



OFFICE OF THE STATE PUBLIC DEFENDER STATE OF MONTANA

PROPOSAL TO CREATE SEPARATE PROGRAMS WITHIN THE AGENCY

To: Strategic Planning Committee

From: Bill Hooks

Date: March 10, 2014

This Memo addresses how creation of a new Program, which would be responsible for handling the representation of children in DN cases, would impact the budget and operations of Program 1. I've set out a general description of the DN process and our obligations, and provided a summary of programs used in other states.

The “Dependent/Neglect” Process

DPHHS Investigation. § 41-3-201, MCA imposes on certain professionals and officials a mandatory duty to report to DPHHS suspected child abuse or neglect. Under subsection (1), when the professionals and officials “know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected by anyone[,]” they must report to DPHHS. Reports are taken by a centralized office. ARM 37.47.302, .303. If the department determines that an investigation is required, a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation. The investigating social worker shall furnish a written report within 60 days of commencing an investigation. § 41-3-202(1), (6), MCA. If the social worker, a peace officer or the county attorney has reason to believe a child is in immediate or apparent danger of harm, that child may be immediately removed and placed in a protective facility. If this is done, an abuse and neglect petition must be filed within five working days. § 41-3-301(1), (6), MCA.

DPHHS has implemented a safety intervention system, the Montana Safety Assessment and Management System (SAMS), which is designed to ensure that safety assessment guides decision-making throughout the life of the case. Child and Family Services Policy Manual, 201-2 (rev. 01/12).

Initiation of Proceedings. Sec. 41-3-422, MCA sets out the procedures for filing an “abuse and neglect” petition. The state may request in the petition any of the following:

-immediate protection and emergency protective services, pursuant to § 41-3-427. If the parent, custodian or attorney for the child disputes the material issues of fact contained in the affidavit filed in support of the petition, the person may request a contested show cause hearing within 10 days of service of the petition and affidavit;

-temporary investigative authority into allegations of child abuse, neglect or abandonment, pursuant to § 41-3-433, MCA. An order for temporary investigative authority may not be issued for a period longer than 90 days;

-temporary legal custody, pursuant to § 41-3-442, by which the department may place a child in care provided by a custodial or noncustodial parent, kinship foster home, youth foster home, youth group home, youth shelter care facility, or institution. An order may be in effect for no longer than 6 months, but may be renewed for an additional 6 months;

-long term custody, pursuant to § 41-3-445;

-appointment of a guardian for a child who has been placed in the temporary or permanent custody of the department, upon the petition of the department or guardian ad litem, enter an order appointing a guardian, pursuant to § 41-3-444;

-termination of the parent-child legal relationship, pursuant to § 41-3-607;

-any combination of these provisions, or any other relief that may be required for the best interests of the child.

Termination of parental rights requires a separate trial-type hearing. Termination is required in certain circumstances.¹

¹ **41-3-604. When petition to terminate parental rights required.** (1) If a child has been in foster care under the physical custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights. If a child has been in foster care for 15 months of the most recent 22 months or if the court has found that reasonable efforts to preserve or reunify a child with the child's parent or guardian are

The Current Situation

OPD is Responsible for Assigning Counsel to all Parties. The filing of a petition under § 41-3-422 triggers the right to counsel.

Sec. 41-3-422(11), MCA states that “any party in a proceeding pursuant to this section is entitled to counsel as provided in 41-3-425.” Subsection (13)(a) requires service of the petition on the parent, guardian or legal custodian, and written notice advising that person of the “right, pursuant to 41-3-425, to appointment or assignment of counsel if the person is indigent or if appointment or assignment of counsel is required under the federal Indian Child Welfare Act, if applicable[.]” Sec. 41-3-425(2), MCA provides that any indigent parent, guardian or legal custodian of a youth in a removal, placement or termination proceeding is entitled to assigned counsel. The court also shall appoint counsel for any child when a guardian ad litem is not appointed.

The right to counsel means the right to the effective assistance of counsel. The Supreme Court, in In re A.S., 2004 MT 62, 320 Mont. 268, 87 P.3d 408, recognized that a natural parent's right to the care and custody of his or her child is a fundamental liberty interest which must be protected by fundamentally fair procedures. Fundamental fairness requires that a parent be represented by counsel at proceedings to terminate parental rights. The Court deemed it “self-evident that the right to counsel carries with it a concomitant requirement that such counsel be effective.” 2004 MT 62, ¶¶ 12, 20.²

not required pursuant to 41-3-423, a petition to terminate parental rights must be filed unless [certain circumstances are present]

² The U.S. Supreme Court has held that “[t]he liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. ... ‘It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’” Troxel v. Granville, 530 U.S. 57, 65-66 (2000)

Assignment of Counsel in the Regions. The general OPD practice is to assign a staff attorney to represent a parent in a DN case (typically, OPD will represent the custodial parent or the alleged “offending” parent). To avoid a conflict of interest, cases are assigned to the Conflict Coordinator to assign conflict counsel to all other parties entitled to representation.

OPD does not have a uniform method of assigning counsel or staff to DN cases. In most regions, there is not a dedicated DN attorney or unit which primarily handles DN cases. Rather, attorneys are assigned to DN cases as well as to other non-DN cases.

Representation Models for a New Program

Three types of representation models are used to provide representation in DN cases. Many of these models limit their client base to parents in child welfare cases.³ The three models are:

Contract/panel model: this system is made up of an administrative staff, with the case load assigned to a panel of contract attorneys, who are provided with resources, compensation, training, and standards compliance.

Institutional parent representation model: this type of system generally is comprised of offices with full time staff of attorneys, investigators and social workers. These models typically represent parents only.

Hybrid model: this system generally is comprised of a panel of contract attorneys who handle the majority of case assignments, and a state or regional office with staff who may handle some case assignments, oversee the panel and supervise the system. Two systems which provide representation both for parents/custodians and children in child welfare cases are discussed below.

Massachusetts: The Child and Family Law Division (CAFL) oversees all court-appointed child welfare attorneys. Approximately 90% of dependency cases

³ I’m using the term “child welfare” to describe a broader context of cases, which in Montana might include what we refer to as “dependent/neglect” cases.

are handled by a panel of qualified private attorneys overseen by CAFL. Staff attorneys handle the remaining 10% of the cases.

New Jersey: New Jersey has two separate programs within the public defender agency. The Office of Parental Representation provides legal representation to parents in cases of alleged neglect or abuse of a child, and in parental rights termination cases, through staff attorneys and through contracted private counsel. The Office of Law Guardian provides legal representation to children in family court matters involving allegations of abuse and neglect against parents or other caregivers, or in cases involving termination of parental rights, through staff attorneys.

The two programs are separated as much as possible, to the point where the offices are housed in separate buildings whenever possible. Firewalls are installed on the computers, and lines of management are kept distinct. Each program reports to the Chief Public Defender, but the Chief does not have any decision-making authority in terms of cases handled in either program. Contract attorneys cannot represent both parents and kids.

Proposal - Create a Separate “Hybrid” Civil Program with a Separate Budget

Managing our costs and expenses is the primary goal from a systemic view. OPD could create a separate budget program, so that the costs and expenses are allocated to a separate budget. The benefit would be to gain some measure of control over costs and expenses, and avoid having to allocate funds from other needs to address DN costs.

The program 1 attorneys would be responsible for representing the parent in a DN case. Program 3 would be created, with a separate and distinct budget. The Conflict Coordinator would administer program 3, and would be charged with assigning counsel to those entitled to counsel other than the parent, in DN cases.

Central office staff would assist Program 3 staff in processing payments and other support issues. Selection and supervision of contract attorneys, training needs, and other matters would have to be coordinated between the contract manager, the conflict coordinator, and the training coordinator.

In some regions, we do not have a sufficient number of qualified private attorneys available to absorb the demand for counsel in DN cases. Additionally, utilization of private counsel is more expensive than using staff attorneys. Therefore, adding staff and attorneys to Program 3, as appropriate, would be a viable way of addressing the demands of a high caseload while providing economic benefits to the agency and to clients.