

1 **AMENDMENTS TO CHILD ABUSE AND**
2 **NEGLECT PROVISIONS**

3 1999 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: Matt Throckmorton**

6 AN ACT RELATING TO THE DIVISION OF CHILD AND FAMILY SERVICES; PROVIDING
7 SPECIFIED LIMITATIONS ON INVESTIGATION OF CHILD ABUSE OR NEGLECT;
8 REQUIRING DIVISION TO PETITION COURT FOR REMOVAL OF CHILD FROM STATE
9 AND FROM DIVISION CUSTODY UNDER SPECIFIED CIRCUMSTANCES; INCLUDING
10 PROVISIONS REGARDING DEFENSE OF INEFFECTIVE ASSISTANCE OF COUNSEL;
11 PROHIBITING DIVISION FROM VIOLATING PARENTS RELIGIOUS BELIEFS OR
12 MATTERS OF CONSCIENCE WITH REGARD TO CHILDREN WHO HAVE BEEN
13 REMOVED; REQUIRING SPECIFIED ACCESS TO DIVISION RECORDS; AND PROVIDING
14 AN EFFECTIVE DATE.

15 This act affects sections of Utah Code Annotated 1953 as follows:

16 AMENDS:

17 **62A-4a-409**, as last amended by Chapter 274, Laws of Utah 1998

18 ENACTS:

19 **62A-4a-201.5**, Utah Code Annotated 1953

20 *Be it enacted by the Legislature of the state of Utah:*

21 Section 1. Section **62A-4a-201.5** is enacted to read:

22 **62A-4a-201.5. Removal of child from state and from division custody -- Claims of**
23 **ineffective assistance of counsel -- Prohibiting division from violating religious beliefs or**
24 **matters of conscience with regard to children who have been removed -- Providing access to**
25 **records.**

26 (1) Notwithstanding any other provision of law, the division shall petition the appropriate
27 juvenile court, alleging a material and substantial change in the circumstances of a child who is

28 subject to the court's jurisdiction, meriting revision of existing court orders to allow for removal
29 of the child from this state and the division's custody, if:

30 (a) parental rights have not been terminated with regard to that child;

31 (b) the parent of the child who is subject to the court order has established domicile or
32 residence in another state, either pursuant to court order or as an exercise of a constitutional right
33 to travel;

34 (c) the parent of the child who is subject to the court order is able to show, by substantial
35 evidence, that it is more likely than not that:

36 (i) the child was either domiciled or residing in that other state when the division removed
37 the child;

38 (ii) the child will receive necessary child welfare services in that other state; or

39 (iii) the child is the subject of a petition filed in a juvenile court in that other state by a
40 person or entity that has standing to file that petition, and the child will receive necessary child
41 welfare services under order of that court, in accordance with the provisions of the laws of that
42 state; and

43 (d) where applicable, the provisions of Title 62A, Chapter 4a, Part 7, Interstate Compact
44 on the Placement of Children; Title 78, Chapter 45c, Uniform Child Custody Jurisdiction, and the
45 federal Parental Kidnaping Prevention Act of 1980, 28 U.S.C. Section 1738A, have been complied
46 with.

47 (2) (a) In the absence of exigent circumstances, when the goal of a treatment plan is
48 reunification and the child is in the custody of the division, and a previously custodial parent with
49 whom reunification is sought has notified the division that specified conduct of the division
50 regarding the child violates or prevents the exercise of religious beliefs or conduct, or infringes on
51 the conscience of the parent or child, the division may not engage in or prohibit the conduct unless,
52 after a hearing, the juvenile court determines that the division has shown by clear and convincing
53 evidence that:

54 (i) the division's proposed action or conduct is essential to the immediate well being of the
55 child; and

56 (ii) the action taken is the least restrictive alternative to achieve the immediate protection
57 or well being of the child.

58 (b) Administrative convenience for the division is insufficient justification for violating

59 the religious beliefs or matters of conscience of a parent who is seeking reunification with his
60 child.

61 (c) There is a rebuttable presumption that the religious beliefs and matters of conscience
62 of the parent are sincerely held and are for the benefit of that parent's family, including the child
63 who is in the division's custody. If that presumption is challenged, the parent may overcome the
64 challenge by showing, by a preponderance of the evidence, that:

65 (i) the religious beliefs or matters of conscience are sincerely held;

66 (ii) the religious beliefs or matters of conscience held by the parent are infringed upon or
67 impeded by the action or conduct of the division, its employees, or agents; and

68 (iii) other professionally accepted and competent, less intrusive alternatives exist, which
69 could be used to meet the needs of the child without infringing on the religious belief or matter of
70 conscience of the parent. Other professionally competent alternatives may be established before
71 the court by the professional opinion of a person licensed in this or another state, or the
72 presentation to the court of at least two peer-reviewed articles regarding alternate courses of
73 conduct.

74 (3) Notwithstanding any other provision of law, a parent of any child in the custody of the
75 division is entitled to all records in the control or custody of the division that affect that child. The
76 parent is entitled to provide, at his own expense, an independent medical, psychiatric, or
77 psychological examination of his child to the court at any stage of a civil abuse or neglect
78 proceeding. The parent, his counsel, or any person designated in writing by either of them, is
79 entitled to review division and public court records relating to the named child with a member of
80 the Legislature, or his designee.

81 (4) In an abuse or neglect proceeding in juvenile court or on appeal, a parent may raise the
82 defense of ineffective assistance of counsel regarding any matter that has an alleged or actual
83 impact on the formulation, adoption, or failure to fulfill or comply with any part of a treatment plan
84 regarding any child or his parent or guardian. The division, or any other party to the action, may
85 challenge or oppose a parent's claim of ineffective assistance of counsel.

86 Section 2. Section **62A-4a-409** is amended to read:

87 **62A-4a-409. Investigation by division -- Temporary protective custody.**

88 (1) The division shall make a thorough investigation upon receiving either an oral or
89 written report of alleged abuse, neglect, fetal alcohol syndrome, or fetal drug dependency, when

90 there is reasonable cause to suspect a situation of abuse, neglect, fetal alcohol syndrome, or fetal
91 drug dependency. The primary purpose of that investigation shall be protection of the child.

92 (2) The following reported conditions do not, of themselves, create sufficient allegations
93 of abuse or neglect for the division to initiate a child protective service investigation:

94 (a) children, age eight and older, who are left in the parent's or caretaker's home without
95 parental supervision for brief periods of time, but not overnight, provided the child has no
96 significant medical or handicapping condition;

97 (b) children, age ten and older, who provide brief supervision for younger children who
98 are at least one year of age or older, provided that the supervised children have no significant
99 medical or handicapping condition;

100 (c) the use of legal substances or tobacco products in the presence of a child;

101 (d) the presence of head lice, poor grooming, or irregular hygiene practices of a child;

102 (e) failure of a parent or caretaker to immunize a child;

103 (f) use of profane language in the presence of a child;

104 (g) the exercise of parental discipline of a child by spanking, so long as there is no
105 significant external or internal physical injury to a child; or

106 (h) the refusal of a parent to support, sanction, or approve:

107 (i) a minor's desire to obtain an abortion;

108 (ii) a minor's engaging in conduct that violates the parent's religious beliefs; or

109 (iii) a minor's engaging in conduct that is prohibited by state law, including acts of
110 fornication, sodomy, or adultery.

111 [(2)] (3) The investigation may include inquiry into the child's home environment,
112 emotional, or mental health, nature and extent of injuries, and physical safety.

113 [(3)] (4) The division shall make a written report of its investigation. The written report
114 shall include a determination regarding whether the alleged abuse or neglect was substantiated or
115 unsubstantiated.

116 [(4)] (5) (a) The division shall use an interdisciplinary approach whenever possible in
117 dealing with reports made under this part.

118 (b) For this purpose, the division shall convene appropriate interdisciplinary "child
119 protection teams" to assist it in its protective, diagnostic, assessment, treatment, and coordination
120 services.

121 (c) A representative of the division shall serve as the team's coordinator and chair.
122 Members of the team shall serve at the coordinator's invitation, and whenever possible, the team
123 shall include representatives of health, mental health, education, law enforcement agencies, and
124 other appropriate agencies or individuals.

125 [~~(5)~~] (6) In any case where the division supervises, governs, or directs the affairs of any
126 individual, institution, or facility that has been alleged to be involved in acts or omissions of child
127 abuse or neglect, the investigation of the reported child abuse or neglect shall be conducted by an
128 agency other than the division.

129 [~~(6)~~] (7) If a report of neglect is based upon or includes an allegation of educational neglect
130 the division shall immediately consult with school authorities to verify the child's status in
131 accordance with Sections 53A-11-101 through 53A-11-103.

132 [~~(7)~~] (8) When the division has completed its initial investigation under this part, it shall
133 give notice of that completion to the person who made the initial report.

134 [~~(8)~~] (9) Division workers or other child protection team members have authority to enter
135 upon public or private premises, using appropriate legal processes, to investigate reports of alleged
136 child abuse or neglect.

137 [~~(9)~~] (10) In accordance with the procedures and requirements of Sections 62A-4a-202.1
138 through 62A-4a-202.3 and 78-3a-301, a division worker or child protection team member may take
139 a child into protective custody, and deliver the child to a law enforcement officer, or place the child
140 in an emergency shelter facility approved by the juvenile court, at the earliest opportunity
141 subsequent to the child's removal from its original environment. Control and jurisdiction over the
142 child is determined by the provisions of Title 78, Chapter 3a, and as otherwise provided by law.

143 Section 3. **Severability clause.**

144 If any provision of this act, or the application of any provision to any person or
145 circumstance, is held invalid, the remainder of this act shall be given effect without the invalid
146 provision or application.

147 Section 4. **Effective date.**

148 If approved by two-thirds of all the members elected to each house, this act takes effect
149 upon approval by the governor, or the day following the constitutional time limit of Utah
150 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the
151 date of veto override.

Legislative Review Note
as of 2-16-99 8:50 AM

This legislation raises the following constitutional or statutory concerns:

The provisions enacted by this legislation in Section 62A-4a-201.5 affect and potentially conflict with existing statutory provisions throughout Title 62A, Chapter 4a, and Title 78, Chapter 3a, Parts 3 and 4, regarding the standards for civil abuse and neglect proceedings. Because of the broad nature of the proposed provisions and the limited time for review, it is not possible to provide a thorough legal and constitutional analysis of each potential conflict.

Subsection (2) of 62A-4a-201.5, absent any limitation or definition of "religious beliefs" or "matters of conscience" may also conflict with existing code provisions throughout Title 62A, Chapter 4a, and Title 78, Chapter 3a, Parts 3 and 4, which define abuse and neglect and provide procedures and guidelines for the courts to determine when a parent's action is abusive. Several existing Utah Code sections (for example, Section 62A-4a-201), the United States and Utah Constitution, and state and federal case law currently protect parents' constitutional rights. The same potential conflict exists with regard to Subsection 62A-4a-409(2). This provision also requires an additional court hearing and determination, requiring proof by clear and convincing evidence, regarding issues that have been and will be considered by the court in proceedings that are currently statutorily prescribed.

It is uncertain how the provision relating to the claim of ineffective assistance of counsel will interrelate to existing court rules and rules of procedure, but, on its face, it does not appear to conflict.

Additionally, the effect of Subsection 62A-4a-409(2)(h)(i), regarding a minor's attempt or desire to obtain an abortion, may be interpreted under the latest 10th Circuit opinion, Jane L. v. Bangerter, 102 F3d 1112 (1996), to place a "substantial obstacle" or "undue burden" on a minor woman, and therefore may be considered unconstitutional under the 10th Circuit's opinion.

Office of Legislative Research and General Counsel