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OPD001

*** Bill No. ***

Introduced By *****

By Request of the Office of State Public Defender

A Bill for an Act entitled: ~~—~~"An Act revising appointment of the office of state public defender; amending sections 41-3-102, 41-3-306, 41-3-422, 41-3-425, 46-8-101, 46-8-103, 47-1-104, and 72-5-408, MCA

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 41-3-102, MCA, is amended to read:

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

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

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

(ii) willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the

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child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child;

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

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

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

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

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

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

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

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

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OPD001 Appointment Clarification.docx

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

(b) The term does not include a child who has been referred to or raised in a manner consistent with the child's biological sex, including in the making of related mental health or medical decisions.

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

(b) This chapter may not be construed to require or justify a finding of child abuse or neglect for the sole reason that a parent or legal guardian, because of religious beliefs, does not provide adequate health care for a child. However, this chapter may not be construed to limit the administrative or judicial authority of the state to ensure that medical care is provided to the child when there is imminent substantial risk of serious harm to the child.

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(5) "Best interests of the child" means the physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child.

(6) "Case determination" means a determination to a specified degree of proof, made by the department after the investigation is completed, on whether the reported act of child abuse or neglect occurred. Case determinations are limited to the general categories of substantiated, unsubstantiated, and unfounded.

(7) "Child" or "youth" means any person under 18 years of age.

(8) (a) "Child abuse or neglect" means:

(i) actual physical or psychological harm to a child;

(ii) substantial risk of physical or psychological harm to a child; or

(iii) abandonment.

(b) (i) The term includes:

(A) actual physical or psychological harm to a child or substantial risk of physical or psychological harm to a child by the acts or omissions of a person responsible for the child's welfare;

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(B) exposing a child to the criminal distribution of dangerous drugs, as prohibited by 45-9-101, the criminal production or manufacture of dangerous drugs, as prohibited by 45-9-110, or the operation of an unlawful clandestine laboratory, as prohibited by 45-9-132; or

(C) any form of child sex trafficking or human trafficking.

(ii) For the purposes of this subsection (8), "dangerous drugs" means the compounds and substances described as dangerous drugs in Schedules I through IV in Title 50, chapter 32, part 2.

(c) In proceedings under this chapter in which the federal Indian Child Welfare Act or the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, is applicable, this term has the same meaning as "serious emotional or physical damage to the child" as used in 25 U.S.C. 1912(f).

(d) The term does not include:

(i) self-defense, defense of others, or action taken to prevent the child from self-harm that does not constitute physical or psychological harm to a child;

(ii) a youth not receiving supervision solely because of parental inability to control the youth's behavior; or

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(iii) referring to and raising the child in a manner consistent with the child's biological sex, including in the making of related mental health or medical decisions.

(e) For the purposes of this subsection (8), substance use by a parent or guardian, a child's obesity, disorderly living conditions, or other factors closely related to economic status do not alone constitute "physical or psychological harm to a child".

(9) "Child protection investigator" means an employee of the department who investigates allegations of child abuse, neglect, and endangerment and has been certified pursuant to 41-3-127.

(10) "Child reunification specialist" means an employee of the department who coordinates reunification services for a child after removal and has been certified pursuant to 41-3-127.

(11) "Concurrent planning" means to work toward reunification of the child with the family while at the same time developing and implementing an alternative permanent plan.

(12) "Decline to prosecute" means a decision not to file criminal charges based on the matter reported by the

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department or investigation by law enforcement for any reason, including but not limited to insufficient evidence.

(13) "Department" means the department of public health and human services provided for in 2-15-2201.

(14) "Family engagement meeting" means a meeting that involves family members in either developing treatment plans or making placement decisions, or both.

(15) "Indian child" has the meaning provided in 41-3-1303.

(16) "Indian child's tribe" has the meaning provided in 41-3-1303.

(17) "Indian custodian" has the meaning provided in 41-3-1303.

(18) "Indian tribe" has the meaning provided in 41-3-1303.

(19) "Limited emancipation" means a status conferred on a youth by a court in accordance with 41-1-503 under which the youth is entitled to exercise some but not all of the rights and responsibilities of a person who is 18 years of age or older.

(20) "Parent" means a biological or adoptive parent ~~or~~ stepparent.

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(21) "Parent-child legal relationship" means the legal relationship that exists between a child and the child's birth or adoptive parents, as provided in Title 40, chapter 6, part 2, unless the relationship has been terminated by competent judicial decree as provided in 40-6-234, Title 42, or part 6 of this chapter.

(22) "Permanent placement" means reunification of the child with the child's parent, adoption, placement with a legal guardian, placement with a fit and willing relative, or placement in another planned permanent living arrangement until the child reaches 18 years of age.

(23) "Physical abuse" means an intentional act, an intentional omission, or gross negligence resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily organ or function, or death.

(24) (a) "Physical neglect" means:

(i) failure to provide basic necessities, including but not limited to appropriate and adequate nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions;

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Last printed 7/2/2026 12:53:00 PM

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(ii) failure to provide cleanliness and general supervision, or both;

(iii) exposing or allowing the child to be exposed to an unreasonable physical or psychological risk to the child;

(iv) allowing sexual abuse or exploitation of the child; or

(v) causing malnutrition or a failure to thrive.

(b) The term does not include referring to and raising the child in a manner consistent with the child's biological sex, including in the making of related mental health or medical decisions.

(25) (a) "Physical or psychological harm to a child" means the harm that occurs whenever the parent or other person responsible for the child's welfare inflicts or allows to be inflicted on the child physical abuse, physical neglect, or psychological abuse or neglect.

(b) The term does not include referring to and raising the child in a manner consistent with the child's biological sex, including in the making of related mental health or medical decisions.

(26) (a) "Protective services" means services provided by the department:

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(i) to enable a child alleged to have been abused or neglected to remain safely in the home;

(ii) to enable a child alleged to have been abused or neglected who has been removed from the home to safely return to the home; or

(iii) to achieve permanency for a child adjudicated as a youth in need of care when circumstances and the best interests of the child prevent reunification with parents or a return to the home.

(b) The term includes emergency protective services provided pursuant to 41-3-301, written prevention plans provided pursuant to 41-3-302, and court-ordered protective services provided pursuant to parts 4 and 6 of this chapter.

(27) (a) "Psychological abuse or neglect" means severe maltreatment, through acts or omissions, that is injurious to the child's intellectual or psychological capacity to function and that is identified as psychological abuse or neglect by a licensed psychologist, a licensed professional counselor, a licensed clinical social worker, a licensed psychiatrist, a licensed pediatrician, or a licensed advanced practice registered nurse with a focused practice in psychiatry.

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Last printed 7/2/2026 12:53:00 PM

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(b) The term includes but is not limited to the commission of acts of violence against another person residing in the child's home.

(c) The term may not be construed to hold a victim responsible for failing to prevent the crime against the victim.

(d) The term does not include referring to and raising the child in a manner consistent with the child's biological sex, including in the making of related mental health or medical decisions.

(28) "Qualified expert witness" as used in cases involving an Indian child in proceedings subject to the federal Indian Child Welfare Act or the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, means:

(a) a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to a family organization and child-rearing practices;

(b) a lay expert witness who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

cultural standards and child-rearing practices within the Indian child's tribe; or

(c) a professional person who has substantial education and experience in providing services to children and families and who possesses significant knowledge of and experience with Indian culture, family structure, and child-rearing practices in general.

(29) "Qualified individual" means a trained professional or licensed clinician who:

(a) has expertise in the therapeutic needs assessment used for placement of youth in a therapeutic group home;

(b) is not an employee of the department; and

(c) is not connected to or affiliated with any placement setting in which children are placed.

(30) "Reasonable cause to suspect" means cause that would lead a reasonable person to believe that child abuse or neglect may have occurred or is occurring, based on all the facts and circumstances known to the person.

(31) "Residential setting" means an out-of-home placement where the child typically resides for longer than 30 days for the purpose of receiving food, shelter, security, guidance, and, if necessary, treatment.

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(32) "Safety and risk assessment" means an evaluation by a child protection investigator following an initial report of child abuse or neglect to assess the following:

- (a) the existing threat or threats to the child's safety;
 - (b) the protective capabilities of the parent or guardian;
 - (c) any particular vulnerabilities of the child;
 - (d) any interventions required to protect the child;
- and
- (e) the likelihood of future physical or psychological harm to the child.

(33) (a) "Sexual abuse" means the commission of sexual assault, sexual intercourse without consent, aggravated sexual intercourse without consent, indecent exposure, sexual abuse, ritual abuse of a minor, or incest, as described in Title 45, chapter 5.

(b) Sexual abuse does not include any necessary touching of an infant's or toddler's genital area while attending to the sanitary or health care needs of that infant or toddler by a parent or other person responsible for the child's welfare.

(34) "Sexual exploitation" means:

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(a) allowing, permitting, or encouraging a child to engage in a prostitution offense, as described in 45-5-601;

(b) allowing, permitting, or encouraging sexual abuse of children as described in 45-5-625; or

(c) allowing, permitting, or encouraging sex trafficking as described in 45-5-702, 45-5-705, 45-5-706, or 45-5-711.

(35) "Special advocate" means a trained volunteer who is appointed as an officer of the court to advocate for the best interests of a child or a sibling group in the child welfare system pursuant to 41-3-112.

(36) "Substantiated" means that the department has investigated the reported act of child abuse or neglect and determined by a preponderance of the evidence that an act of child abuse or neglect occurred.

(37) "Therapeutic needs assessment" means an assessment performed by a qualified individual within 30 days of placement of a child in a therapeutic group home that:

(a) assesses the strengths and needs of the child using an age-appropriate, evidence-based, validated, functional assessment tool;

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(b) determines whether the needs of the child can be met with family members or through placement in a youth foster home or, if not, which appropriate setting would provide the most effective and appropriate level of care for the child in the least restrictive environment and be consistent with the short-term and long-term goals for the child as specified in the child's permanency plan; and

(c) develops a list of child-specific short-term and long-term mental and behavioral health goals.

(38) "Treatment plan" means a written agreement between the department and the parent or guardian or a court order that includes action that must be taken to resolve the condition or conduct of the parent or guardian that resulted in the need for protective services for the child. The treatment plan may involve court services, the department, and other parties, if necessary, for protective services.

(39) "Unfounded" means that the department has investigated the reported act of child abuse or neglect and there is no evidence to corroborate the report.

(40) "Unsubstantiated" means that the department has investigated the reported act of child abuse or neglect and

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

is unable to determine by a preponderance of the evidence that an act of child abuse or neglect occurred.

(41) (a) "Withholding of medically indicated treatment" means the failure to respond to an infant's life-threatening conditions by providing treatment, including appropriate nutrition, hydration, and medication, that, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting the conditions.

(b) The term does not include the failure to provide treatment, other than appropriate nutrition, hydration, or medication, to an infant when, in the treating physician's or physicians' reasonable medical judgment:

(i) the infant is chronically and irreversibly comatose;

(ii) the provision of treatment would:

(A) merely prolong dying;

(B) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

(C) otherwise be futile in terms of the survival of the infant; or

(iii) the provision of treatment would be virtually futile in terms of the survival of the infant and the

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Last printed 7/2/2026 12:53:00 PM

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treatment itself under the circumstances would be inhumane.

For purposes of this subsection (41), "infant" means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously hospitalized since birth, who was born extremely prematurely, or who has a long-term disability. The reference to less than 1 year of age may not be construed to imply that treatment should be changed or discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available under state laws regarding medical neglect of children 1 year of age or older.

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

{Internal References to 41-3-102:

41-1-601~~x~~ 41-3-205~~x~~ 41-3-602~~x~~ 41-5-1201~~x~~
42-2-608~~x~~ 50-20-503~~x~~ 52-2-603~~x~~}

Section 2. Section 41-3-306 , MCA, is amended to read:

"41-3-306. Emergency protective services hearing -- exception. (1) (a) A district court shall hold a hearing within 5 business days of a child's removal from the home pursuant to 41-3-301 to determine whether there is probable cause to continue the removal beyond 5 business days.

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(b) The department shall provide notification of the hearing as required under 41-3-301.

(c) A hearing is not required if the child is released prior to the time of the required hearing.

(2) The hearing may be held in person, by videoconference, or, if no other means are available, by telephone.

(3) The child and the child's parents, parent, guardian, or other person having ~~physical or~~ legal custody of the child must be represented by counsel at the hearing.

(4) If the court determines that continued out-of-home placement is needed, the court shall:

(a) establish guidelines for visitation by the parents, parent, guardian, or other person having physical or legal custody of the child pending the show cause hearing; and

(b) review the availability of options for a kinship placement and make recommendations if appropriate.

(5) The court may direct the department to develop and implement a treatment plan before the show cause hearing if the parents, parent, guardian or other person having physical or legal custody of the child stipulates to a condition subject to a treatment plan and agrees to

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

immediately comply with the treatment plan if a plan is developed.

(6) If the court determines continued removal is not appropriate, the child must be immediately returned to the parents, parent, guardian, or other person having physical or legal custody of the child.

(7) The emergency protective services hearing is an emergency proceeding for the purposes of the federal Indian Child Welfare Act and is not subject to the notice requirements of that act.

(8) The emergency protective services hearing is an emergency proceeding for the purposes of the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, and is not subject to the notice requirements of the Montana Indian Child Welfare Act."

{Internal References to 41-3-306:

41-3-126~~x~~ 41-3-126~~x~~ 41-3-301~~x~~ 41-3-301~~x~~
41-3-307~~x~~ 41-3-1311~~x~~}

Section 3. Section 41-3-422 , MCA, is amended to read:

"41-3-422. Abuse and neglect petitions -- burden of proof. (1) (a) Proceedings under this chapter must be initiated by the filing of a petition. A petition may request the following relief:

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

- (i) immediate protection and emergency protective services, as provided in 41-3-427;
 - (ii) temporary legal custody, as provided in 41-3-442;
 - (iii) long-term custody, as provided in 41-3-445;
 - (iv) termination of the parent-child legal relationship, as provided in 41-3-607;
 - (v) appointment of a guardian pursuant to 41-3-444;
 - (vi) removal or resignation of a guardian pursuant to 41-3-444
 - ~~(vi)~~ (vii) a determination that preservation or reunification services need not be provided; or
 - ~~(vii)~~ (viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a) ~~(vi)~~ (vii) or any other relief that may be required for the best interests of the child.
- (b) The petition may be modified for different relief at any time within the discretion of the court.
- (c) A petition for temporary legal custody may be the initial petition filed in a case.
- (d) A petition for the termination of the parent-child legal relationship may be the initial petition filed in a case if a request for a determination that

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

preservation or reunification services need not be provided is made in the petition.

(2) The county attorney, attorney general, or an attorney hired by the county shall file all petitions under this chapter. A petition filed by the county attorney, attorney general, or an attorney hired by the county must be accompanied by:

(a) an affidavit by the department alleging that the child appears to have been abused or neglected and stating the basis for the petition; and

(b) a separate notice to the court stating any statutory time deadline for a hearing.

(3) Abuse and neglect petitions must be given highest preference by the court in setting hearing dates.

(4) An abuse and neglect petition is a civil action brought in the name of the state of Montana. The Montana Rules of Civil Procedure and the Montana Rules of Evidence apply except as modified in this chapter. Proceedings under a petition are not a bar to criminal prosecution.

(5) (a) Except as provided in subsection (5)(b), the person filing the abuse and neglect petition has the burden of presenting evidence required to justify the relief requested and establishing:

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(i) probable cause for the issuance of an order for immediate protection and emergency protective services;

(ii) a preponderance of the evidence for an order of adjudication or temporary legal custody;

(iii) a preponderance of the evidence for an order of long-term custody; or

(iv) clear and convincing evidence for an order terminating the parent-child legal relationship.

(b) If a proceeding under this chapter involves an Indian child, as defined in the federal Indian Child Welfare Act, 25 U.S.C. 1901, et seq., or 41-3-1303, the standards of proof required for legal relief under the federal Indian Child Welfare Act and the Montana Indian Child Welfare Act provided for in Title 41, chapter 3, part 13, apply.

(6) (a) Except as provided in the federal Indian Child Welfare Act and the Montana Indian Child Welfare Act, if applicable, the parents or parent, guardian, or other person or agency having legal custody of the child named in the petition, if residing in the state, must be served personally with a copy of the initial petition and a petition to terminate the parent-child legal relationship at least 5 days before the date set for hearing. If the

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

person or agency cannot be served personally, the person or agency may be served by publication as provided in 41-3-428 and 41-3-429.

(b) Copies of all other petitions must be served upon the person or the person's attorney of record by certified mail, by personal service, or by publication as provided in 41-3-428 and 41-3-429. If service is by certified mail, the department must receive a return receipt signed by the person to whom the notice was mailed for the service to be effective. Service of the notice is considered to be effective if, in the absence of a return receipt, the person to whom the notice was mailed appears at the hearing.

(7) If personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall immediately provide for the appointment or assignment of an attorney as provided for in 41-3-425 to represent the unavailable party when, in the opinion of the court, the interests of justice require. If personal service cannot be made upon a putative father, the court may not provide for the appointment or assignment of counsel as provided for in 41-3-425 to represent the father unless, in the opinion of the court,

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

the interests of justice require counsel to be appointed or assigned.

(8) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian, and if there is no guardian, the court shall appoint one.

(9) (a) Any person interested in any cause under this chapter has the right to appear. Any foster parent, preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition of all judicial hearings for the child and has the right to be heard. The right to appear or to be heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring for the child must be given notice of all reviews by the reviewing body.

(b) A foster parent, preadoptive parent, or relative of the child who is caring for or a relative of the child who has cared for a child who is the subject of the petition who appears at a hearing set pursuant to this section may be allowed by the court to intervene in the action if the court, after a hearing in which evidence is presented on those subjects provided for in 41-3-437(4), determines that the intervention of the person is in the best interests of the child. A person granted intervention

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

pursuant to this subsection is entitled to participate in the adjudicatory hearing held pursuant to 41-3-437 and to notice and participation in subsequent proceedings held pursuant to this chapter involving the custody of the child.

(c) Whenever a child is placed with a foster parent, preadoptive parent, or relative, the department shall provide written notice to the foster parent, preadoptive parent, or relative explaining the foster parent's, preadoptive parent's, or relative's rights under this subsection (9) to receive notice, to appear and be heard, and to attempt to intervene in proceedings under this chapter.

(10) An abuse and neglect petition must state:

(a) the nature of the alleged abuse or neglect and of the relief requested;

(b) the full name, age, and address of the child and the name and address of the child's parents or the guardian or person having legal custody of the child; and

(c) the names, addresses, and relationship to the child of all persons who are necessary parties to the action.

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(11) Any party in a proceeding pursuant to this section is entitled to counsel as provided in 41-3-425.

(12) At any stage of the proceedings considered appropriate by the court, the court may order an alternative dispute resolution proceeding or the parties may voluntarily participate in an alternative dispute resolution proceeding. An alternative dispute resolution proceeding under this chapter may include a family engagement meeting, mediation, or a settlement conference. If a court orders an alternative dispute resolution proceeding, a party who does not wish to participate may file a motion objecting to the order. If the department is a party to the original proceeding, a representative of the department who has complete authority to settle the issue or issues in the original proceeding must be present at any alternative dispute resolution proceeding.

(13) Service of a petition under this section must be accompanied by a written notice advising the child's parent, guardian, or other person having physical or legal custody of the child of the:

(a) right, pursuant to 41-3-425, to appointment or assignment of counsel if the person is indigent or if appointment or assignment of counsel is required under the

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Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

federal Indian Child Welfare Act or the Montana Indian Child Welfare Act, if applicable;

(b) right to contest the allegations in the petition;
and

(c) timelines for hearings and determinations required under this chapter.

(14) If appropriate, orders issued under this chapter must contain a notice provision advising a child's parent, guardian, or other person having physical or legal custody of the child that:

(a) the court is required by federal and state laws to hold a permanency hearing to determine the permanent placement of a child no later than 12 months after a judge determines that the child has been abused or neglected or 12 months after the first 60 days that the child has been removed from the child's home;

(b) if a child has been in foster care for 15 of the last 22 months, state law presumes that termination of parental rights is in the best interests of the child and the state is required to file a petition to terminate parental rights; and

(c) completion of a treatment plan does not guarantee the return of a child.

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

(15) A court may appoint a standing master to conduct hearings and propose decisions and orders to the court for court consideration and action. A standing master may not conduct a proceeding to terminate parental rights. A standing master must be a member of the state bar of Montana and must be knowledgeable in the area of child abuse and neglect laws."

{Internal References to 41-3-422:

41-3-126 x	41-3-126 x	41-3-216?	41-3-301 x
41-3-302 x	41-3-401 x	41-3-425 x	41-3-425 x
41-3-425 x	41-3-425 x	41-3-425 x	41-3-427 x
41-3-437 x	41-3-437 x	41-3-442 x	41-3-607 x
41-3-1311 x	41-3-1311 x	47-1-104 x	}

Section 4. Section 41-3-425 , MCA, is amended to read:

"41-3-425. Right to counsel. (1) Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition.

(2) Except as provided in subsection (3), the court shall immediately appoint the office of state public defender to assign counsel for:

(a) any ~~indigent~~ parent, guardian, or other person having legal custody of a child or youth in a ~~removal,~~ placement, or termination proceeding on a petition filed

CD-ROM Draft Copy

Last printed 7/2/2026 12:53:00 PM

OPD001 Appointment Clarification.docx

pursuant to 41-3-422, ~~pending a determination of~~
~~eligibility pursuant to 47-1-111;~~

(b) any child or youth involved in a proceeding under
a petition filed pursuant to 41-3-422;

(c) any party entitled to counsel at public expense
under the federal Indian Child Welfare Act or the Montana
Indian Child Welfare Act provided for in Title 41, chapter
3, part 13; and

(d) any child petitioning for reinstatement of
parental rights pursuant to 41-3-615.

(3) Except as provided in the federal Indian Child
Welfare Act or the Montana Indian Child Welfare Act, a
court may not appoint a public defender to a putative
father, as defined in 42-2-201, of a child or youth in a
removal, placement, or termination proceeding pursuant to
41-3-422 until:

(a) the putative father is successfully served notice
of a petition filed pursuant to 41-3-422; and

(b) the putative father makes a request to the court
~~in writing~~ to appoint the office of state public defender
to assign counsel."

{Internal References to 41-3-425:

41-3-422 x	41-3-422 x	41-3-422 x	41-3-422 x
41-3-423 x	41-3-432 x	41-3-1310 x	41-3-1316 x
47-1-104 x	47-1-104 x		

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Section 5. Section 46-8-101 , MCA, is amended to read:

"46-8-101. Right to counsel. (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel and must be asked if the aid of counsel is desired.

(2) Except as provided in subsection (3), if the defendant desires ~~assigned~~counsel at public expense because of financial inability to retain private counsel and the offense charged is a felony or the offense is a misdemeanor and incarceration is a sentencing option if the defendant is convicted, the court shall ~~order~~appoint the office of state public defender, provided for in 2-15-1029, ~~to assign counsel~~ to represent the defendant ~~without unnecessary delay pending a determination of eligibility under the provisions of 47-1-111.~~

(3) If the defendant desires ~~assigned~~counsel at public expense because of financial inability to retain private counsel and the offense charged is a misdemeanor and incarceration is a sentencing option if the defendant is convicted, during the initial appearance the court may order that incarceration not be exercised as a sentencing

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option if the defendant is convicted. If the court so orders, the court shall inform the defendant that the assistance of counsel at public expense through the office of state public defender is not available and that time will be given to consult with an attorney before a plea is entered. If incarceration is waived as a sentencing option, athe office of state public defender may not be assignedappointed."

{Internal References to 46-8-101:
46-7-102x 47-1-104x}

Section 6. Section 47-1-104 , MCA, is amended to read:

"47-1-104. Statewide system -- structure and scope of services --~~assignment of counsel at public expense~~ appointment of the office of state public defender. (1)

There is a statewide public defender system, which is required to deliver public defender services in all courts in this state. The system is supervised by the director. The director must be an attorney licensed to practice law in the state.

(2) The director shall approve a strategic plan for service delivery and establish not more than 11 public defender regions. The director may establish a regional

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office to provide public defender services in each region as provided in 47-1-215 for nonconflict regions and as provided in 47-1-403 for conflict regions, establish a contracted services program to provide services in the region, or utilize other service delivery methods as appropriate and consistent with the purposes described in 47-1-102.

(3) When ~~a court orders the assignment of a the~~ office of state public defender is appointed, the ~~appropriate~~ office shall ~~immediately assign a public defender qualified to~~ provide the required services. The director shall establish protocols to ~~ensure that the~~ ~~offices~~ make appropriate assignments in a timely manner.

(4) A court may ~~order assignment of a~~ appoint the office of state public defender under this chapter in the following ~~cases~~:

(a) in cases in which a person is entitled to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of indigence pursuant to 47-1-111, as follows:

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- (i) for a person charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration, as provided in 46-8-101;
 - (ii) for a party in a proceeding to determine parentage under the Uniform Parentage Act, as provided in 40-6-119;
 - (iii) for an applicant for sentence review pursuant to Title 46, chapter 18, part 9;
 - (iv) for a petitioner in a proceeding for postconviction relief, as provided in 46-21-201;
 - (v) for a petitioner in a habeas corpus proceeding pursuant to Title 46, chapter 22;
 - (vi) for a parent or guardian in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;
 - (vii) for a witness in a criminal grand jury proceeding, as provided in 46-4-304; and
 - (viii) for a parent in a proceeding to involuntarily terminate the parent's parental rights pursuant to 42-2-607;
- (b) in cases in which a person is entitled by law to the assistance of counsel at public expense regardless of

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the person's financial ability to retain private counsel,
as follows:

(i) as provided for in 41-3-425;

(ii) for a youth in a proceeding under the Montana Youth Court Act alleging a youth is delinquent or in need of intervention, as provided in 41-5-1413, and in a prosecution under the Extended Jurisdiction Prosecution Act, as provided in 41-5-1607;

(iii) for a juvenile entitled to ~~assigned~~ counsel at public expense in a proceeding under the Interstate Compact on Juveniles, as provided in 41-6-101;

(iv) for a minor who petitions for a waiver of parental consent requirements under the Parental Consent for Abortion Act of 2013, as provided in 50-20-509;

(v) for a respondent in a proceeding for the involuntary commitment of a developmentally disabled person to a residential facility, as provided in 53-20-112;

(vi) for a minor voluntarily committed to a mental health facility, as provided in 53-21-112;

(vii) for a person who is the subject of a petition for the appointment of a guardian or conservator in a proceeding under the provisions of the Uniform Probate Code in Title 72, chapter 5;

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(viii) for a ward when the ward's guardian has filed a petition to require medical treatment for a mental disorder of the ward, as provided in 72-5-322;

(ix) for a parent, guardian, or other person ~~with physical or having~~ legal custody of a child or youth in ~~any removal, placement, or termination~~ proceeding on a petition filed pursuant to 41-3-422 and as required under the federal Indian Child Welfare Act and 41-3-1316, as provided in 41-3-425;

(x) for a respondent in a proceeding for involuntary commitment for a mental disorder, as provided in 53-21-116; and

(xi) for a respondent in a proceeding for the involuntary commitment of a person for alcoholism, as provided in 53-24-302; and

(c) for an ~~eligible appellant individual listed in subsection (4) or (5) whenever any party to a proceeding listed in subsection (4) or (5) files a direct appeal of the proceeding to an appellate court~~in an appeal of a proceeding listed in this subsection (4).

~~(5)(d) A court may also order assignment of a public defender~~ to serve as a member of a treatment court team established pursuant to 46-1-1104 or 46-1-1204.

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~~(6)~~(5) The office of state public defender is appointed without separate court order in the following;

(a) Except as provided in 41-3-425(3), for any child, parent, guardian, party entitled to counsel at public expenses under the federal Indian Child Welfare Act or the Montana Indian Child Welfare Act, or person having legal custody of a child involved in a petition filed pursuant to 41-3-422 upon filing of the petition;

(b) For a youth in a proceeding under the Montana Youth Court Act upon notice to the office of a youth subject to a probable cause hearing pursuant to 41-5-332;

(c) For a youth in a proceeding under the Montana Youth Court Act upon filing of a petition pursuant to 41-5-1402; and

(d) For an individual listed in subsection (4) or (5) whenever any part to a proceeding listed in subsection (4) or (5) files a direct appeal of the proceeding to an appellate court and the office has already been appointed to represent the individual in the underlying proceeding.

(6) Except as provided in subsection (7) or (8),

(a) Appointment to represent an individual in a trial court terminates upon expiration of the individual's right

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to file a notice of appeal from the court's judgment or other final order;

(b) Appointment to represent an individual on appeal to a district court terminates upon expiration of the individual's right to file a notice of appeal to the Montana Supreme Court;

(c) Appointment to represent an individual on appeal to the Montana Supreme Court terminates upon remittitur or other final order of the Montana Supreme Court;

(7) (a) Appointment under (4) (a) (i) continues for the limited purpose of making a timely request to conform the written judgment to the oral pronouncement of sentence pursuant to 46-18-116(2)

(b) Appointment under (4) (1) (iii) terminates upon decision of the sentence review division;

(c) Appointment under (4) (a) (v) terminates upon the court's grant or denial of the petition;

(d) Appointment under (4) (a) (vii) terminates upon the respresented witness being released from subpoena;

(e) For appointment under (4) (b) (i) or (5) (a), an order granting a guardianship is a final order and the appointment terminates upon expiration of the individual's

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right to file a notice of appeal from that guardianship order;

(f) Appointment to represent a youth convicted under the Criminally Convicted Youth Act continues until the youth reaches the age of 21 for the limited purpose of assisting the youth as to sentence review pursuant to 41-5-2503 and 41-5-2510;

(g) Appointment under (4) (b) (vii) to represent the subject of a petition for the appointment of a guardian or conservator terminates when the time to appeal from the court's grant or denial of the petition has expired. The appointment does not extend past that point to ongoing representation of a ward or review of a guardian's or conservator's annual reports;

(h) Appointment under (5) (c) terminates if the youth is released from custody pursuant to 41-5-334 and no petition has ben filed pursuant to 41-5-1402; and

(i) An appointment previously terminated under (6) (a) or (b) is reinstated without separate court order if an appellate court subsequently remands the matter for further proceedings.

(8) An appointment shall terminate immediately if:

(i) a court rescinds the appointment;

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Last printed 7/2/2026 12:53:00 PM

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(ii) the individual obtains representation by private
counsel; or

(iii) a court relieves the office of the duty to provide
representation following a motion requesting permission to
withdraw pursuant to 46-8-103.

(9) (a) Except as provided in subsection (6) (b), a The
office of state public defender may not be ~~assigned~~
~~appointed~~ to act as a court-appointed special advocate or
guardian ad litem in a proceeding under the Montana Youth
Court Act, Title 41, chapter 5, or in an abuse and neglect
proceeding under Title 41, chapter 3.

(b) A private attorney who is contracted with under
the provisions of this title to provide public defender
services under this chapter may be appointed as a court-
appointed special advocate or guardian ad litem in a
proceeding described in subsection ~~(6)~~(9) (a) if the
appointment is separate from the attorney's service for the
statewide public defender system and does not result in a
conflict of interest."

{Internal References to 47-1-104:
41-3-1310~~x~~ 47-1-215~~x~~ 47-1-403~~x~~}

Section 7. Section 46-8-103 , MCA, is amended to
read:

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Last printed 7/2/2026 12:53:00 PM

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"46-8-103. ~~Duration of assignment~~Motion to withdraw from frivolous appeal. ~~(1) When counsel has been assigned, the assignment is effective until final judgment, including any proceeding upon direct appeal to the Montana supreme court, unless relieved by order of the court that assigned counsel or that has jurisdiction over the case.~~

~~(2)~~ If counsel determines that an appeal would be frivolous or wholly without merit, counsel shall file a motion with the court requesting permission to withdraw. The motion must attest that counsel has concluded that an appeal would be frivolous or wholly without merit after reviewing the entire record and researching applicable statutes, case law, and rules and that the defendant has been advised of counsel's decision and of the defendant's right to file a response. The motion to withdraw must be accompanied by a memorandum discussing any issues that arguably support an appeal. The memorandum must include a summary of the procedural history of the case and any jurisdictional problems with the appeal, together with appropriate citations to the record and to the pertinent statutes, case law, and procedural rules bearing upon each issue discussed in the memorandum. Upon filing the motion and memorandum with the court, counsel's certificate of

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~~mailing-service~~ must certify that copies of each filing were mailed to ~~the local county attorney, the attorney general's office, and~~ the defendant. The defendant is entitled to file a response with the court."

{Internal References to 46-8-103:
25-21-116~~x~~}

Section 8. Section 72-5-408 , MCA, is amended to read:

"72-5-408. Procedure concerning hearing and order on original petition. (1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If at any time in the proceeding the court determines that the interests of the minor are or may be inadequately represented, the court may order the office of state public defender, provided for in 2-15-1029, to assign counsel pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the minor.

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of the

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person's own choice, the court ~~shall~~may, in the interest of justice, appoint an appropriate official or order the office of state public defender to assign counsel to represent the person pursuant to the Montana Public Defender Act, Title 47, chapter 1. If the alleged disability is mental illness or mental deficiency, the court may direct that the person to be protected be examined by a physician or professional person as defined in 53-21-102 designated by the court. If the alleged disability is physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court. It is preferable that a physician designated by the court not be connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(3) In the case of an appointment pursuant to 72-5-410(1)(h), the court shall direct that the person to be protected be examined by a physician as set forth in subsection (2).

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Last printed 7/2/2026 12:53:00 PM

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(4) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order."

{Internal References to 72-5-408:

72-31-413x}

-END-