct the inadequacies of 10-509 and 10-510.

Part (b) of section 14 sets forth the different dispositions. It states:

Upon entry of its decree, the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:

(1) Permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(2) Subject to conditions and limitation as the court prescribes, transfer temporary legal custody to any of the following:
   (i) Any individual who is found by the court to be qualified to receive and care for the child;
   (ii) A private agency or organization licensed or otherwise authorized by law to receive and provide care for the child;
   (iii) The director of the county welfare board or other public agency authorized by law to receive and provide care for the child;

(3) Terminate parental rights to a child if:
   (i) The petition states clearly that an order for termination of parental rights is requested and that the effect thereof will be as stated in the first sentence of section 15; and
   (ii) The parent has abandoned the child; or
   (iii) The child is found to be a dependent or neglected child and the court finds that the conditions and causes of the neglect or dependency are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; or
   (iv) The written consent of the parent acknowledged before the court has been given.

Under this and the other provisions a clear distinction is drawn between temporary and permanent custody. The latter exists only where
there has been an order of termination of parental rights. It is clearly spelled out in section 15 that the effect of such an order is to terminate all of a parent's rights and obligations with respect to the child and of the child to or through him arising from the parental relationship.

Under section 17 an order terminating parental rights is without limit as to duration while an order of temporary custody may not continue in force more than two years. Similarly, section 18 provides that an order of temporary custody may be modified or vacated upon a showing of changed circumstances but an order of termination of parental rights may not.

The existing Montana statutes were criticized above for failure to specify those conditions of neglect or dependency which would justify taking temporary custody and those which would justify taking permanent custody. Paragraph (3) of the section set out above attempts to remedy this. While any child found to be dependent or neglected may be taken from the home temporarily, the parental rights may be terminated only where (1) the parent consents, (2) the parent has abandoned the child, or (3) the court finds that the conditions or causes of the neglect or dependency are likely to continue and that the child will be seriously harmed thereby.

The third condition differs considerably from traditional grounds for termination of parental rights or permanent custody. Most such statutes use phrases such as "has substantially and continuously or repeatedly neglected." Such terminology directs the court's attention to the past and is difficult to apply to the typical situation where the child has already been taken from the home temporarily in order to prevent continuous or repeated neglect. Thus the repeated or continuous neglect can only be established by periodically returning the child to the home where he may be abused or otherwise neglected. This lack of stability or certainty in the disposition of the child is generally considered to be just as harmful and undesirable as the abuse or neglect. The proposed language is therefore intended to put the focus of concern upon the present and future rather than the past. The primary question to be asked is whether the causes and conditions of the neglect can reasonably be expected to be remedied.

Upon entering an order terminating parental rights the court, under section 16, must commit the child to the custody of the public welfare board or a licensed child-placing agency for the purpose of placing the child for adoption, or in a foster home or "take other suitable measure for the care and welfare of the child." It is further provided that the custodian has authority to consent to the adoption of the child, his marriage, his enlistment in the armed forces of the United States, and surgical and other medical treatment for the child.

Conclusion

The problems confronting the courts in the various types of neglect
cases are not simple. They involve balancing the interests of the child against those of the parents and of society. They involve the determination of many nonlegal as well as legal questions. Judges, lawyers, social workers and others working in the field must be aware not only of the law, but of the many social, psychological and medical considerations involved. The legal framework presently existing in Montana to deal with these problems is outdated and serves merely as a legislative recognition of the general equity jurisdiction of the court. It offers little guidance to any of the parties involved and few protections for their legal rights. With the increasing awareness of child neglect and abuse and the even greater increase in the awareness of legal rights by parents and others it is only natural that the present child neglect statutes will come under increasing challenge. New legislation designed to recognize modern areas of child protection and modern concepts of judicial fairness should be enacted in Montana.

JAMES L. JONES

APPENDIX

CHILD PROTECTIVE ACT

SECTION 1. Interpretation. This Act shall be construed to effectuate the following public purposes:

(1) to provide for the care, protection, and wholesome moral, mental, and physical development of children coming within its provisions;
(2) to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare; and
(3) to provide a simple judicial procedure through which this Act is executed and enforced and in which the parties are assured a fair hearing and their legal rights recognized and enforced.

SECTION 2. Definitions. As used in this Act:

(1) "child" means a person under the age of eighteen years;
(2) "dependent child" includes:
   (i) a child who is without a parent, guardian, or other custodian;
   (ii) a child whose parent, guardian, or other custodian for good cause desires to be relieved of his care and custody.
(3) "neglected child" includes:
   (i) a child who is without proper parental care or control, subsistence, education as required by law, or medical care, including surgery or psychiatric services when required, or any other care necessary for his health, morals or well-being;
   (ii) a child whose parent, guardian, or custodian has abandoned him or subjected him to mistreatment or abuse;
   (iii) a child whose occupation, behavior, condition, environment or associations are such as to be injurious or dangerous to himself or others;
   (iv) a child who has been placed for care or adoption in violation of law.

SECTION 3. Jurisdiction. The District Courts of the State of Montana shall have and exercise jurisdiction in all matters relating to dependent and neglected children.

SECTION 4. Retention of Jurisdiction. Jurisdiction obtained by the court under this Act shall be retained until the child becomes twenty years of age, unless terminated prior thereto.

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SECTION 5. Investigation-Petition. (a) Whenever the court is informed that a child is within the purview of this act, it shall order an immediate preliminary investigation by the county welfare department to determine whether the interests of the child require that further action be taken, in which event the court may authorize the filing of a petition.

(b) The petition and all subsequent documents shall be entitled "In the interest of ____________________ , a child under eighteen years of age." The petition shall be verified but the statements may be made upon information and belief. It shall set forth plainly:

(1) the facts which bring the child within the purview of this Act;
(2) the name, age, birthdate, birthplace and residence of the child;
(3) the names and residences of his parents including the maiden name of the child's mother;
(4) the names and residences of his legal guardian, if there be one, of the person or persons having custody or control of the child, or of the nearest known relative if no parent or guardian can be found.

(c) If termination of parental rights is requested the petition shall state clearly that an order for termination of parental rights is requested and that the effect thereof will be as stated in the first sentence of section 15.

(d) If any of the facts herein required are not known by the petitioner, the petition shall so state.

SECTION 6. Informal Adjustment. Before a petition is filed, the court or a person designated by it and subject to its direction, may give counsel and advice to the parties with a view to an informal adjustment if it appears:

(1) the admitted facts bring the case within the jurisdiction of the court;
(2) counsel and advice without an adjudication would be in the best interests of the child; and
(3) the child and his parents, guardian or other custodian consent thereto with knowledge that consent is not obligatory.

SECTION 7. Venue. A proceeding under this Act may be commenced in the county in which the child resides or in the county in which the child is present when it is commenced.

SECTION 8. Transfer to Other County. When a petition has been filed and the child resides in another county of this state, the court may transfer the case to the court of the county where the child resides. The court receiving such transfer shall dispose of the case as if the petition were originally filed in such court. Whenever a case is transferred, certified copies of all pertinent legal and social records shall be forwarded to the receiving court.


(a) After a petition has been filed and if the matter is set for hearing, the court shall issue a summons requiring the person or persons who have custody or control of the child to appear personally and bring the child before the court at a time and place stated; provided, however, if hearing is to be held, it shall be held not later than twenty (20) days after the summons is issued unless the court should order on being shown cause that the time be extended.

(b) If the person so summoned shall be other than the parent or guardian, then the parent or guardian or both shall also be notified of the pendency of the case and of the time and place set for the hearing.

(c) It shall be sufficient to confer jurisdiction if service of summons is effected at least forty-eight (48) hours before the time fixed in the summons for the hearing.

(d) Where it appears the child is in such condition or surroundings that his welfare requires he be taken into custody, the court may so order by endorsement upon the summons, whereupon in the court's discretion the child shall be brought before the court, released to his parents or guardian or taken to a place of shelter.


(a) A child may be taken into custody by any peace officer without process only when he is seriously endangered in his surroundings and prompt removal appears to be necessary for his immediate protection.

(b) When a child is taken into custody as provided in this section, he shall be released to his parents or taken without unnecessary delay to a place of shelter designated by the court. The officer or other person who brings a child
to a place of shelter shall at once give notice to the court and to the parent or
guardian of the child. A child may be released to his parent or guardian un-
conditionally or subject to protective supervision on the order of the court
at any time prior to hearing on the petition.

SECTION 11. Right to Counsel. The child, his parents, guardian or custodian
shall be notified as soon as practicable after the filing of a petition and prior
at the start of a hearing of their right to counsel. If counsel is requested and
the parent, guardian or custodian are financially unable to employ counsel, the
court shall appoint counsel, who shall receive reasonable compensation at county
expense.

SECTION 12. Hearing.

(a) Hearings under this Act shall be conducted by the court without a jury,
in an informal but orderly manner, and separate from other proceedings.

(b) The county attorney upon request of the court shall present the evidence
in support of the petition and otherwise conduct the proceedings on behalf of
the state.

(c) If requested by a party or ordered by the court the proceedings may be
recorded by stenographic notes or by electronic, mechanical, or other appropriate
means. If not so recorded minutes of the proceedings shall be kept by the court.

(d) Except in hearings to declare a person in contempt of court, the general
public shall be excluded from hearings under this Act. Only the parties, their
counsel, witnesses, and other persons accompanying a party for his assistance,
and any other persons as the court finds have a proper interest in the proceeding
or in the work of the court may be admitted by the court. The court may temporarily
exclude the child from the hearing.


(a) No final decree or other final disposition shall be entered until a written
report of the investigation by the county welfare department has been presented
to and considered by the court. Reports of investigation shall be submitted to
the court by the department within a period of time designated by the court
as the facts and circumstances of the case warrant.

(b) During the pendency of any proceeding the court may order the child to
be examined at a suitable place by a physician or psychologist and may also order
medical or surgical treatment of a child who is suffering from a serious physical
condition or illness which in the opinion of a licensed physician requires prompt
treatment, even if the parent, guardian, or other custodian has not been given
notice of a hearing, is not available, or without good cause informs the court of
his refusal to consent to the treatment.

SECTION 14. Decree and Disposition.

(a) When a child is found by the court to be dependent or neglected, the
court shall so decree and in its decree shall make a finding of the facts and
conclusions of law upon which it exercises jurisdiction over the child.

(b) Upon entry of its decree, the court may make any of the following orders
of disposition best suited to the protection and physical, mental and moral wel-
fare of the child:

(1) Permit the child to remain with his parents, guardian, or other custodian,
subject to conditions and limitations as the court prescribes, including
supervision as directed by the court for the protection of the child;

(2) Subject to conditions and limitations as the court prescribes, transfer
temporary legal custody to any of the following:
(i) Any individual who is found by the court to be qualified to receive
and care for the child;
(ii) A private agency or organization licensed or otherwise authorized
by law to receive and provide care for the child;
(iii) The director of the county welfare board or other public agency
authorized by law to receive and provide care for the child;

(3) Terminate parental rights to a child if:
(i) The petition states clearly that an order for terminations of parental
rights is requested and that the effect thereof will be as stated in
the first sentence of section 15; and
(ii) The parent has abandoned the child;
The child is found to be a dependent or neglected child and the court finds that the conditions and causes of the neglect or dependency are likely to continue or will not be remedied and that by reason thereof the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; or

(iv) The written consent of the parent acknowledged before the court, has been given.

(c) Unless a child found to be dependent or neglected is found also to be delinquent in a proper proceeding for that purpose, he shall not be committed to or confined in an institution or other facility designed or operated for the benefit of delinquent children.

SECTION 15. Effect of Order Terminating Parental Rights. An order terminating parental rights terminates all of a parent's rights and obligations with respect to the child and of the child to or through him arising from the parental relationship. The parent is thereafter not entitled to notice of proceedings for the adoption of the child by another nor has he any right to object to the adoption or otherwise to participate in the proceedings.


(a) If, upon entering an order terminating the parental rights of a parent, there is no parent having parental rights, the court shall commit the child to the custody of the executive director of the public welfare board or a licensed child-placing agency willing to accept custody for the purpose of placing the child for adoption or, in the absence thereof, in a foster home or take other suitable measures for the care and welfare of the child.

(b) The custodian has authority to consent to the adoption of the child, his marriage, his enlistment in the armed forces of the United States, and surgical and other medical treatment for the child.

(c) If the child is not adopted within two years after the date of the order and a general guardian of the child has not been appointed by the district court, the child shall be returned to the court for entry of further orders for the care, custody, and control of the child.

SECTION 17. Limitations of Time On Orders of Disposition.

(a) An order terminating parental rights is without limit as to duration.

(b) Any other order of disposition continues in force for not more than two years. The court may sooner terminate its order or extend its duration for further periods. An order of extension may be made if:

1. A hearing is held prior to the expiration of the order upon motion of a party or on the court's own motion;

2. Reasonable notice of the hearing and opportunity to be heard are given to the parties affected;

3. The court finds that the extension is necessary to accomplish the purposes of the order extended; and

4. The extension does not exceed two years from the expiration of the prior order.

(c) The court may terminate an order of disposition or extension prior to its expiration, on or without an application of a party, if it appears to the court that the purposes of the order have been accomplished. If a party may be adversely affected by the order of termination the order may be made only after reasonable notice and opportunity to be heard have been given to him.

(d) Except as provided in subsection (a) when the child reaches twenty years of age, all orders affecting him then in force terminate and he is discharged from further obligation or control.

SECTION 18. Modification or Vacation of Orders.

(a) An order of the court shall be set aside if (1) it appears that it was obtained by fraud or mistake sufficient therefor in a civil action, or (2) the court lacked jurisdiction over a necessary party or of the subject matter, or (3) newly discovered evidence so requires.

(b) Except an order terminating parental rights, or an order of dismissal, an order of the court may also be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child.

(c) Any party to the proceeding or other person having supervision or legal custody of or an interest in the child may petition the court for the relief pro-
vided in this section. The petition shall set forth in concise language the grounds upon which the relief is requested.

(d) After the petition is filed the court shall fix a time for hearing and cause notice to be served on the parties to the proceeding or affected by the relief sought. After the hearing, which may be informal, the court shall deny or grant relief as the evidence warrants.

SECTION 19. Guardian ad litem. The court at any stage of a proceeding under this Act, on application of a party or on its own motion, may appoint a guardian ad litem for a child who is a party to the proceeding if he has no parent, guardian, or custodian appearing on his behalf or their interests conflict with his own or in any other case in which the interests of the child require a guardian. A party to the proceeding or his employee or representative shall not be appointed.

SECTION 20. Costs and Expenses for Care of Child.

(a) The following expenses shall be a charge upon the funds of the county upon certification thereof by the court:

(1) the cost of medical and other examinations and treatment of a child ordered by the court;

(2) the cost of care and support of a child committed by the court to the legal custody of a public agency other than an institution for delinquent children, or to a private agency or individual other than a parent;

(3) reasonable compensation for services and related expenses of counsel appointed by the court for a party;

(4) reasonable compensation for a guardian ad litem;

(5) the expense of service of summons, notices, subpoenas, travel expense of witnesses, transportation of the child, and other like expenses incurred in the proceedings under this Act.

(b) If, after due notice to the parents or other persons legally obligated to care for and support the child, and after affording them an opportunity to be heard, the court finds that they are financially able to pay all or part of the costs and expenses stated in paragraphs (1), (2), (3), and (4) of subsection (a), the court may order them to pay the same and prescribe the manner of payment.

(c) If a child is placed in a foster home the state department of public welfare shall pay one-half of the cost thereof, provided that one-half of any amount collected by the county from a parent or parents, when a child is placed in a foster home, shall be transmitted to the state department of public welfare, and by it paid over to the state treasurer, who shall deposit the same to the credit of the state general fund.

SECTION 21. Protective Order. On application of a party or on the court's own motion the court may make an order restraining or otherwise controlling the conduct of a person if:

(1) An order of disposition of a dependent or neglected child has been or is about to be made in a proceeding under this chapter;

(2) The court finds that the conduct (a) is or may be detrimental or harmful to the child and (b) will tend to defeat the execution of the order of disposition; and

(3) Due notice of the application or motion and the grounds therefor and an opportunity to be heard thereon have been given to the person against whom the order is directed.

SECTION 22. Inspection of Court Files and Records. All files and records of the court in a proceeding under this Act are open to inspection only by:

(1) the judge, officers, and professional staff of the court;

(2) the parties to the proceeding and their counsel and representatives;

(3) a public or private agency or institution providing supervision or having custody of the child under order of the court;

(4) with leave of court any other person or agency or institution having a legitimate interest in the proceeding or in the work of the court.

SECTION 23. Appeals.

(a) An aggrieved party, including the state or a subdivision of the state,
may appeal from a final order, judgment, or decree of the district court to the supreme court by filing written notice of appeal within thirty days after entry of the order, judgment, or decree, or within any further time the supreme court grants, not to exceed six months from entry of the order, judgment, or decree. The appeal shall be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the district court. The name of the child shall not appear on the record on appeal.

(b) The appeal does not stay the order, judgment, or decree appealed from but the supreme court may otherwise order on application and hearing consistent with this chapter if suitable provision is made for the care and custody of the child. If the order, judgment, or decree appealed from grants the custody of the child to, or withholds it from, one or more of the parties to the appeal it shall be heard at the earliest practicable time.