Montana Child Abuse and Neglect Court Statistics and Case Analysis

Prepared for the Children, Families, Health, and Human Services Interim Committee
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I. Court Statistics

District Court Abuse and Neglect Cases

	2003	2004
Filings	994	1,081
Dispositions	926	957

Supreme Court Cases

2003	2004	
860	882	Total new filings
609	670	Total appeals filed
878	800	Total cases closed
377	395	Opinions issued
26	22	Abuse and Neglect Decisions
4	1	Reversals

Montana Supreme Court Cases: Appeals of Youth in Need of Care (YINC) Cases 1998-2005:

- 152 Appeals of District Court orders on child abuse and neglect. Avg: 19 per year (Range: 9 to 29 cases per year - no consistent trend)
- Average of 362 Supreme Court opinions (over 800 cases) per year
- Average number of days between date of District Court order and submission of briefs: 405.99 days[1]
- Average number of days between briefs and opinion: 92.96[1]
- Number of reversals in 8 years: 16 of 152 YINC appeals

Of 16 reversals from 1998 to 2005:

- 12 involved termination of parental rights
- 4 involved treatment plans (failure to write one, none ordered, wrong reason for termination)
- 5 involved adjudication hearings (none held, children weren't adjudicated YINC, untimely)
- 2 involved not following ICWA
- 1 no GAL appointed for minor mother
- 1 evidence failed to establish abandonment
- 3 other reasons (District Court exceeded authority in ordering custody or costs, guardianship)

Summary: With a caveat that all cases filed in a year are not disposed in the same year, nor is

[1]Average for 147 cases, not including dismissals, etc.

the appeal filed and disposed in the same year, basic trends can be reviewed. In 2003 and 2004, there were just under 1,000 District Court dispositions each year for child abuse and neglect cases. There have been an average of 19 appeals per year over the last 8 years (1998 through 2005), approximately 2% of the cases are appealed. In 2003, four cases were reversed, two from 2002 and two from 2003. In 2004, one case was reversed, from 2003. Those five reversals represent 0.25% of the number of dispositions in those 2 years.

Sources:

2003 and 2004 District Court Case Filings and Dispositions, Supreme Court 2004 Filing and Disposition Overview, Summary of Major Statistical Categories, and 2003-2004 Comparison, Montana Court website: http:\\www.montanacourts.org

Court Assessment Program. Supreme Court Appeals - YINC. Excel spreadsheet. 2006.

II. Summary of the Conclusions of the Court Assessment

Areas of concern were:

- The number of continuances. Over 40% of show cause hearings, adjudicatory hearings, and temporary legal custody hearings were continued. This results in a delay in permanency for the child, which can result in multiple placements, etc.
- Representation had been an issue but under the Public Defender Program adopted in 2005, eligible parents will receive appointment of legal counsel.
- Consistency in the courts' handling of child abuse and neglect cases was not seen. Some of the inconsistencies involve the combining of the show cause, adjudicatory, and dispositional hearings and using stipulations by the parents. Number of treatment plans is also an issue.
- Reasonable efforts language (required by federal law). Reasonable efforts language (to prevent the necessity of removal and to reunify families) was found in over 94% of the show cause and adjudicatory orders. Less than half of the judges enter findings on the efforts although they indicated having received training on the matters.
- Judicial oversight on whether reasonable services had been provided by the Child and Family Services Division was included in over 91% of the case files reviewed, although less than one-third always consider whether the family had been availing themselves of the services or whether the services are alleviating the reason the child was removed.
- ICWA. The majority of judges, attorneys, and caseworkers always or nearly always inquire as to whether the children in a case are of Native American heritage and if the case falls under ICWA.

A new concern that was identified through the case file reviews is "that hearings aren't being held timely in all cases, all orders aren't being received in a timely fashion and required federal language isn't being written into every order. In addition, overworked staff and lack of additional resources result in the children lingering too long in the system." (From the Conclusions of the "Reassessment of Court Practice in Child Abuse and Neglect Proceedings in Montana Courts".)

III. Supreme Court Case Analysis -- Chief Justice Karla Gray's Concerns

In a recent Supreme Court (Court) decision, *In the Matter of the Custody and Parental Rights of D.S.*, 2005 MT 275, Chief Justice Karla Gray joined the Court in a special concurring opinion in which she expressed her "serious and ongoing concerns about the manner in which youth in need of care/termination of parental rights cases are being handled by DPHHS, those who prosecute on behalf of DPHHS, and the trial courts". D.S., ¶ 42. She stated that "[h]aving been unsuccessful in garnering DPHHS's attention for well over a decade, perhaps my best hope now lies in the current legislative interim study of matters related to cases of this type. I wish them well but recognize, with sadness, that it is not the law that is lacking, it is the will to follow it". D.S., ¶ 51.

In her concurring opinion, she cites four cases in which she, other justices, or the full Court has taken the DPHHS to task over the years. I have analyzed the four cases mentioned in her opinion to discern the major concerns.

Four cases out of the many heard over the last 10 years, as indicated by the earlier data, is not necessarily a significant number. The significance lies in the commonality of the comments on court concerns, albeit concerns over different representatives of DPHHS, county attorneys, and District Courts statewide. The purpose of this exercise is to provide information to the Committee so that it can prepare questions and have a dialogue with the various representatives of the Court to elicit any changes that the Legislature needs to make or to understand any barriers to compliance with statutory procedures that may be present for DPHHS, the county attorneys, and the courts.

The legislative committee was mentioned in *In re D.S.* The issues on appeal were whether 41-3-423(2)(a), MCA, was void on its face for vagueness, whether the District Court abused its discretion in terminating A.S.'s parental rights to D.S., and whether DPHHS failed to provide

A.S. (mother) with sufficient notice.

Section 41-3-423, MCA, states that a court may make a finding that the department need not make reasonable efforts to provide preservation or reunification services if the court finds that the parent has committed one of a list of acts, including subjecting a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child. The Court did not find that the statute was vague, but found that it allows a court discretion and simply lists several examples of conduct rising to the level of an aggravated circumstance. D.S., ¶¶ 17,18.

The Court held that the District Court did not abuse its discretion in terminating parental rights because of substantial evidence of chronic and severe emotional neglect. D.S., ¶ 31. In this case, the notice contained the entire list of grounds enumerated above in 41-3-423, MCA. The Court stated that "This type of notice is unacceptable and we admonish DPHHS to refrain from using this type of notice in the future". D.S., ¶ 37. The Court noted that it was disinclined to reverse the District Court's decision on the basis of the faulty notice because the affidavit that was served with the petition contained adequate notice. D.S., ¶ 39.

In her concurring opinion, Chief Justice Gray concurred with the majority's decision and stated that the decision was appropriate, but also that it was appropriate that "more be said about existing jurisprudence on this issue, jurisprudence DPHHS and its prosecutors apparently are happy to ignore". D.S., ¶ 44. She further stated that "DPHHS has been on direct notice since December 31, 2001, the date we decided *In re T.C.*, 2001 MT 264, 307 Mont. 244, 37 P.3d 70, of the necessity of providing constitutional due process via adequate notice in its petitions to terminate". D.S., ¶ 45. Chief Justice Gray listed her concerns with T.C. (which will be enumerated below) and closed her comments on the D.S. case with "When might we expect DPHHS and its prosecutors--and, indeed, the trial courts who, pursuant to T.C., have a duty to protect parents' rights via fundamentally fair procedures--to proceed pursuant to the law? The only rational answer at this point appears to be never." D.S., ¶ 48. She then asks if wholesale reversals in these kinds of cases are needed to get the attention of those charged with duties in these cases.

Comment: The most relevant fact for the Committee is that the problem involves three different agents of the state: DPHHS, the prosecutors, and the trial courts. DPHHS brings the case to the attention of the county attorney who is responsible

to prepare and serve the legal documents which are brought before the court. The court is intended to be the arbiter, providing oversight of all of the parties in the case. DPHHS would do well to make sure that they are very specific in the information that they provide to the county attorney, but the county attorney must in turn be specific in the notice, and that the judge must be vigilant in keeping the DPHHS and the prosecutor on task and rule accordingly.

In D.S., Chief Justice Gray referred to *In re T.C.* decided in 2001. The comments to which she refers are in the full court opinion. In T.C., the DPHHS petition to terminate parental rights was initially premised on a parent's failure to comply with a treatment plan. At the termination hearing, DPHHS moved to amend the pleading to conform with evidence presented by allowing it to include abandonment as the new statutory basis for termination. The mother objected, but the trial court granted the amendment. DPHHS argued that sufficient information was included in the petition and consequently the mother received adequate notice. D.S., ¶ 45. The Court did not agree stating that due process requires both notice and an opportunity to be heard. D.S., ¶ 46. The notice in T.C. was basically the same as in D.S. with the entire list of the five grounds for termination (taken from section 41-3-423, MCA) included--which the court believed was not providing sufficient notice in order to prepare one's defense. The Court also ruled that the District Court erred in allowing DPHHS to amend the pleadings during the hearing, which was the first time the mother learned of the termination based on abandonment. D.S., ¶ 46.

Comment: The notice was the same "shotgun notice" that was problematic in D.S. Notices are prepared by the county attorney based on an affidavit prepared by DPHHS workers. It is unclear from the opinion as to which party instigated the change to the theory of abandonment from the original petition based on failure to comply with a treatment plan. However, it was the county attorney who brought the motion forward, and it was granted by the District Court.

In D.S., Chief Justice Gray also cited *In the matter of S.C. and L.Z.* 2005 MT 241, 328 Mont. 476. In this case, the issues were whether the District Court abused its discretion in granting the DPHHS motion for a protective order against a discovery request, whether there was an error in failing to bifurcate the adjudicatory and dispositional hearings, and a claim of ineffective assistance of counsel. The Court could not "conclude that the District Court abused its discretion in granting the state's request for a protective order" against discovery. S.C., ¶ 23. DPHHS has contended that they now had an "open file" policy that made discovery unnecessary. S.C., ¶ 20.

The Court cautioned that parties who are subject to parental termination proceedings have the full right to discover the case against them. S.C., ¶ 24.

On the second issue, the Court stated that DPHHS agrees that the District Court awarded temporary legal custody (a disposition) at the adjudicatory hearing "which may have been in error". S.C. ¶ 27. The department asked the court to treat the earlier assignment as a temporary placement regardless of what actually occurred. To remediate, the District Court scheduled a dispositional hearing immediately and allowed the parents to move for reconsideration. However, the Supreme Court still held that the District Court erred in violating the statute (41-3-438, MCA) that requires that dispositional issues are specifically addressed apart from adjudicatory issues. S.C., ¶ 28. The Court concluded that "in light of the facts of this case, the District Court's error, followed by its immediate efforts at remediation, caused, in the end, no substantial prejudice to the parents warranting reversal". S.C., ¶ 29. The third issue of effectiveness of counsel was not further addressed because it was related to the bifurcated hearing issue that was concluded to be harmless.

Chief Justice Gray concurred with the Court's opinion on the issue related to ineffectiveness of counsel, but dissented in part. She took great issue with the inappropriate attitude of DPHHS that the trial court "may have been in error" and an apparent unwillingness to simply concede that an error occurred. She believed that the "department" asking the court to treat something as that which it is not--the assignment of temporary legal custody as a temporary placement--was indefensible. She listed five other cases in which she had warned the department about strict compliance with Montana's very explicit statutory language. She expressed concerns about the manner in which the department and the District Courts handle child abuse and neglect cases and parental termination cases *and* "this Court's willingness to overlook conduct that does not comply with statutory mandates". (Note: a reference to the "department" must at least include reference to or shared responsibility of the prosecutor in these matters.)

She took more issue with the discovery than the full Court did in its opinion. She disagreed that "the Court cannot conclude that the District Court abused its discretion". She provided specific comments on the different types of discovery and how they could have been handled. S.C., ¶¶ 46, 47. She stated that, "if the Department cannot adequately--but fairly--process these cases, the remedy is to seek more resources from the Legislature". S.C., ¶ 48. Justice James C. Nelson

joined Chief Justice Gray in her concurring and dissenting opinion and provided additional

information on the discovery issue. S.C., ¶¶ 54-56.

In S.C. and L.Z., one of the other five cases referred to was *In the Matter of F.H., J.K., and B.K.*, 266 Mont. 36, 878 P.2d 890 (1994). In this case, the major issue is the predicament that the Court feels placed in when DPHHS does not follow the statutory procedures, but because of the need for protection of the children, does not dismiss the court action. The statutory requirement is to file a petition within 48 hours after emergency placement, and DPHHS admitted that it failed to follow the 48-hour rule. The District Court denied the motion to dismiss. In the opinion, it states that the court "carefully balanced the technical statutory requirements against the children's best interest and ultimately decided to protect the children". (p. 4) The opinion also states (and is reiterated by Chief Justice Gray in S.C.) that "We also sound a stern warning to DFS to strictly follow the statutory procedure in future cases or we will, in no uncertain terms, punish its conduct which may result in potential harm to abused and neglected children--the very children that DFS is supposed to protect." (p. 6) Since the options for punishment appear to be limited--to dismissal or reversal--it is understandable that the District Court or the Supreme Court is reluctant to choose either of those options.

In a concurring opinion, Justice Nelson stated that if the 48-hour deadline is unworkable, then the Legislature should change it, but unless and until it does, DFS has the obligation to comply. Chief Justice Gray dissented and would have reversed the District Court's failure to dismiss for not following statutory procedure. She reiterated that the reaction to not dismiss for the protection of the children is the one that happens, but that the problem with that approach is that it results in "judicial amendment of legislative enactments". She states that the courts may wish that there were some other remedy for a violation of the 48-hour rule, but "the legislature has provided no such remedy". (p. 10)

Comment: The common theme is the inability or unwillingness of some of the DPHHS workers or some of the prosecuting attorneys to follow statutory procedure and the unwillingness of judges to "sanction" the department or the prosecution for not following statute because of the desire to protect the children.

This is a small sample of cases, and they involve different statutes, but they do provide a fertile ground for discussion in trying to understand a very complex system with multiple players and tough questions. The 48-hour rule will be an important issue now that the Court Rules require a separate filing for every child.

> Although in F.H., the petition was not filed for 13 days, which is by no means common or desirable, discussion will likely take place on whether the 48-hour rule needs to be lengthened. Finding a balance between the practical needs of DPHHS and the prosecution to accomplish the appropriate paperwork, the protection of the children, and the due process rights of the parents is difficult.

The final case referred to in S.C. by Chief Justice Gray that I will analyze is *In the Matter of Inquiry Into M.M, A.D., and L.D.,* 274 Mont. 166, 906 P.2d 675 (1995). Although this case is over 10 years old and many changes have been made to the statutes and system since then, the issues surrounding treatment plans still persist and are reflected in Supreme Court reversals since 1998 and resonate enough for the Chief Justice to cite them in ongoing opinions.

It is the fourth issue in this case that is relevant: Did the District Court err in terminating P.D.'s parental rights absent the existence of a court-approved treatment plan? A treatment plan was prepared and executed, but the mother refused to sign it. The plan was filed with the District Court but was never officially signed by the Judge, therefore it was not "approved". Everyone proceeded under the assumption that there was a court-approved treatment plan in place. The Court stated that it has consistently interpreted abuse and neglect statutes to protect the best interest of the children and has upheld the termination of parental rights absent a court-approved treatment plan. (p. 9) The opinion concludes that the absence of a formal court approval of the treatment plan is not a bar to termination of parental rights, but proceeds to note, for future termination proceedings, that a court-approved treatment plan should be in place in every case except as specifically provided in statute, and it reiterates its warning to DPHHS to abide by the strict statutory requirements in termination proceedings or risk grave harm to the very children whom they seek to protect. (p. 10).

Justice Erdmann concurred, but noted that the Court has adopted an exception allowing District Courts to disregard procedure, even though the Legislature had not adopted an exception. He stated that "the existence of this court-created exception to the statutory requirements has the effect of tolerating if not condoning improper procedures". (p. 12) Justice Erdmann further stated that "with the continuation of the judicially-created exception, however, there is little incentive for DFHHS [sic] to comply with the statutory requirements. DFHHS [sic] should heed the warning contained in both the majority and dissenting opinions or risk reversal on the basis of procedural errors in the future". (p. 13).

Chief Justice Gray dissented and would have reversed the District Court's termination based on the law. She expounded on the Court's refusal to reverse based on the statutory requirements and states that "the Court seems to herald and celebrate its now nearly two-decade old refusal to apply to law as enacted by the legislature and its concomitant permission to DFS to ignore the law". (p. 17) She dates the Court's warnings to comply with legal mandates and condemnation of disregard for the law back to 1977. In this opinion, she provides more information on an appropriate remedy. She states that the Court should "reverse the District Court and order that the status quo regarding the children be maintained pending further proceedings during which legal mandates are met". (p. 19) She basically directs DFS and the District Court to go back and, within a 30-day period, file the plan for the District Court's timely consideration and follow other procedures as the law requires.

This case was unique in that Justice William Leaphart joined Justice Gray and Justice Nelson also dissented and agreed that the petition should have been denied and required compliance with statutes.

Comment: This case illustrates the Supreme Court's frustration not only with the department, but with the District Court and itself. The county attorney is not mentioned, but the county attorney or attorney general are the only access the department has to the Court so the county attorney or attorney general is an agent in the process. Statutory process and procedure were in place, but if the various agents in the matter, the department as represented by a county or state attorney, judged by the District Court, and review by the Supreme Court, do not follow the law, it is unlikely that further statutory provisions will remedy the situation.

IV. Summary

The basic concerns with DPHHS's noncompliance with statutory procedures are complicated by the fact that they must be represented either by a county attorney or a state attorney through the attorney general's office and be adjudged by a third party--the District Court. All of the agents have different governmental structures, funding, resources, and functions in the system. Changes, if any, that must be made to the statutes or resources must come from the various entities themselves. With the state assumption of District Courts, the Supreme Court has another measure of influence upon the District Court Judges, and perhaps additional training or other methods of communications to the Judges to hold DPHHS and its counsel accountable to the law

may be warranted. If there are legal or resource barriers to accomplishing that goal, the Supreme Court should bring those issues forward to the Legislature for consideration.

County attorneys have expressed frustration with the responsibility to represent these "state" cases in court. However, they prosecute state criminal cases without complaint. A suggestion has been raised that the state should provide its own attorneys, but current statute allows only a county attorney, the attorney general, or an attorney hired by the county to file petitions (41-3-422, MCA). A change in practice would require a change in statute and resource allocation. The Department of Justice has assistant attorneys general available to assist counties in these cases but must receive the request from the county. If the county attorneys or the Department of Justice have barriers to complying with statutory and case law, it is incumbent upon them to bring recommendations for change forward. Complying with the 48-hour rule may be an issue that will come before the Legislature.

DPHHS is ultimately the entity that brings a case to the attention of the county attorney. It is through affidavits that DPHHS relays this information to its legal counsel, a county attorney, or the attorney general. DPHHS should bring any barriers to compliance with statutory procedures to the attention of the Legislature and heed the Supreme Court's many warnings and admonitions. The number of District Court decisions appealed to the Supreme Court for child abuse and neglect cases is a small percentage, and it is unknown how many mistakes go unappealed. The guarantee of legal counsel appointed for the parents earlier in the process could provide some additional oversight and correction to the system, or it may result in additional appeals.

Statutory changes, many significant, have been passed over the course of the years that the Supreme Court has been making these admonitions. With reorganization of the Executive Branch, state assumption of District Courts, and natural staff turnover in the department, county attorney offices, and the courts, it is expected that some errors will occur. But if errors occur consistently, then systemic changes or resource allocation or reallocation may need to occur.