

Montana Legal Services Association

Provide, protect and enhance access to justice.

SENATE JUDICIARY
EXHIBIT NO. 5
DATE 1/17/11
CALL NO. CPD



Alison L. Paul
Executive Director
Montana Legal Services Association
616 Helena Avenue, Suite 100
Helena, MT 59601

Phone: (406) 442-9830 Ext. 15
Fax: (406) 442-9817
Toll Free: (800) 666-6124
E-mail: apaul@mlsa.org
Web site: www.mlsa.org

To: Senator Jim Shockley

From: Alison L. Paul
Executive Director

Date: January 12, 2011

Re: Representation of Children in Dependency and Neglect Cases

At Senator Shockley's request, the Montana Legal Services Association (MLSA) submits this proposal to create a statewide unit to provide representation to Montana children in abuse and neglect cases (DN cases). MLSA believes that this proposal will be both cost effective and beneficial to Montana's children, due to our experience in providing such services and the efficiencies of scale associated with a centralized program. The proposal is to create a legal unit separate from the rest of MLSA to avoid conflicts of interest to the extent possible. The unit would consist of 20 staff attorneys, one appellate/training attorney, one managing attorney, one administrator, and seven paralegals who would be placed in seven offices throughout the state. The total estimated cost of the proposal is approximately \$2.3 million per year. Of this amount, and aside from one-time expenses to establish the program, 88% reflects personnel costs such as staff and administrative salaries and benefits. The remaining 12% reflects non-personnel costs such as training expenses, postage and printing, overhead costs, travel expenses, litigation expenses, and adaptation of MLSA's case management system.

As background, a child has a statutory right to counsel (a "child's attorney") in a DN case under § 41-3-425, MCA. The Montana Supreme Court has not addressed whether a child also has a constitutional right to counsel under the Montana Constitution or the United States Constitution, but courts in other states have so concluded. *See e.g. Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1357, 1359-61 (N.D.Ga., 2005), *Matter of Jamie TT*, 191 A.D.2d 132, 136 (NY 1993). According to American Bar Association (ABA) standards, a "child's attorney" is "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client," while an attorney appointed as a "guardian ad litem" is "an officer of the court appointed to protect the child's interests without being bound by the child's expressed preferences." Both the ABA and U.S. Department of Health and Human Services have expressed a strong preference for appointing a "child's attorney" along with a non-attorney guardian ad litem.¹ Accordingly, MLSA submits this proposal with the intent to provide attorneys in the "child's attorney" role.² MLSA has learned that, historically, not all courts in Montana have appointed a child's attorney in every DN case. Solely for purposes of comparison with the present situation, MLSA

Administrative Office

616 Helena Ave., Ste 100
Helena, MT 59601
Toll Free: (800) 666-6124
Phone: (406) 442-9830
Fax: (406) 442-9817

Statewide HelpLine Number ☎ 1-800-666-6899

Websites:
www.MontanaLawHelp.org
www.mlsa.org

Funded in part by:

Montana Justice Foundation
&



estimates our proposal would cost between \$225,000 and \$500,000 less if we omit communities we are aware of in which courts have historically not been appointing lawyers to act in the role of a child's attorney.³

Currently, the Office of the Public Defender (OPD) is charged with providing counsel for children in DN cases. See §§ 47-1-104(4)(b)(i) (referencing § 41-3-425, MCA). The OPD often contracts with private attorneys to provide representation as a "child's attorney." See § 47-1-216, MCA. This contracting is necessary when the OPD represents a parent and, as in most DN cases, the child's interests conflict with the parent's. By contrast, the Office of the Court Administrator pays for attorneys to act as guardians ad litem as a court expense.

Among other things, MLSA has designed this proposal to follow the National Association of Counsel for Children (NACC) recommendation to have attorney caseloads of no more than 100 individual clients. Recognizing that the data about children in need of representation in DN cases in Montana is in some respects difficult to ascertain, MLSA has estimated caseloads and formulated its proposal based on the best information available to us. We have also attempted to account for travel time to cover the regions. After examining relevant data, we propose establishing seven regional offices in Kalispell, Missoula, Bozeman, Billings, Great Falls, Helena, and a northeastern Montana community such as Malta, Glasgow or Poplar. In addition, we propose setting up a separate office in Helena for the managing attorney and appellate/training attorney. The unit of children's attorneys would participate in cross-training with other entities involved in DN cases to the extent possible.

In making this proposal, we are mindful of *State v. St. Dennis*, 2010 MT 229, in which the Montana Supreme Court determined no conflict of interest existed when two different trial-level public defender offices represented co-defendants in a criminal case, so long as established protocols to separate the offices were followed. MLSA intends to institute similar protocols and maintain "firewalls" between offices so that different offices can represent siblings with conflicting interests when such cases arise.

While many qualified, competent and caring attorneys currently contract with OPD to act as a "child's attorney," MLSA understands that there has been wide variation in the quality of services provided throughout the state by contract attorneys. MLSA believes this proposal will allow for quality control because children's attorneys will be under direct supervision. Ultimately, MLSA's goal in forming this proposal is to make the system better for children.

MLSA appreciates this opportunity to submit a proposal, and we will provide further information on request.⁴

¹ MLSA supports the CASA (Court Appointed Special Advocates) program and believes CASA volunteers acting as guardians ad litem would continue to serve a valuable role under this proposal.

² MLSA is aware of Senator Jent's bill draft request (LC 0769) to revise guardian ad litem laws to allow judges discretion in appointing counsel. MLSA is also aware that some judges do not want to change their current practice of appointing certain private attorneys as guardians ad litem or as counsel for a guardian ad litem instead of appointing children's attorneys. MLSA expressly does not address the merits of these factors at this time, although potential constitutional issues may warrant close examination. We have attempted to design the structure and financial aspects of this proposal to be flexible enough to account for various contingencies.

³ These communities include those in Silver Bow, Gallatin and Yellowstone Counties. MLSA understands that courts in Yellowstone County have recently started appointing counsel for children in DN cases. If Yellowstone County is not omitted for purposes of the comparison, our estimate would reduce by approximately \$225,000 instead of \$500,000. MLSA also understands that Gallatin County courts have appointed a lawyer to represent the guardian ad litem in a DN case, and that some of these lawyers perform this service pro bono and others are compensated by the OPD. MLSA provides this analysis simply so that legislators can compare existing costs with the costs that have been incurred to date.

⁴ Some of the sources of information for this narrative include:

- LaShanda Taylor, ABA Center of Children and the Law, *The Unfulfilled Promise: The Right to Counsel for Parents and Children in Child Welfare Proceedings*, presented at the ABA National Conference on Children and the Law, May 14-16, 2009, available at <http://www.abanet.org/child/parentrepresentation/PDFs/060.pdf>
- ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (1996), available at <http://www.abanet.org/child/repstandwhole.pdf>
- NACC Recommendations for Representation of Children in Abuse and Neglect Cases, available at http://www.naccchildlaw.org/resource/resmgr/resource_center/nacc_standards_and_recommend.pdf