

House Joint Resolution No. 3 Study Plan

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for the Children, Families, Health, and Human Services Interim Committee
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In enacting House Joint Resolution No. 3 (HJR 3), the Legislature requested that an interim study examine child abuse and neglect proceedings in order to determine how to provide representation for indigent families and to determine the appropriate earliest opportunity for representation.

The whereas clauses included in HJR 3 provide valuable background information:

(1) the Montana Family Policy Act states in section 41-7-102, MCA, that it is the policy of the State of Montana to support and preserve the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children;

(2) in child protective services, it is also the policy of the State of Montana set out in section 41-3-101, MCA, to ensure that all youth are afforded an adequate physical and emotional environment to promote normal development, to compel in proper cases the parent or guardian to perform the parent's or guardian's moral and legal obligations, to achieve these purposes in a family environment and to preserve the unity and welfare of the family whenever possible, to ensure that there is no forced removal of a child from a family based on unsubstantiated allegations, to provide for protection of children, and to require the interview of parents and an opportunity for parents to appear before a judge and have statements presented before a decision is rendered;

(3) there is no statutory obligation to appoint legal counsel for indigent parents prior to a permanent custody proceeding, including termination of parental rights, but the Montana Supreme Court has also stated that "there are also no guidelines precluding or making inappropriate the appointment of counsel for indigent parents in child protective proceedings prior to termination proceedings" (In re A.F.-C., 2001 MT 283, 307 Mont. 358, 37 P.3d 724 (2001));

(4) there are significant due process, philosophical, and resource issues involved in the determination of at what point parents require counsel in proceedings involving child protection and potential termination of parental rights; and

(5) the Legislative Audit Division recently conducted a performance audit of child protective services and, although it did not make a specific recommendation in this area, found that there is statewide variation in whether indigent parents receive legal representation in child abuse and neglect proceedings prior to termination of parental rights (October 2002 report, page 53).

The resolution specifically asks that the Committee examine child abuse and neglect proceedings in order to determine how to best provide representation to families at an appropriate time in the child protective services proceedings to further the goals of balancing the best interests of the child, the rights of parents, and the possibility of reunification of the family and to provide prevention and early intervention strategies as early in the process as possible. The resolution also states that the Legislature recognizes that the issue of representation of families in child abuse and neglect proceedings may also be relevant to other court proceedings that involve the intervention of one or more public agencies or require public services for children and families, such as Youth Court and civil mental health commitment proceedings.

History and Background

House Joint Resolution No. 3 was requested by the 2001-2002 Children, Families, Health, and Human Services Interim Committee after receiving information regarding the child abuse and neglect system. Chuck Hunter, former administrator of the Child and Family Services Division, was asked for suggestions for the improvement of the system. One suggestion was the appointment of legal counsel for parents very early on in the process. His suggestion included proposing specific banks of attorneys from the state level that would specialize in child and family services law, one for prosecution of these cases and one for defense counsel for parents.

This information was provided in the October 2002 Legislative performance audit on the Child and Family Services Division. A recommendation was not offered because the Audit Division did not specifically examine the outcomes of cases where legal representation varied, but they did note that there was statewide variation in whether indigent parents received legal representation in child abuse and neglect proceedings prior to termination of parental rights.

In her response to the audit, Chief Justice Karla Gray felt compelled to comment:

If the Legislature wants to require the appointment of counsel for indigent parents at some stage prior to the Termination petition, it can and should do so (with the understanding, of course, that the costs of that representation--under current state assumption of district court expenses law--would be the State's burden). Such an approach certainly would ensure that all indigent parents receive appointed counsel at the same, earlier stage and might also be perceived as providing a more level playing field between the indigent parents, on the one hand, and the combined resources of the CFSD and county attorneys, on the other. Otherwise, leaving the matter to the district court judges' discretion--and Supreme Court's review on a case by case basis, as noted in the audit--is entirely appropriate and should not result in any negative connotation.

Child Abuse and Neglect Process

The child abuse and neglect process is triggered by a report of abuse or neglect. Any person can make a report of abuse or neglect; however, there is a list of 10 categories of professionals and officials, i.e., physicians, nurses, school teachers, social workers, foster care worker, clergy, that are required to report when a child is suspected of having been abused or neglected.

The Department of Public Health and Human Services (DPHHS) recently instituted a Centralized Intake in which all calls are routed through the Child and Family Services Division (CFSD) in Helena for evaluation. A determination is made as to whether or not an investigation is required. When a field investigation is conducted, if the child has not been abused or neglected or the allegations are unfounded, the records must be destroyed. If the allegations are unable to be proven or are "unsubstantiated", the files are retained for 3 years and then destroyed unless there were previous substantiated reports or court orders involving the initial allegation.

If the CFSD has reasonable cause, it may provide emergency protective services or voluntary protective services. If the case comes to legal action, a series of show cause, adjudication, and dispositional hearings are held on petitions for various kinds of relief, including immediate protection and emergency protective services, temporary investigative authority, temporary legal custody, termination of the parent-child relationship, or a determination that reunification or preservation services are not needed (under specific circumstances). There are immediate tools available to the CFSD and to the courts to remove a child from a dangerous circumstance, with short timeframes for notice to parents and hearings that must be held. All placements must be approved by the District Court.

If the child is placed outside the child's home, two placement plans are initiated. Plan A outlines the steps needed to assist the parents to achieve the goal of returning the child to the family of origin as soon as possible. Plan B is to establish a permanent substitute home for the child if Plan A fails. The home may be with a relative, guardian, or adoptive parent. These proceedings may happen over a longer period of time within statutory time requirements in order to provide the CFSD with an opportunity to provide services and to provide the parents with the opportunity to follow a treatment plan toward reunification with their child. Every case has unique circumstances, and the law allows for various options during the process. A case may go to termination proceedings very early if the conditions warrant it, or it may proceed over a longer period of time while the parents attempt to resolve their personal difficulties.

The following chart was compiled by the Legislative Audit Division and is taken from the October 2002 Performance Audit of Child Protective Services (HJR 32).

Legal Requirements

The basis for all child abuse and neglect proceedings is the safety and protection of the child or the "best interests of the child". The parents or guardians are the party alleged to have abused or neglected the child. The system has been developed and organized around the principles of protection of the rights of children, not the parents. Child abuse and neglect proceedings are civil proceedings, and the youth must be found to be a Youth In Need of Care.

The "best interests of the child" are defined in statute as "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". Parents have rights and obligations to their children, and state policy (41-3-101, MCA) provides that the protection of children should be achieved in a family environment to preserve the unity and welfare of the family whenever possible. This goal is tempered by the specific time parameters set forth in federal law that seeks permanency for the child (i.e. reunification, adoption, guardianship, or long-term or permanent legal custody) within approximately 22 months, instead of an endless stream of uncertainty and foster care placements.

Montana Constitution

Equal justice under the law is a founding principle of the United States. The notion of parental representation in child abuse and neglect proceedings is derived from the 14th Amendment, Section 1, to the U.S. Constitution that prohibits a state from denying to any person within its jurisdiction the equal protection of the laws and is reflected Article II, section 17, of the Montana Constitution, which reads:

Due process of law. No person shall be deprived of life, liberty, or property without due process of law.

Adoption and Safe Families Act of 1997 (ASFA)

The ASFA (P.L. 105-89, 111 Stat. 2115) was enacted by Congress in November 1997 and is intended to promote safety and permanence for children who have been abused and neglected. In a December 1999 GAO report, the report summarized the spirit of the Act, which is relevant to this study, as follows:

Under the amended provisions, states are required to find these children a safe, permanent home more quickly. In particular, two key provisions affect those children who are unable to safely return home within a reasonable time. First, the provision clarifying the circumstances under which states are not required to try to prevent a child's removal from home or to return a foster child home allows states to forgo services to preserve or reunite the biological family. Second, the provision on terminating parental rights establishes a time frame for states to begin proceedings to terminate parental rights for certain foster children for whom adoption is appropriate. As a result of these two provisions, states must make the difficult decision between the need to preserve parental rights and the need to give the child the opportunity to live in a permanent home within a reasonable time.

Indian Child Welfare Act (ICWA)

The ICWA was enacted to protect the interests of American Indian children and tribes and provides minimum standards for cases involving American Indian children. Federal law requires that an indigent parent or Indian custodian of an Indian child must be appointed counsel in any removal, placement, or termination proceeding.

(b) Appointment of counsel. In any case in which the court determines indigency, **the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding.** The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. (25 USC 1912(b)) (emphasis added)

Montana Code Annotated

Title 41, chapter 3, MCA, provides the Department of Public Health and Human Services with the authority over child abuse and neglect cases. Many of the provisions include the federal requirements of the Adoption and Safe Families Act and the Indian Child Welfare Act or refer to the respective federal laws. There are currently provisions in Montana law that provide for legal representation of parents at two points in the process: when a request for a determination that preservation or reunification services need not be provided and upon the filing of a petition for termination of parental rights.

Section 41-3-422(11), MCA, states "The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party." This provision has been in statute since 1974. Language was added in 2001 (Ch. 281) by inserting a second sentence that reads: "If an indigent parent is not already represented by counsel, counsel must be appointed for an indigent parent at the time that a request is made for a determination that preservation or reunification services need not be provided."

Section 41-3-432(4), MCA, states that at the show cause hearing, which must be conducted within 20 days of the filing of a child abuse and neglect petition, "the court shall explain the procedures to be followed in the case and explain the parties' rights, including the right to request appointment of counsel if indigent or if appointment of counsel is required under the federal Indian Child Welfare Act".

Section 41-3-607(4), MCA, provides "At the time a petition for termination of a parent-child relationship is filed, parents must be advised of the right to counsel, and counsel must be appointed for an indigent party." This provision was enacted in 1981 (Ch. 420). In subsection (5), there is also a provision that "If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent in addition to any counsel requested by the parent."

Supreme Court Rulings

There have been a series of United States and Montana Supreme Courts rulings on appointment of a guardian or counsel for parents at various points in child abuse and neglect proceedings. A more thorough analysis of these rulings is necessary, but the basic summary of the cases allows the decision for whether due process requires appointment of counsel, prior to and even in some termination proceedings, to be made by the trial and reviewing court because of the infinite variety of situations that these cases can involve.

Services and Representation for Children

Child and Family Services Division

The Department of Public Health and Human Services administers the Child and Family Services Division (CFSD), which is responsible for child protective services. The staff provides state and federally mandated protective services to children who are abused, neglected, or abandoned. Services include receiving and investigating reports of suspected child abuse and neglect, domestic violence prevention, child protection, in-home services, foster care, reunification, adoption, and guardianship.

Centralized intake (CI) specialists accept reports of suspected abuse, neglect, and/or abandonment through the Child Abuse Hotline (1-866-820-5437 or TTY 1-866-341-8811), which operates 24

hours a day, 7 days a week. Only reports that the Division has the legal authority and responsibility to investigate are sent to county offices. CI specialists screen reports, assess the level of risk to children, and prioritize reports according to the urgency of the allegation for response time needed from the assigned social worker. CI specialists also forward referrals to county offices indicating that families may need additional information regarding community resources.

The 2005 biennial budget for the CFSD is \$99,616,874, which includes a complex mixture of state and federal funds. Federal funds include Title IV-E of the Social Security Act, Title XX, Temporary Assistance for Needy Families (TANF), Chaffee Foster Care Independence Act funds, and other sources. State sources include state general fund, payments from parents, payments from private insurance companies, and other sources, including several federal grants that support special activities. The work of the CFSD is accomplished by employees in 340 positions. Thirty staff work out of three bureaus in the Helena central office: Operations and Fiscal, Program, and Training. Field staff work from 50 offices across the state, under the direction of five Regional Administrators located in Billings, Great Falls, Helena, Miles City, and Missoula. Seventeen staff support the Centralized Intake Unit. These regional offices are advised by Local Family Services Advisory Councils, which serve as the link between local communities and the department. The CFSD is the primary user of the Child and Adult Protective Services (CAPS) computer system.¹

Guardians Ad Litem and Court-Appointed Special Advocates

A guardian ad litem (GAL) is a person who advocates for the best interests of a child in an abuse and neglect proceeding. Section 41-3-112, MCA, provides that in every judicial proceeding, the court shall appoint for any child alleged to be abused or neglected a guardian ad litem and provides that when necessary, the guardian ad litem may serve at public expense. The section also sets forth the duties of

¹The CFSD information was compiled from the DPHHS Child and Family Services Division website and the Legislative Fiscal Report, 2005 Biennium.

the guardian ad litem, such as investigations, interviews with the child, access to records, reports, appearance in proceedings, duties as directed by the court, and, if an attorney, the filing of motions. The federal Child Abuse Prevention and Treatment Act (P.L. 93-247, 1974) also requires the appointment of guardians ad litem, for all children involved in abuse and neglect cases, although the Act did not specify who was allowed to be a guardian ad litem.

A Court-Appointed Special Advocate or CASA is a volunteer who is generally not an attorney and who is appointed as the guardian ad litem in the areas of the state that have local programs (40 counties). In areas where CASA programs do not exist, the counties usually contract with an attorney guardian ad litem.

There are five models for CASA and GAL programs across the state with variations on the CASA and GAL, whether they are the same person, whether or not they are attorneys, or whether they are represented by or teamed with an attorney. Of the approximate 300 people involved in the statewide CASA networks, there are only 19 paid positions, most of which are part-time.²

Foster Care Review Committees are provided for in statute (41-3-115, MCA) to provide a review of child abuse and neglect cases to ensure the timely development of the proceedings. Unless a judicial district has a citizen review board, every judicial district is required to have a foster care review committee. It includes members from the DPHHS, Youth Court, a knowledgeable person from outside the department, a representative of the school district, an Indian person or someone knowledgeable about Indian culture if the child is an Indian, and the foster parent of the child under review. The DPHHS adopts rules regarding foster care review committees.

²Much of this information was provided by Ellen Bush in two documents: "Facts about Guardian ad Litem and CASA Advocacy in Montana," and "Montana CASA/GAL Program Models At A Glance".

Citizen review boards are provided for in Title 41, chapter 3, part 10, MCA. They are to provide a more extensive review that is court-driven, not department-driven. The 2003 Legislature in budget-balancing reductions removed the state funding for the citizen review boards, including 4 FTE (\$300,000 general fund savings over the biennium). The state involvement in case reviews ceased in May 2003, and the District Courts picked up the case reviews on their own in June 2003. The current status of some of the programs is:

- Missoula County is now using a hybrid that is not as extensive as the citizen review board review, but is more involved than a case review by a traditional foster care review committee.
- Judge Kruger in Butte/Silverbow County is continuing with a citizen review board as a county pilot program.
- Great Falls and Bozeman have returned to a traditional foster care review committee.³

County Attorneys and the Department of Justice

Prosecution of child abuse and neglect cases is performed by the county attorneys in each county. The Department of Justice contains a Child Protection Unit that assists county attorneys across the state in handling child protection cases and other legal matters in the District Courts.

Resources

Prior to the state assumption of District Court costs, the counties were responsible for assuming the costs of a public defender for an indigent parent when appointed. As noted before, there was variation in when jurisdictions across the state appointed counsel. There is also variation in how each county provides public defense. Some counties have a public defender's office and some contract for public

³Information received in a phone conversation from Sherri Rafter, Court Assessment Program, Supreme Court, 10/15/03.

defense counsel within the local bar. "Only seven of the 56 Montana counties have a full-time, fully staffed, county-run public defenders office. They are Cascade, Missoula, Yellowstone, and Lewis and Clark, while Anaconda-Deer Lodge, Granite and Powell Counties share a three-county public defender office. And a public-defender office is in the planning stages for Gallatin County."⁴

The Office of the Court Administrator of the Supreme Court developed a Handbook on the Payment of State Costs for Montana's District Court (July 2003). In accordance with 3-5-901, MCA, District Court costs paid directly by the state include the following expenses incurred by the state in a proceeding held pursuant to Title 41, chapter 3, part 4 or part 6, MCA, that seeks temporary investigative authority of a youth, temporary custody of a youth, or termination of the parent-child legal relationship and permanent custody:

- (1) transcript fees;
- (2) witness fees;
- (3) expenses for medical and psychological evaluation of a youth or the youth's parent, guardian, or other person having physical or legal custody of the youth except for expenses for services that a person is eligible to receive under a public program that provides medical or psychological evaluation;
- (4) expenses associated with appointment of a guardian ad litem or child advocate for the youth; and
- (5) expenses associated with court-ordered alternative dispute resolution.

In addition to the costs assumed under the state-funded District Court program, the state shall reimburse counties, within 30 days of receipt of a claim, for the following for the proceedings cited above:

- (1) expenses for appointed counsel for the youth;

⁴Wood, Charles. "Are state's policies squeezing out the counties' public defenders?" The Montana Lawyer (August 2003), p. 7.

(2) expenses for appointed counsel for the parent, guardian, or other person having physical or legal custody of the youth; and

(3) costs of juror and witness fees and witness expenses before a grand jury.

The costs for appointed counsel for parents, guardians, or other persons having physical or legal custody of the youth are now allowable costs for actions seeking temporary investigative authority of a youth, temporary custody of a youth, or termination of the parent-child legal relationship and permanent custody. There is no capacity for the current budget to absorb mandatory appointment for all of the above actions or to include other possible actions.

Alternatives In and Out of State

The Cascade County Law Clinic began a pilot project called the CasCo Youth Project in 1998 with a grant from the Montana Supreme Court Assessment Project. The Montana Board of Crime Control also funded a 3-year grant for the project from 1998 to 2001. This program includes a public defender that specializes in youth-in-need-of-care cases, an investigator, and a parent education coordinator. The parent education program is intended to reduce parental non-involvement as a factor in delaying court proceedings. In 1998, most of the referrals came through the public defender's office, but since 2000, CFSD social workers have provided 50% or more of the referrals. Former participants also make referrals. The program has received positive evaluations from program participants, individuals, and agencies involved in the proceedings as a program that increases parents' knowledge and reduces their noninvolvement. In 2002, 97% of the participants responding reported an increase in knowledge, 87% believed that the program assisted them in resolving their case, and 94% replied they would refer parents to the program.

The program is very inexpensive for the services that are rendered. One parent education coordinator is the contact and provides personal attention to parents. In a presentation on the program, the

coordinator testified that many parents have a mental disability or are unable to understand the proceedings. He estimates that 1/2 to 3/4 of all cases in Cascade County are referred to the program. There are no court orders to attend the program, so parents sometimes do not show up. The coordinator monitors the cases, and if in 6 months they are not heading toward reunification, he refers them to the public defender's office (and often takes them to the office in person).

Washington State's Office of Public Defense has a pilot program in two county juvenile court systems. The program involves hiring more public defenders who receive extensive training and, in one program, hiring additional paralegals and social workers for better case investigation and development. The program goals are to enhance the quality of parental representation, reduce continuances, establish maximum caseloads, implement enhanced practice standards, use investigative and expert services in appropriate cases, and ensure implementation of indigency screenings. A January 2003 evaluation that compared the pilot programs to a control group reported improvements in the rate at which hearings took place, the rate of family reunification, and the rate at which cases were opened and resolved. The pilot cases showed a significant correlation between quality and efficiency of attorney practices and outcomes in child protection cases.

In an online survey of court improvement program grantees, 14 of 25 states report that public defenders never represent parents in child protection and termination of parental rights cases, instead they contract with private attorneys or use a variety of panels from which they make appointments; 4 of the 25 states report that public defenders represent parents in nearly every case; and 7 of the 25 states report that public defenders sometimes represent parents in these cases, usually on a county-by-county basis.⁵

⁵Information received from Judith Nord, Staff Attorney, Minnesota Supreme Court, "Others States' Use of Public Defenders to Represent Parents and Children in CHIPS and TPR Cases", August 21, 2003.

Related Efforts

The Law and Justice Interim Committee has dedicated 40% of its time this interim to the issue of state assumption of indigent defense, and it is important to coordinate any proposals or recommendations with that committee.

The Montana Legal Services Association (MLSA) is a part of the national Legal Services Corporation. The Legal Services Corporation is a federally funded not-for-profit corporation that provides legal assistance to eligible low-income clients with civil problems, including those involved in child abuse and neglect cases. It has significant constraints on its resources.

The State Bar of Montana is currently conducting a Montana Legal Needs Study to determine the unmet legal needs of low- and moderate-income Montanans in many areas, including child and family issues. A new website *MontanaLawHelp.org* is a project of the MLSA, the State Bar of Montana, and the Montana Supreme Court Equal Justice Task Force. MLSA is funded in part by the Legal Services Corporation and the Montana Justice Foundation. The website provides legal information and resource contacts to low- and moderate-income Montana residents and includes a category on Families and Kids: Child abuse, neglect, and foster care, among many others.

A recent survey by the State Bar on pro bono reporting indicates that child and family law was an area in 42.5% of the hours reported in pro bono (free of charge) cases or in cases with a substantially reduced fee. That percentage is substantially higher than the other 11 areas of law represented. There are efforts occurring across the state to recruit additional pro bono attorneys and to provide additional pro se services (self-representation).

There is also currently a lawsuit filed by the ACLU of Montana suing seven counties for inadequacies in their public defender programs. The majority of public defender cases involve criminal defense, which

is protected by the 6th Amendment to the U.S. Constitution and Article II, section 24, of the Montana Constitution, involving the right to defense by counsel and the right to a speedy trial. The outcome of this case could have an impact on the obligations of counties or now the state (under state assumption of District Court costs) to provide defense counsel for the indigent. Various due process rights of the criminal justice system require prioritization of criminal defense needs over civil defense needs and will impact any proposals in this area. Any additional requirements burdening the state either as remedy to a lawsuit or a legislative proposal will compete for any resources needed for indigent defense in civil cases, as well as for the adequate funding of resources needed for child protection and representation.

Study Issues

Some of the issues presented by this study are:

1. Should indigent parents who have been substantiated to have abused or neglected their child be mandated to receive court-appointed legal counsel prior to the currently statutorily mandated time for appointment--when a petition for termination of parental rights is or will be imminently filed--or is the status quo of case-by-case District Court discretion with Supreme Court review available sufficient? Are there other options to legal counsel for parents; i.e., CasCo Youth Project or other forms of family advocacy or education?
2. If the answer to question #1 is mandated court-appointed counsel for indigent parents at an earlier point in the process, when is the appropriate time to appoint legal counsel to a parent?

3. What are the estimated costs of providing counsel to indigent parents at various points in the process? How is a determination of indigency made? Who pays (state, counties) and how would they pay for the costs?
4. Should the counsel be a county-based public defender or should the state develop a bank of attorneys with this expertise? Would they be employed by counties (as are county attorneys and public defenders) or by the state in counties, regions, Helena? How do you ensure that the counsel is well-trained and knowledgeable about child abuse and neglect cases?
5. Is providing legal representation for parents going to compete for other resources in the system that may not be in the "best interests of the child"? Does it introduce further competition for resources for child representation or potentially use the legal system in a more adversarial model that may actually lengthen the time in cases and not lead to resolution?
6. Do the proposals work for or take into consideration other areas in which children and parents are involved in other civil court proceedings, such as Youth Court or mental health commitment proceedings, or in criminal proceedings, such as outstanding bench warrants, unpaid tickets, or criminal offenses.

Proposed Study Schedule

1. October 31, 2003

Presentation and adoption of study plan.

2. January 22, 2004

Presentations from Child and Family Services Division, parents, Social Workers, the CASA Program, Cascade County CasCo Youth Program, County Attorneys, Public Defenders, other stakeholders.

Receive research information on numbers of reports, investigations, substantiations, petitions, hearings, etc.

Hold work session to determine answers to issue questions and additional research needs, formulate draft proposals.

3. March, 2004

Make final recommendations to present to Law and Justice Interim Committee, DPHHS, and the Judiciary.

4. May and August, 2004

Determine whether the Committee needs to pursue any proposals or recommendations independently of the Law and Justice Interim Committee, DPHHS, or the Judiciary.

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