



# Children, Families, Health, and Human Services Interim Committee

PO BOX 201706  
Helena, MT 59620-1706  
(406) 444-3064  
FAX (406) 444-3036

## 58th Montana Legislature

### SENATE MEMBERS

JOHN ESP  
JERRY O'NEIL  
GERALD PEASE  
TRUDI SCHMIDT

### HOUSE MEMBERS

EVE FRANKLIN--Vice Chair  
DON ROBERTS--Chair  
EDITH CLARK  
CAROL GIBSON

### COMMITTEE STAFF

SUSAN FOX, Research Analyst  
GREG PETESCH, Staff Attorney  
DAWN FIELD, Secretary

# MINUTES

January 23, 2004

Room 152, State Capitol  
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

### COMMITTEE MEMBERS PRESENT

REP. DON ROBERTS, Chair

SEN. JOHN ESP  
SEN. JERRY O'NEIL  
SEN. GERALD PEASE  
SEN. TRUDI SCHMIDT

REP. EDITH CLARK  
REP. CAROL GIBSON

### COMMITTEE MEMBERS EXCUSED

REP. EVE FRANKLIN

### STAFF PRESENT

SUSAN FOX, Research Analyst  
GREG PETESCH, Staff Attorney  
DAWN FIELD, Secretary

### VISITORS' LIST & AGENDA

Visitors' list, Attachment #1.  
Agenda, Attachment #2.

## **COMMITTEE ACTION**

- approved writing a letter to both the DPHHS and to the Governor, requesting an Attorney General's opinion on this matter and if that matter is not resolved in that scenario, that the Committee draft legislation that would clarify this matter.

## **CALL TO ORDER AND ROLL CALL**

REP. ROBERTS reconvened the Children and Families Interim Committee at 8:30 a.m. The Secretary noted attendance and **were Pease and Franklin both absent?**

## **MENTAL HEALTH OMBUDSMAN REPORT**

**Bonnie Adee, Mental Health Ombudsman**, updated the Committee on activities occurring in the Ombudsman office:

- She recently attended a conference with ombudsman from five other states.
- The purpose of the conference was to examine how the other states' models were developed and if they are functioning effectively.
- There is one other legislatively-developed ombudsman program in Minnesota.
- New Mexico and Wyoming developed ombudsman programs as a result of lawsuits.
- Tennessee and Colorado developed ombudsman programs administratively in conjunction with a managed care contract.
- each program is developed differently

Ms. Adee also updated the Committee regarding her ability to access DPHHS records. Ms. Adee said after the October, 2003, meeting, she formally requested assistance from Greg Petesch, Legal Director, Legislative Services Division, to write the opinion the Committee authorized him to write on her behalf. Ms. Adee said the opinion was forwarded to DPHHS on November 18, 2003. Ms. Adee said she has not yet received a response from the Department. She reported she had informed DPHHS that the Children and Families Committee was meeting today and had hoped there would be a response by the meeting time. Ms. Adee said she had an informal indication that the Department is not planning to change its position regarding allowing her to access information and had been invited to attend a meeting to exchange further information about this issue. She reported that she is the only one of the six ombudsman programs experiencing this problem. The other five programs have all been recognized by their respective states either as an oversight entity, a business partner, or as a part of an existing Health and Human Department. Ms. Adee said she would keep the Committee informed and updated as any additional information became known.

Ms. Adee discussed mental health issues in Montana and compared trends to what was being seen last year. She reported significant upward trends in the areas of commitment for adult issues and issues relating to mental health care within the criminal justice system. Ms. Adee said several categories of people are in need of mental health care:

- prisoners who have been picked up and are being held, prior to adjudication;
- prisoners who have been sentenced;
- prisoners who are leaving incarceration and returning to the general population; and
- juvenile access to mental health care is also of great concern to her.

Ms. Adee said she is aware that the Committee is tracking the development of Service Area

Authority (SAA's). Ms. Adee reported she is no longer seeing an equal distribution of complaints between the three areas. There is an increase of complaints from the western SAA area and a decrease from the eastern region. She is thinking of strategies to help equalize that. She reported seeing an increase in the number of adult concerns reported and a decrease in the number of children's concerns.

SEN. SCHMIDT asked if Ms. Adee traveled outside of Helena to meet with SAA Local Advisory Councils. Ms. Adee said she met with all of the Local Advisory Councils four years ago when she first became the ombudsman has tried to do it periodically since.

SEN. O'NEIL asked Mr. Petesch what options the Committee has available regarding the DPHHS's refusal to grant Ms. Adee, as Montana's Mental Health Ombudsman, access to records. Mr. Petesch said the easiest solution would be for the Committee to introduce legislation to clarify for the Department that the Ombudsman is an oversight entity. He said other remedies could include writing a letter to DPHHS or to the Governor asking for specifics or seeking an opinion from the Attorney General, which would be binding.

REP. CLARK **moved** that the Committee write a letter to both the DPHHS and to the Governor, requesting an Attorney General's opinion on this matter and if that matter is not resolved in that scenario, that the Committee draft legislation that would clarify this matter.

SEN. SCHMIDT said she would like Shirley Brown, DPHHS, to comment. **Shirley Brown, Division Administrator, Child and Family Services Division, Department of Public Health and Human Services (DPHHS)**, said this is a very complicated matter and because it involves the federal HIIPA regulations, there are many restrictions that must be considered and did not wish to comment further.

The **motion passed** on a voice vote, with SEN. SCHMIDT abstaining.

REP. ROBERTS asked Ms. Adee to elaborate on her concern over juvenile access to mental health care. Ms. Adee said the requests are primarily for mental health treatment in situations in which a youth is in probation, detention, or some kind of adjudication. She said there are few services or programs in place to serve this population.

Ms. Adee also provided a report for fiscal year 2004 from the Mental Health Ombudsman Office (EXHIBIT #1).

### **HER 3 STUDY: PUBLIC DEFENSE FOR INDIGENT PARENTS IN CHILD ABUSE AND NEGLECT PROCEEDINGS**

**Susan Fox, Research Analyst, Legislative Services Division (LSD)**, discussed an overview of HJR 3 Study issues and said there were a number of presenters who would be discussing various perspectives on the issue of public defense for indigent parents in child abuse and neglect hearings.

**Shirley Brown, Division Administrator, Child and Family Services Division (CFSD), (DPHHS)**, distributed a report to the Committee (EXHIBIT #2) containing detailed information on public defense for indigent parents in abuse and neglect proceedings. Ms. Brown discussed each of the following aspects:

- individual judicial district data revealing at what point in proceedings representation is provided for indigent parents;
- the CFSD's Mission;
- statutory protections for parents;
- DPHHS practice methods developed specifically to ensure parental protection, which include the *WHAT HAPPENS NEXT* booklet published by Child Protective Services (EXHIBIT #3);
- Montana's Child Protective Services system's checks and balances;
- Division activity for fiscal year ending June, 2003;
- child abuse and neglect investigations from fiscal years 1999 - 2003;
- children entering and exiting care from fiscal years 1998 - 2003;
- percentages and types of abuse and neglect substantiations for fiscal year 2003;
- children exiting the system for fiscal year 2003;
- completed adoptions for fiscal years 1997-2003; and
- Division conclusions.

SEN. O'NEIL asked Ms. Brown about the person who was acting as a liaison and said he had sent things to her and had never heard back from her. Ms. Brown said the person to whom SEN. O'NEIL referred to had retired and that a replacement had started the middle of August. She said efforts to get this position streamlined and operating were ongoing. She said it is very difficult for CFSD to communicate about a specific case if it doesn't have a release but could perhaps discuss an issue in general terms.

SEN. SCHMIDT referred back to page 1 of EXHIBIT #2 (judicial district data), and said she did not understand how there could be such a variation between districts. Ms. Brown said she was surprised by this data as well. She thought a lot of the differences were due to different levels of funding in the districts. Some districts have very little funding for public defenders, others have attorneys on contract to provide representation, and each judge has the authority to make many of those decisions in his/her own district.

SEN. SCHMIDT asked Ms. Brown for the locations of each judicial district. Ms. Brown said she did not have that information. SEN. SCHMIDT asked Ms. Brown to provide that information.

SEN. ESP referred to page 10, EXHIBIT #2 (statutory protections for parents), and read aloud "that completion of a treatment plan does not guarantee the return of a child and that completion of the plan without a change in behavior that caused removal in the first instance may result in termination of parental rights." SEN. ESP said that language seemed nebulous and that a parent may find this difficult to understand. Ms. Brown said under statute, there are certain circumstances under which parental rights may be terminated. There must be compliance with a treatment plan and a substantial change in behavior before a child will be returned to parents. SEN. ESP asked if this was clearly explained in the *WHAT HAPPENS NEXT* booklet (EXHIBIT #3). Ms. Brown said she thought it was in the booklet but was not certain where in the booklet it was. SEN. ESP said this must be very clearly explained to parents. Ms. Brown said she would look into this.

SEN. ESP asked about information releases, particularly as they relate to a child's privacy interest. Ms. Brown said if parents sign a release, the Department will release the information, with a few exceptions. HIPA has complicated this considerably and has made sharing medical information much more difficult.

SEN. ESP referred to page 24, EXHIBIT #2 (Substantiations by Type), and asked if the categories, specifically "Neglect/Deprivation", are statutorily defined. Ms. Brown said physical neglect is a statutorily defined term. She said in her opinion, the main reason that specific category is so high is due to families struggling with addiction issues, especially methamphetamine addiction. Ms. Brown said meth families often experience a lot of domestic violence as well. SEN. ESP asked if the *WHAT HAPPENS NEXT?* booklet for parents (EXHIBIT #3) contained an easy-to-understand definition of neglect. Ms. Brown said page 3 of the booklet contained definitions of types of child abuse and neglect.

SEN. O'NEIL said Washington state has implemented a pilot program which provided representation for parents as soon as allegations of neglect or abuse were made and that there was approximately a 65% family reunification rate. He asked if there were statistics available from the Montana counties that also provide immediate representation to compare with the Washington data. Ms. Brown said that information has not been gathered from Montana counties. SEN. O'NEIL asked Ms. Brown if it was possible to get that information. Ms. Brown said she wasn't sure how to access it but would check with the system data staff and determine if it was possible to find that information. Ms. Fox said she has three years of data and is working to separate out that type of information. She said because there is such a volume of information, it would be difficult to make a statistically sound analysis for the whole state but it would be possible to identify trends and patterns.

SEN. SCHMIDT referred to a parents right to request counsel (Item 1, Page 7, EXHIBIT #2 - statutory protections for parents), and asked Ms. Brown if this was being clarified in order to be more easily understood. Ms. Brown said she wasn't sure if the language could be clarified because court funding affects a court's ability to appoint counsel. Parents will always have the right to request counsel but whether the judge has the ability to appoint counsel depends on the funding for that county. This language was added in the 2001 Legislature and is where the confusion has come from.

SEN. SCHMIDT asked what the exceptions to terminations of parents' rights were, as relating to Item 2, Page 7, EXHIBIT #2, and asked what circumstances would influence the State's decision to not terminate parents' rights if a child has been in foster care for 15 of the last 22 months. Ms. Brown said three exceptions may be made:

- if the State can show that there is a compelling interest and it is in the best interest of the child not to terminate parents' right;
- if the child can be placed with a relative; and
- if the State has not provided the services identified in the treatment plan as being necessary for the parent to receive in order to be reunited with the child.

SEN. SCHMIDT asked Ms. Brown to elaborate on Family Decisions Making Counseling and if this is available statewide. Ms. Brown said the State is divided into five regions and each region has at least one family group decision making coordinator. Some of the regions are more active than others. It is very time consuming and there are efforts to increase the capacity to conduct those meetings because they are such a positive resource for families.

**Brenda Roche Ph. D., Program Evaluator, Treatment Courts**, said the bulk of her testimony would focus on the Yellowstone County Family Treatment Drug (YCFTDC) Court but that she would also provide information on the Missoula Juvenile Drug Court and an update on the development of other treatment courts in Montana. Dr. Roche introduced Connie Camino,

Defense Counsel, YTFTDC. Dr. Roche distributed and discussed information and data regarding Treatment/Drug/Wellness Courts in Montana (EXHIBIT #4). Dr. Roche presented information on:

- treatment courts in Montana;
- team members and key elements of a drug court;
- adult and child demographics;
- data on graduation, termination, and child reunification;
- sanctions and incentives;
- drug testing results;
- preliminary participant and child outcomes;
- adult and child neuropsychological findings at intake and follow-up;
- Missoula Youth Drug Court outcomes; and
- her suggestions for future efforts.

**Connie Camino, Defense Attorney, Billings**, gave the following testimony to the Committee members:

- Many parents involved in these proceedings are very young, poorly educated, angry, distrusting, and afraid. These parents have many problems and need an advocate.
- The DPHHS' focus is the children and a judge will almost always err to the side of caution so the children are frequently removed from the family home. This just adds to the difficulties the parents are experiencing in trying to navigate the system.
- Many of these parents can recover if given the proper assistance and services. The Drug Treatment Court provides these services and understands the needs of these families.
- In Yellowstone County, there are five private attorneys who contract to represent parents charged with abuse and neglect. These attorneys are appointed at the initial proceedings.

SEN. SCHMIDT asked what the funding source is for the five contracted attorneys who represent the indigent parents. Ms. Camino clarified that she is the only attorney for the YCFDTC but is one of the five that handle abuse and neglect cases for Yellowstone County. Under state assumption of District Court costs, the State of Montana now is responsible for the funding.

Ms. Fox asked if the attorneys have special training or interest in child abuse and neglect cases. Ms. Camino said the attorneys who applied for the position were selected by the District Court judges and have no special training.

SEN. O'NEIL asked a drug court cost to operate on an annual basis. Dr. Roche explained the annual cost is about \$100,000 and covered the needs of 26 adults and 48 children. She also said that the Family Court tries to determine how to provide the most effective services while being fiscally responsible and that she would provide a cost benefit analysis to the Committee in March of 2004. Dr. Roche stated that a drug court does cost more up front but that the cost benefit is there. SEN. O'NEIL asked if the \$100,000 included any funding from DPHHS. Dr. Roche said the \$100,000 is above and beyond DPHHS funding.

REP. ROBERTS asked if the drug court found itself becoming more involved in neglect cases, abuse cases, or other types of cases. Ms. Camino said the drug court has specific criteria that participants must meet before being accepted. If there are any serious abuse issues, then they

are usually not eligible for the family drug court program. She said the family drug court uses a whole family approach, as opposed to the Child Protective Services approach, which focuses more on just the child.

REP. GIBSON commented that in a study of female prisoners it was proven that when a woman is incarcerated, there is very high chance that her children will also end up in prison. She stated that Montana needs to be forward looking in this issue and while it may take some time before the benefits can be seen but in the long term, this approach makes sense.

Dr. Roche, in response to a question by SEN. O'NEIL, said the family drug court is much more than just dollars. It offers a whole system and philosophy change, especially relationship building among the participants, judge, treatment providers, attorneys, and case workers.

SEN. ESP said it is critical that the client's needs be understood. He commented to Ms. Brown that the *WHAT HAPPENS NEXT* booklet (EXHIBIT #3) may not be the most appropriate approach to help indigent parents understand what is happening and how to deal with the system.

SEN. SCHMIDT asked Mr. Petesch if drug courts are statutorily provided for. Mr. Petesch said there are no statutory authorizations for drug courts. Drug courts have been established by a specific judge who convinces his community to participate and the funding comes from a multitude of sources. Ms. Fox said the Law and Justice Interim Committee is working with the State Court Administrator and is compiling data on the state assumption of District Court costs. She said and the information will not be specific to treatment court, but should reveal an amount of what is being spent in the State on indigent defense.

SEN. SCHMIDT asked Dr. Roche is she works with other courts. Dr. Roche said she works with many courts and has been involved in establishing two juvenile drug courts and all of the family treatment courts, except for Tribal Courts. She also consults with Wyoming courts and has developed a drug court coalition that meets monthly via Visionnet to discuss current data and information issues.

REP. CLARK asked how many cases appear at each court session. Dr. Roche said the most that have appeared is about 13. Each week cases are scheduled by the providers. There is a report filed on how the participant and children have done that week and that is sent out to all team members the day prior to treatment court (Wednesday). On Thursday afternoon before court begins, a treatment team meeting is held to talk about sanctions and sentence. Court is held from approximately 3 to 5 p.m.

REP. ROBERTS asked if positron emission tomography scans are being used on the clients. Dr. Roche said neuroimaging services are not yet available but that she is hopeful that they would be added at some point. It would be a tremendous tool for gathering information on what is happening to these people's brains as they become clean and the information would be very useful on a local, state, and national level.

SEN. ESP asked Ms. Camino how her billable hours compare between Drug Court versus District Court. She said she would estimate that her hours as a Drug Court defense attorney would total fewer hours.

**Jason Kinsvatter, Director, Cascade County Law Clinic, CasCo Project**, gave an overview of the CasCo Youth Project, discussed goals and objectives of the program, program elements, program participants, and program status (EXHIBIT #5). The Committee also examined a workbook and video that are provided to parents which explains what is happening, how the process works, and what they need to do.

Mr. Kinsvatter provided information on referring agencies, participant statistics, program evaluation data, and parent education programs (EXHIBIT #6).

SEN. SCHMIDT asked if there was a waiting list of participants to get into the parent education program. Mr. Kinsvatter said there was not a waiting list for the parent education services but there was a waiting list for the pro bono program.

SEN. O'NEIL asked what happens if a parent is not satisfied with the outcome of the situation. Mr. Kinsvatter said that has happened and when it does, he explains to the parent how the Child and Families Services is looking at their situation. He said it is difficult to advocate for certain parents but tries to explain the circumstances and what they need to do. SEN. O'NEIL asked Mr. Kinsvatter if he is a licensed attorney or a law student and if the pro bono project is administered by licensed attorneys or law students. Mr. Kinsvatter answered that he is not an attorney or a law student and that the Cascade County Bar Association administers the pro bono project.

**Judy Williams, Assistant Attorney General, Child Protection Unit, Department of Justice (DOJ), Billings**, said the Child Protection Unit is made up of four members housed throughout the state. Ms. Williams said she has several perspectives on the issue of counsel for parents in child abuse and neglect cases:

- During her tenure as a social worker at DPHHS, parents were not appointed counsel until the Department decided to petition for termination of parental rights, unless they hired a private attorney.
- After law school, Ms. Williams spent ten years working in Montana Legal Services representing low income people, including representation in cases involving DPHHS.
- There is a remarkable difference in how clients are able to navigate the system and deal with the Department if they have representation.
- Yellowstone County appoints parental representation at the very beginning of a case. That is not a routine practice in other counties.
- People who are having their children removed usually have many serious problems. They and their children are very vulnerable and need a lot of help getting through the system. It is a very intimidating experience and the pressure is extraordinary.
- When people do not have representation, they often look to the judge or the prosecuting attorney for guidance, neither of whom is in a legal position to provide guidance or advice.
- The Child Protection Unit is fully supportive of having attorneys appointed for parents from the outset and would also like to see attorney guardian ad litem appointed for all children at the outset of all cases. CASA volunteers do an admirable job but they are not attorneys sometimes the law can be very complicated.
- Ms. Williams realizes budgetary considerations are involved but can see no down side to parents or their children having representation.

Ms. Fox asked Ms. Williams to explain how the Child Protection Unit works. Ms. Williams said

the Unit is housed within Prosecution Services in the Attorney General's Office. It is a pool of state-employed attorneys who act as a resource to County Attorneys who are faced with a case that is difficult, complicated, or outside that County Attorney's area of expertise. The County Attorney must ask the Unit for assistance and only the Unit may only work where it is invited. It is up to the County Attorney as to when the Unit becomes involved.

SEN. O'NEIL asked how many cases Ms. Williams typically handles in a year. Ms. Williams said her average number of active cases at any given time is between 15 and 20 cases.

REP. ROBERTS asked if the Unit has a relationship with the Reservations. Ms. Williams said there is not a direct relationship with the Reservations but that she works with Tribal Attorneys as needed.

**Kandi Matthew-Jenkins, Family Advocate, Missoula**, read her testimony regarding the need for indigent parental representation. Ms. Matthew-Jenkins encouraged the Committee to work for changes in the Child Protective Services system and to afford better protection of parents' rights (EXHIBIT #7).

Ms. Matthews-Jenkins also distributed copies of various newspaper clippings and articles promoting adoption. She said she believes this contributes to children being removed from their family homes and not returned, but instead placed for adoption (EXHIBIT #8).

#### **PUBLIC COMMENT**

**Colette Gray, Board Member, Cascade County Law Clinic, Great Falls**, said she wanted the Committee to know that the CasCo Project is closing its doors on April 30, 2004 because at that point, the funding will be depleted.

**Pastor John Cook, Missoula**, testified to his personal experiences and difficulties with the Child Protective Services and specifically as related to the Public Defender's Office. Pastor Cook made the following points:

- He and his children have been appointed Public Defenders and feel that none have provided adequate representation.
- It is not only the Public Defender Office that has failed but the entire system. Laws are being abused and families are being hurt.
- Parents need to have input into establishing a working system.

**Lillian Gunder, Stevensville**, read a letter describing her experience as a parent who, in defending herself against Child Protective Services charges, was in need of representation (EXHIBIT #9).

**Kelly Worthan, Parent, Missoula**, said he has been wrongfully accused of sexual, emotional, and physical abuse. Mr. Worthan said there is no evidence of abuse and that he disagreed with earlier comments made by Ms. Brown, DPHHS, about the procedures followed by Child Protective Services. Mr. Worthan said few of the procedures and services described by Ms. Brown were followed or provided in his situation. Mr. Worthan said the Department has destroyed his family without having to provide evidence. He said it has been extremely difficult to obtain representation throughout this experience.

**Al Nerling, Sun River**, testified that children, parents, and grandparents seem to have no say in custody issues and that the Department is very difficult to deal with. Mr. Nerling said he has been fighting for custody of his granddaughter for ten years and distributed a newspaper article written about his struggle to gain custody of his granddaughter, Krystyna (EXHIBIT #10).

**Krystyna Nerling, Sun River**, spoke to the Committee of her years as foster child and the difficulties she experienced while in the foster care system. She said she finally was reunited with her grandparents but said much pain and suffering by both her and her grandparents could have prevented if she had been returned to her family earlier. She implored the Committee to give children a voice in abuse and neglect proceedings and submitted a poem she wrote as a foster child (EXHIBIT #11).

REP. ROBERTS asked Ms. Nerling if anyone had ever asked her opinion at any point in the process. Ms. Nerling said in spite of her repeating that she wanted to be returned to her grandparents, no one listened to her.

**Melissa Worthan, Parent, Missoula**, read a letter explaining her experience with a Public Defender in her custody dispute with the DPHHS (EXHIBIT #12).

**John Jenkins, Parent, Missoula**, read a letter expressing his opinion that public defenders do not adequately defend their clients and asked the Committee to consider a Grand Jury investigation of the DPHHS (EXHIBIT #13).

Bonnie Adee said she would like to make three points related to Dr. Roche's previous testimony:

- She is very interested in the statistic that 96% of the parents in the Family Drug Court also had a co-morbid mental health diagnosis. This fits with my data - Policy decision is going to have to do with the Medicaid redesign and the ability of those parents to get mental health treatment. How that need for treatment may be folded into a treatment plan as such that the Department produces and whether or not that is least coordinated.
- She would like to know what the cost of mental health treatment for the children involved in the Drug Court is. As you're looking at Medicaid redesign and where to focus those dollars, knowing about the cost of treatment for this population both for Medicaid and two other systems (the Child Welfare system and the Juvenile Justice system) through the placement dollars. I don't know if that data is available but if we could understand what we are paying in the cost of mental health treatment for children in this identified population, I think we would learn something about where dollars are going.
- Regarding the removal of children, one of the things heard recently from the Mental Health Advisory Oversight Committee from the staff person in the adult side, Deb Sanchez, that as a transition issue for young adults over 18 with mental health needs, there is a great need for them to return to or know more about their biological parents. As you look at the whole system and the number of children who are removed from their parents, it is important to understand that when they become of age and are no longer in that system, many will feel a need to return to and find out more about their biological parents.

**Shirley Brown, DPHHS Wrap-up** said the DPHHS never doubts that parents love their children but sometimes even parents who love their children are not able to safely and effectively parent them. She said she wanted to make it clear that while there are improvements that may be

made, the process does work. Ms. Brown said the Department supports parental representation and believe very strongly that counsel should be appointed at the initiation of proceedings. She said she also appreciated the concepts and viewpoints expressed by Family Treatment Drug Court and the CasCo Project. Ms. Brown said confidentiality laws prevented her from commenting on any of the specific testimony heard at today's meeting but wanted to stress that the Department does the best it can with what it has.

### Committee Work Session

**Staff Report, Susan Fox, Research Analyst, LSD** asked members to review the document prepared by Mr. Petesch regarding Supreme Court rulings on parental rights (EXHIBIT #14).

Mr. Petesch commented that the document provides a very broad overview of cases and that the appeals of termination of parental rights are appearing on the Court's docket more and more frequently. In order to satisfy due process protections, the appointment of counsel for a termination hearing is the minimum that is required. Some counties provide just this minimum and others appoint counsel much earlier in the process. This creates an imbalance and is a concern. Another concern is that this data could also provide a basis for an equal protection challenge to the system by arguing that an individual was given greater protection and more due process based on his designation as indigent.

SEN. O'NEIL asked if many of the decisions on parental rights termination are being overturned. Mr. Petesch said some are being reversed and remanded. An appeal is based on the factual record and no evidence may be introduced so it is difficult to get a case overturned. Those that are overturned are usually done on a procedural mistakes.

Ms. Fox referred to a document provided by the National Conference of State Legislatures regarding information how other states have handled this issue (*Information on State Requirements or Guidelines for Court-appointed Counsel for Indigent Parents in Dependency Cases*, EXHIBIT #15). Ms. Fox said many states are struggling with this issue and reviewed the legislation enacted in each state listed in the document.

Ms. Fox identified several basic issues that have emerged from all of the information gathered thus far:

- identifying at what point in the process should parents be provided counsel;
- education versus advocacy **Does this need more explanation?**
- the advantages of treatment court over the traditional District Court track;
- that the quality of counsel varies from county to county and from state to state and related resource and budget issues.

Ms. Fox said it is also important to understand why the Child Protection Unit was established and how it operates. Many County Attorneys do not have the expertise to prosecute these cases and there are even some who are unwilling to prosecute these cases. For these reasons, this bank of experts was established through the Department of Justice to help alleviate these problems. Ms. Fox suggested that this model may be applicable to establishing a similar program for the defense side of the issue.

Ms. Fox said it was now time for the Committee to decide what it wanted to do with all of the information and asked the members to consider the following:

- Does the Committee want more information of the guidelines?

- Is the Committee ready to make a proposal and for me to begin preparing issues and options?
- There is additional DPHHS **caps data** (statistical state-wide information) coming.
- The Law and Justice Interim Committee is also compiling similar information from the State Court Administrator's Office and that data will be incorporated also and think the distinction will be whether or not the attorney is (**GAIL cases or non-GAIL cases?**) also a guardian ad litem.
- Dr. Roche's cost benefit analysis of treatment courts will contain important data but will not be available until March.

SEN. O'NEIL asked if Ms. Fox could provide all of the members with those statistics. Ms. Fox said she would do that.

REP. CLARK asked how much more time was available for HJR 3. Ms. Fox said she hoped the Committee could complete its work on this issue by the next meeting. Ms. Fox suggested allowing another half-day meeting for this study. SEN. SCHMIDT asked Ms. Fox what the Children and Families Interim Committee parameters were, considering the Law and Justice Interim Committee is also studying this issue. Ms. Fox said Ms. Heffelfinger was going to try to have the survey distributed by the next Law and Justice meeting in March. Ms. Heffelfinger has suggested that this Committee postpone its March meeting and meet in April in conjunction with the Law and Justice Committee, in order to jointly discuss these issues. The Committee should decide how much more time it wants to devote to this issue.

SEN. SCHMIDT asked what exactly the Committee's options are for developing proposals or recommendations. Ms. Fox said the Children and Families Committee could make recommendations to the Law and Justice Committee and stand-alone recommendations also. SEN. SCHMIDT said the Children and Families Committee's focus is on the issue of representation for indigent parents only. Ms. Fox said yes, the only part of the Public Defense issue that this Committee has been directed to study is whether or not to change the situation of indigent defense for parents involved in child abuse and neglect proceedings. We know now that it is required at termination and asked if the Committee wanted to move that up and say that public defense must be appointed at initial proceedings. The Committee could draft language which would strike out "may request" and insert "must appoint" in the existing statute. This is a cost issue so data will play a very important role in your decision. The information from Ms. Brown and the State Court Administrator will help you develop a concept of how many cases will be affected. Ms. Fox said the Committee also had the option of doing nothing.

REP. ROBERTS said the Committee had gathered a great deal of information indicating the drug court concept is working. He recommended that the Committee at least make a statement on that and that it would be a missed opportunity if the Committee chose to do nothing.

SEN. O'NEIL said he wanted to discuss the information with the judges in Flathead County and see how they felt about the concept before he would make a decision regarding drug court. He said regarding the issue of representation for indigent parents in child abuse and neglect cases, the current language states that a judge shall notify the parents they have a right to request counsel. He said he would like to see language added that states that if a judge fails to appoint counsel at that time, he shall notify them that they have a right to have whoever they want to come and advocate for them throughout the court process. He said he didn't agree with Ms. Brown's suggestion to him that there be a limit on who they can ask to advocate but if there are

restrictions, it could be either a mediator that is listed with the Clerk of Court, a social worker, or someone of that nature. Ms. Fox responded that the Court Assessment Program recently sent out information on mediation for child abuse and neglect cases and would provide this information to the Committee if it desired. She also said that the Drug Courts are closing down because of lack of funding and that they may not be able to support this. SEN. O'NEIL said he was not convinced that putting resources into the drug courts is the best use of funding. Those same resources may help more people if we put that funding into a regular District Court. The resources may accomplish more if not limited to a drug court.

Ms. Fox said a definition of indigency must be established and suggested that this might be a worthwhile area on which to focus. She said Jim Oppedahl, Court Administrator, has also pointed out the difference in not being able to afford counsel and not being able to participate towards the cost of counsel and said this is another issue.

SEN. O'NEIL said he thought parents should have the right to have someone advocate for them from moment DPHHS initiates action against the parents, prior to it even becoming a court case. He said parents should not be restricted to hiring an expensive attorney in order to have representation. Mr. Petesch commented that the first court proceeding that triggers any temporary transfer of custody is a judicial finding that the youth in question is in need of care. This is the first place counsel may appear with parents.

SEN. SCHMIDT said she was interested in which judicial districts are appointing counsel at the initiation of proceedings.

SEN. O'NEIL said establishing a sliding fee scale in which an eligible family would be responsible for paying a certain percentage of the cost of representation and the State paying the remaining amount could be an option. SEN. SCHMIDT asked who would determine the financial need of a family. SEN. O'NEIL said that determination could be made by the same agency that determines a family's need for food stamps or other public assistance. REP. CLARK asked what programs had eligibility requirements. Ms. Fox said there are eligibility requirements for CHIP, Medicaid, general fund programs, and food stamps.

**REP. GIBSON said there has to be a formula that the entire state would use because of the inequity among the courts.**

**SEN. SCHMIDT asked Mr. Petesch about trying to define indigency on difficult background ????? Mr. Petesch said he thought it could be done based on several different things: you have several programs that are already required to do it for social service purposes. You can look at court cases where the judge makes the determination that yes you are indigent and that qualifies you for the public defender so you can look at the standards the courts have traditionally applied and try to use those to craft a uniform definition of indigency so there are several ways we can approach that. SEN. SCHMIDT asked if that would be a firm guideline or would it vary from area to area. Ms. Fox said that is one of the issues in the current litigation because some of the counties are paying on a contract rate and some are paying on.....it has to be consistent wherever it is. Families that fall right outside of the poverty limit or whatever limit is set will be affected and that would be another problem....and remember that judges do what judges want. REP. CLARK said the lack of consistency in representation was very troublesome to her.**

REP. ROBERTS asked the members if they wanted Ms. Fox to do a more in-depth accumulation of data on the treatment courts and make the final decision at the next meeting. The Committee members agreed. SEN. O'NEIL suggested including input from the Supreme Court or a District Court Judge before making a final decision.

REP. ROBERTS asked SEN. PEASE what approach the Tribes are using in dealing with this issue. SEN. PEASE answered that the Tribes use the traditional judicial court approach but that the Northern Cheyenne, the Blackfoot, and the Fort Peck are beginning to implement drug court programs. He said if there is a system that works, he would really like to follow through with it.

REP. ROBERTS said, regarding the appointment of counsel for indigent parents, that changing the statutory language from "may" to "shall" may have an exponential effect and that the good intentions by the Committee could result in "busting the budget". He added that it was likely that situations would arise in which it would be more effective for the judge to have the discretion to make decisions but if the language is changed, that discretion is gone. SEN. PEASE agreed that there is a very large difference between "may" and "shall" in statutory language.

SEN. O'NEIL suggested working that would allow the court to appoint counsel but if it didn't, the parents would have a right to have an advocate. This wouldn't cost the state anything. Criteria on what the advocates qualifications should be could be defined but as long as the parents are paying for it, they should be able to have someone come to court and help them work through the process. Mr. Petesch said care must be taken to not allow non-licensed people to represent others in court because the court would quickly strike that down. In administrative proceedings it would be allowable but in judicial proceedings, "advocate" usually means representation in a formal legal proceeding and would not be allowed.

SEN. O'NEIL suggested basing it on a position similar to Mr. Kinsvatter's of the CasCo Project. Ms. Fox said Mr. Kinsvatter was very careful to say that he did not advocate for his clients, but rather was there to answer questions and give information. She said a counterpoint to that is the non attorneys that are allowed to be there for the best interest of the child (CASAs and guardian ad litem). They are not attorneys but do have training and maybe that is the difference. The Department may be concerned that advocates may come with personal issues or information that may be outdated or inaccurate.

REP. ROBERTS suggested the Children and Families Committee come up with its own idea and have the Law and Justice Committee review it for their input. SEN. PEASE agreed.

Ms. Fox suggested keeping the March meeting date and said by then this Committee would have an update from the Law and Justice Committee's meeting on what it intends to do. At that point, this Committee could send a subcommittee to attend its next meeting or send a written recommendation. SEN. O'NEIL asked if this issue was on the Law and Justice agenda for their March meeting. Ms. Fox said she wasn't sure but would make sure this Committee stayed informed.

**Susan, the tape ended here and the two remaining audio tapes were blank so I don't know how much, if any, of the meeting is missing.**

## **ADJOURNMENT**

With no further business before the Committee, REP. ROBERTS adjourned the meeting at 2 p.m.

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Ms. Fox said there are two elements to this program . One is the drug court...and the initial appointment of public defense I wanted to hear that....she showed a method of how child abuse and neglect and indigent defense is done. It is not done through e general office, it is done through a...specific panel that had to apply - didn't have training but has developed expertise. That's a real important piece....because if you're just going to have every public defense office do this...that's one forma of doing that....and then, how it has evolved to be a non adversarial process. Those are pieces of information that I wanted you to pick up specific tp the HJR 3 study. On the other end, the drug treatment court involves both studies and thought it was important for your to hear. Two different issues here: one is specific to public defense - how it works within this program which is clearly different that public defense in a regular track and the kind of needs that the family has and Dr. Roach evaluates the cognitive ability...your kids in care the whole time.....look at different alternatives for system.

Part of that is a result of the permanency placement laws that are in effect now but that "liberty interest"....and this is a civil proceeding, not a criminal proceeding . There have to be findings in order to allow the children to be taken and that is the liberty interest and that is why appointment

of counsel for due process protection reasons is necessary at the termination hearing at a minimum. That's the minimum due process protection and that is what some counties are doing. Others are providing greater protection. A concern I have is that the different ways different counties are doing it. Some are not providing it until the termination proceedings, some are providing it at initiation. As statistical data is gathered, some of that data may provide a basis for an equal protection challenge to the system because you are given greater protection and more due process based on your indigency, which is a suspect classification in some counties, and that data may actually come back to haunt you. It cuts both ways.

John Connor testimony in the 2003 Legislature on an indigent defense bill and there only being 158 terminations and 50 were in Billings. If we already know that the most populous county in the state is already appointing at initial proceedings, then we might know that one-eighth of the budget is already being spent in that manner. This Committee must determine what the other 55 counties are doing and

, so we can find out are we taking it from one-third to whole or from two-thirds to whole or....and that's part of what I don't think we have a concept of...how many cases is there and how much. A lot of the cases get dismissed, enter a voluntary agreement, ...then the critical ones end up in a treatment court or a drug court situation...but the Public Defender says she spends less time on those cases, so maybe in the end, maybe we are at a wash. We are not going to get good enough data to get an absolutely clear picture.

SEN. O'NEIL suggested a lot of the administrative procedure that occurs within the Department even before you get to that point. The child isn't out of the home until it is found to be a youth in need of care. Emergency care is provided for in statute but is not the formal or normal process used in removing a child from the home. A child removed under this provision would still have to have an administrative hearing to make sure that the emergency intervention was proper.

REP. CLARK said she would like to know how many actual cases would be affected and have counsel appointed at the onset of court proceedings. Ms. Fox said she was attempting to identify this number.

Great Falls, Billings, Kalispell...Ms. Fox said the big seven... SEN. SCHMIDT said the "case-by-case basis" court could be out in Jordan that may only hear one case a year

Mr. Petesch said the Committee could pursue establishing a common definition of indigency. REP. CLARK said the Bozeman court has its own definition of indigency and uses it consistently with every case.

And that perhaps that if you are going to do that, if you're going to have non attorneys, thought we have heard that that is not satisfactory to some to have non attorneys for children but perhaps it comes back to training issues. If attorneys need training and they already understand the system, then certainly a lay person would need training to become familiar with the court system and the law before they would be able to provide information. REP. CLARK asked how many are we talking about? One a year in Jordan or something and a lot of the rest are paid for? That would be helpful to know. Ms. Fox said she would never have a good answer to that but that she was trying to get trend data which would provide some information.

She said the survey being conducted by Ms. Heffelfinger on behalf of the Law and Justice Committee would have the most reliable information and would use that.