



Children, Families, Health, and Human Services Interim Committee

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58th Montana Legislature

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May 4, 2004

To: Members of the Law and Justice Interim Committee

From: Susan Byorth Fox, Research Analyst

Re: Recommendations regarding House Joint Resolution No. 3 in regards to the development of a Statewide Public Defender System

House Joint Resolution No. 3 directed the Children, Families, Health, and Human Services Interim Committee (Committee) to "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 Committee has concentrated its study on legal counsel for indigent parents, but has also reviewed the use of guardians ad litem and court-appointed special advocates for children. The Committee adopted the following recommendations on April 30, 2004, and refers them to the Law and Justice Interim Committee for consideration as an integral part in the development of a statewide public defender system.

As a part of this document, I have included the issues that the Committee addressed and their recommendations. I have also included as attachments the recommendations with the full background provided to the Children and Families Interim Committee as a part of an Issues and Options Paper, and the House Joint Resolution No. 3 Study Plan that includes additional background information. Thank you for allowing me to present a summary of these recommendations on April 30 at the Subcommittee meeting. If you have any questions, I am available to assist the Law and Justice Interim Committee members and staff in any way possible.

Summary of Issues and Recommendations

I. Representation for Parents

Issue A: Should all parents receive legal counsel in child abuse and neglect cases that reach the court? At what point should legal representation be appointed for indigent parents in child abuse and neglect cases: removal, placement, termination of parental rights?

Recommendation: Recommend to the Law and Justice Interim Committee to consider statutory changes to require appointment of legal counsel for all parents, guardians, or those with legal custody who are involved in child abuse and neglect proceedings that may result in removal or placement of a child or termination of parental rights as a part of that Committee's consideration in the development of a public defender system in the state.

The Committee also asks the Law and Justice Interim Committee to consider a family law specialist in the public defender system to assist public defenders in difficult cases* and recommends the wisdom of a background or expertise in family law for those who are assigned these cases in a public defender system.

Additional Data Necessary

Issue B: At this point, specific data is not available on how many parents are already receiving legal counsel for removal, placement, and termination proceedings and how many additional parents would need services. Additional analysis would be necessary in order to determine how many children are actually served in 1 year in any capacity that brings the case in front of a court and to determine the number of parents that would need to have counsel provided. The addition of an unknown burden on the various public defender programs that exist separately in each county may not be reasonable, and to fully implement a proposal, additional information is necessary.

Recommendation: The Law and Justice Committee may want to consider requesting that the State Court Administrator or the DPHHS Child and Family Services Division, in cooperation with the other, determine the numbers of parents, guardians, or those with legal custody of children who would require legal counsel in removal, placement, and termination proceedings. Many parents are not married, are divorced, or even if married may have conflicts of interest. The Court Assessment Program may be an appropriate entity within the State Court Administrator's Office to perform much of this information gathering and to serve as a liaison to the DPHHS. They have expressed interest in this area and would be a valuable resource in the development of any system. Without additional information, it is unknown how many additional resources would be necessary to implement representation for all indigent parents. The information cited above indicates that of the 9 counties over 25,000 in population, 6 are currently appointing at the initiation of the proceedings anyway (Flathead, Cascade, and Lake Counties are the exceptions), in addition to any parents involving an American Indian child in state district court.

Definition and Standards for Determination of Indigency

* As a potential model, the Committee may wish to review the Montana Department of Justice Child Protection Unit that assists county attorneys across the state with difficult cases or in rural areas where there are few cases.

Issue C: The issue of a lack of definition of indigency is problematic in determining how many parents are involved in removal, placement, or termination proceedings. Many human services and public assistance programs use the federal poverty level to determine indigency, and the judiciary could adopt a similar approach, take any eligibility for a public assistance program as evidence of indigency, or develop a new definition based specifically on the cost of providing quality legal counsel. Income and assets may not be the only factors determining the need for appointment of counsel (parent as minor, mental competency, etc.) that a proposal should take into consideration. The Washington State Office of Public Defense has a publication on the Criteria and Standards for Determining and Verifying Indigent Defense for reference.

Recommendation: Recommend that a definition of indigency and a standard for a determination of indigency be developed. Indigency may not be the only qualification for appointment of counsel and other areas may require appointment. The issue of a sliding fee scale may also need to be considered.

II. Representation for Children

Issues: If an indigent parent is appointed legal counsel, does the child also need legal counsel? Is appointment of a guardian ad litem sufficient if the guardian ad litem is not an attorney, or do children need both? Is the state adequately funding the current mandate for a guardian ad litem for each child alleged to be abused or neglected?

Recommendations:

1. Recommend that an accurate assessment be made of the cost to provide a guardian ad litem to each child alleged to be abused or neglected across the state.
2. Recommend that additional information on the number of children who may also need legal counsel is needed. It is important to note that 20 states appoint counsel in all cases of child abuse and neglect, and that is an issue that warrants attention in the development of a public defender system.**
3. Recommend the development of standards for guardians ad litem (changes at the federal level now require training) and specify responsibilities when a public defender is also involved.
4. Recommend that consideration be made for specific training for child abuse and neglect cases for public defender staff.

III. Where Do Child Abuse and Neglect Cases Fit in a Public Defense System

Issues: Should the CASA/GAL program be included in a statewide public defender system or should it remain under the State Court Administrator? The Law and Justice Interim Committee is

**State law (41-3-112, MCA) requires that the court shall appoint for any child alleged to be abused or neglected a guardian ad litem, if necessary at public expense. State law also provides authority for the court to appoint counsel for any indigent party (41-3-422, MCA).

trying to determine what would constitute "public defender/appointed counsel" costs and what would constitute other administrative costs. As noted in the previous section, costs for court-appointed special advocates are set per case, regardless of how many children per case, and the amount of revenue from the state is set and does not cover all of the costs of the program. County in-kind services and nongovernmental donations fund the CASA/GAL program also. Guardians ad litem are required to be appointed in all cases, but these services currently are not being fully funded by the state. The equity of this situation would be even more questionable if all indigent parents receive court-appointed counsel funded through a public defender system and the CASA/GAL system remains only a partially-funded state mandate staffed mainly by volunteers. Any proposal must address the equity between advocacy for children and representation for parents.

Recommendations:

1. Recommend to maintain the administration of the state CASA/GAL program and its specific role in the child abuse and neglect proceedings at the State Court Administrator's Office.
2. Specify that any costs for a public defender who participates on a treatment team be included as "public defender costs". It has been questioned whether the cost of a public defender participating in a treatment team in a treatment court should be a reimbursable public defender cost. Although the treatment team may not operate in a traditional adversarial model, if the public defender performs diligent representation and fulfills standards of professional responsibility toward the client, the costs for participation in that treatment team are legitimate costs that may save additional costs later and should be reimbursed by a public defender/appointed counsel model. If they require an alternative method, it is suggested that whatever is instituted include the development of an alternate reimbursement scheme to support the goal of diligent representation and treatment court.

IV. Quality of Representation and Other Issues

Issues: There are many issues illustrated by the following studies that must be considered in the development of any system of public defense and appointed counsel, especially in relation to child abuse and neglect proceedings or other specialized areas of law.

Recommendation: Of the "other issues" that are vital for development of any proposal to provide appointed counsel for children and parents in child abuse and neglect proceedings, the Committee supports the Law and Justice Interim Committee efforts specifically in the areas of reasonable caseloads and consistency and continuity in representation.

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