Annotated Table of Contents for LCCF11

Comments by Kathleen Jenks, Department of Justice

Reorganized to match LCCF11 by Susan Byorth Fox, Legislative Services

NEW SECTION. **Section 1. Discovery.** 1

NEW SECTION. **Section 2. Available discovery.** 1

NEW SECTION. **Section 3. Discovery not available.** 2

NEW SECTION. **Section 4. Motions regarding disclosure.** 4

NEW SECTION. **Section 5. Disclosure of witnesses.** 5

NEW SECTION. **Section 6. Failure to disclose.** 5

The Goal of sections 1 through 6:

The goal of this proposal is to provide for a streamlined method of access for parents and their attorneys to the contents of the Department's files, while complying with HIPA and 42 USCS §290, which protect the confidentiality of health care information and chemical dependency treatment records. This draft provides parents attorneys with a method to obtain this information while protecting sensitive information including the identities of confidential reporters (currently covered under §41-3-205(3)(d)) and the names and addresses of foster parents and the records of other adults involved in the case (currently covered under the broad statement in §41-3-205(3) providing that information may be given to parents unless "disclosure of the records is determined to be detrimental to the child or harmful to another person". In my view, 41-3-205(3) has been problematic because it is overly broad and places all discretion and responsibility with the social workers. This proposal addresses specific problem areas while allowing the Department or other interested parties to request protection from the court if necessary. The confidentiality statute (41-3-205) is very cumbersome and really needs to be re-written. Time did not currently permit that rewrite.

Specific examples of practical problems I hope to address:

If John and Mary, the biological parents, are not living together or parenting together, should Mary have access to John's records, including psychological evaluations and chemical dependency records? Generally speaking - no. Therefore it is protected by Section 3(1)(a). However, what if Mary's child is going to be placed with John, and she has concerns that he is dangerous? Then Mary may move for disclosure pursuant to Section 3(3). John and the Department have the opportunity to respond, and the Judge can review the information in camera, pursuant to Section 4(7) before making the decision to disclose or not disclose.

If the child is seeing a counselor, should John have access to the counselor's reports? Generally speaking - yes. A parent should have access to a child's health care information. However, what if the therapist believes it would be detrimental to the child for his/her abuser to know what is being said during therapy? Then, the Department or the attorney for the child can ask the court protect the child from the disclosure under Section 3(4), John can respond and the Judge can review the information in camera, pursuant to Section 4(7) before making the decision to disclose or not disclose.

NEW SECTION. **Section 7. Notice to the court of adoption or majority.** . . 5

The goal is to provide a means to notify the court that the child has either aged out or been adopted. Currently there is no procedure in place to accomplish that, and no way for the Court to know the case is over. Some counties give their courts notice some do not.

NEW SECTION. **Section 8. Testimony by electronic means.** 5

The goal of this proposal is to expedite the proceedings and allow the court and the parents to focus on treatment. Parents are frequently in treatment programs out of the community and can't travel to hearings without disrupting the placement. So they

end up waiving their presence or asking for continuances. Also, these cases frequently require professionals from outside the community and frequently involve parents who relocate during the course of the proceedings or who are incarcerated outside the community. Allowing electronic testimony will reduce both delay and cost

NEW SECTION. **Section 9. Termination without a treatment plan.** 6

NEW SECTION. **Section 10. Termination with a treatment plan.** 8

The Goal of sections 9 and 10:

For the most part the goal was to simplify this section and make it more readable and accessible to everyone. 609 is structured in such a way that you jump back and forth within 609 and then get referred back and forth to 41-3-423. It also contained a couple of sections that were essentially duplicates with sections referred to in 41-3-423. [609((4)(d) and (1)(c) are covered by 41-3-423(2)(a)] The provisions relating to termination without a treatment plan and terminating with a treatment plan are grouped together in 609 and are difficult to sort out. The revised statute is intended to be easier to read and use.

Under 41-3-607: Subsection (7) is just moved from 41-3-609 so it wouldn't repeat itself in the new 612 and 613. (41-3-609 is repealed and replaced with 2 new sections)

There are a couple of substantive changes as well. These are:

Section 10(1)(i) which is designed to replace the former section allowing termination if a parent is going to be "incarcerated for more than one year". The reasons for the proposed change are 1) given the statutory structure of the criminal codes, we really don't have determinate sentencing. People receive lengthy sentences and can successfully argue that it is possible they will be released within a year due to appeals, sentence review, parole, pre-release or discretionary good time. 2) the definition of incarcerated is unclear, there is a question about whether or not

pre-release is incarceration or not. If someone has a DOC commitment it is extremely difficult to say when he/she will be sent to a pre-release. It could be a month, it could be a year, it could be two years. 3) Pre-trial incarceration is a big problem for kids. Unfortunately, the parents can accomplish very little while they are incarcerated. And what they can accomplish varies greatly depending on what facility they are housed in. I most facilities visits with the kids are extremely limited and many must take place through glass and are really very hard on the kids. From the perspective of children, this time is dead time. They are just in a holding pattern waiting for the parents to sort out the mess they got themselves into.

To try to address the above and eliminate the guess work:

For a conviction, I used a 5 year commitment as a cut off. In my experience a 5 year commitment will usually amount to substantially more time away than 1 year. On the other hand a 3 year commitment will likely have someone out in about a year.

For the pretrial issue, I used 15 months, to be consistent with the 15 of 22 month requirement for termination and to make sure the incarceration time was well outside the criminal requirement for speedy trial. I am reasoning that if a defendant is going to get out after conviction he will be out well before 15 months.

Section 11. Section 41-3-101, MCA, is amended to read:

"41-3-101. Declaration of policy. 9

The Goal is to expedite. Priority setting already exists in 41-3-422(3). Unfortunately it is so buried in the statutes that most people don't know its there and those that do can't ever find it when they are trying to get a hearing set. I added the wording about orders because I would also like to encourage the efficient issuance of orders. By and large the judges are signing orders promptly but occasionally the orders don't come for months.

Section 12. Section 41-3-102, MCA, is amended to read:

"41-3-102. Definitions. 11

The Goal for this deletion is to 1) fix a conflict between the definition and the intent of 41-3-425, which requires appointment of an attorney to any "parent", since a step-parent doesn't have a legal parent-child relationship, the step parent shouldn't necessarily be given an attorney, particularly if the step-parent is no longer involved with the parent; 2) to simplify the unnecessary confusion between the definition of parent and the definition of parent-child relationship. 41-3-102(17). 3) To reduce arguments in various other sections that use the word parent and were probably not intended to include step-parent, particularly if that step-parent is now estranged from the parent. Including (18) definition of permanent placement includes reunification with parent, 41-3-103 granting "initial jurisdiction" in the county the parent resides, 41-3-205 (or the discover statutes proposed above) granting access to information by "parent"; 41-3-438(3)(b) allows dismissal if the child is placed with the "noncustodial parent", does that include an estranged step parent? No.

Section 13. Section 41-3-103, MCA, is amended to read:

"41-3-103. Jurisdiction. 21

This is an easy fix of a glaring problem that causes legal confusion As Professor Crowley, drilled into law many a law student head "Jurisdiction is power, venue is place" If you try to transfer "jurisdiction" you get weird arguments about starting the case all over again, because you aren't supposed to be transferring jurisdiction, you transfer venue.

Section 14. Section 41-3-205, MCA, is amended to read:

"41-3-205. Confidentiality -- disclosure exceptions. 22

Section 15. Section 41-3-302, MCA, is amended to read:

"41-3-302. Responsibility of providing protective services -- voluntary protective services agreement. 27

Section 16. Section 41-3-422, MCA, is amended to read:

"41-3-422. Abuse and neglect petitions -- burden of proof. 29

The Goal (for Sections 16 and 19):

This provision has been modified a number of times in past sessions. The insertion of the certified mail requirement is both expensive and unrealistic in a day to day sense. The reality is, that the post office whether they are required to or not, rarely check to see who is signing for the letter. There is simply no way to prove that the person who signed the receipt is the person it is addressed to. The current incarnation of the statute, requires us to serve the person's attorney by certified mail, which really serves no practical purpose. Also since the statute was written, everyone involved now has attorneys, which should simplify service. I am retaining the requirement that the initial petition and a termination petition be served personally (or by publication).

Section 17. Section 41-3-423, MCA, is amended to read:

"41-3-423. Reasonable efforts required to prevent removal of child or to return -- exemption -- findings -- permanency plan. 36

The question here is - what is the goal regarding reunification of families when the parents don't live together? "Families" frequently consist of more than one home. If dad had the child on the weekends and physically abuses him, causing the removal of the child from dads home, the state should not be obligated to reunify with dad while being hindered from returning to mom. If mom is not available for placement after the weekend removal from dad because when she is found she is using drugs, the department should be allowed to work to reunify with either parent as soon as either parent becomes appropriate. The state should not keep kids in custody if there is a fit parent available.

The codes are very unclear and conflicted about this. 41-3-423 (1) requires reunification of "families that have been separated by the state", however, 41-3-101 Declaration of Policy states that whenever possible the Department place the child

with the "non-custodial birth parent" 41-3-438(3)(b) allows dismissal if the child is placed with the "non-custodial parent". The proposed amendment would resolve this conflict.

Section 18. Section 41-3-424, MCA, is amended to read:

"41-3-424. Dismissal. 39

Section 19. Section 41-3-428, MCA, is amended to read:

"41-3-428. Service of process -- service by publication -- effect. . . 40

See Section 16.

Section 20. Section 41-3-437, MCA, is amended to read:

"41-3-437. Adjudication -- temporary disposition -- findings -- order 40

Section 21. Section 41-3-445, MCA, is amended to read:

"41-3-445. Permanency hearing. 44

Section 22. Section 41-3-607, MCA, is amended to read:

(Note from SBF: Section 18, 20, and 21 are grammatical changes and may be unnecessary.)

"41-3-607. Petition for termination -- separate hearing -- no jury trial. 49

Section 23. Section 41-3-611, MCA, is amended to read:

"41-3-611. Effect of decree. 51

There are frequently times when the parents are not on the same timeline and can't be running on the same timeline. This is due to problems associated with identification of fathers, service of an absent or unidentified parent or the existence of an aggravated circumstance by one parent. There is also some confusion caused by the codes switching back and forth between "parent" and "parents". I don't think the switch back and forth was intentional; I think it was just a throw back to thinking that the parents are parenting as a couple, which is usually not the case.

Section 24. Section 41-3-612, MCA, is amended to read:

"41-3-612. Appeals. 52

41-3-113 (repealed) should be combined with 41-3-612. The combined statute should

be 612, because it is a more logical placement in the code.

The goal of this proposal is to 1) clarify a persistent question about whether or not a District Court can hold permanency hearings while the case is on appeal; 2) simplify the codes a bit by combining 41-3-113 and 612; and 3) shorten the delay for children who's parents appeal the termination of parental rights. Parents and their attorneys know within a short period of time after the termination of parental right, whether or not they intend to appeal. Children should not have to wait for two months before the notice of appeal is due. This "dead time" for kids should be minimized as much as possible.

NEW SECTION. **Section 25. {standard} Repealer.** 53

41-3-113 is combined with 41-3-612 and 41-3-609 has been split into New sections 9 and 10.

NEW SECTION. **Section 26. {standard} Codification instruction.** 53

C10425 6244sfhb.