



Montana Legislative Services Division
Legal Services Office

TO: Task Force on State Public Defender Operations

FROM: Julie Johnson, Legal Services Office

RE: Minimum Legal Requirements for the Appointment of Counsel in
Dependent/Neglect (DN) Cases (20, C)

DATE: May 11, 2016

At the February 2016 meeting, I was asked to identify the minimum legal requirements for appointment counsel to parties involved in a Dependent/Neglect case. This includes appointment of counsel for parents, children, and putative fathers. Below are the triggers for when an attorney must be appointed to an indigent person. However, once an attorney is appointed, the attorney has the same legal duty to his or her client as a private attorney would under the Montana Rules of Professional Conduct. These duties include the duty to be competent, diligent, and to communicate with the client, to name a few.

Parents

Under § 47-1-104(4)(a)(iii), MCA, a "parent, guardian, or other person with physical or legal custody of a child or youth in any removal, placement, or termination proceeding pursuant to 41-3-422" is entitled to a court-appointed attorney if the person is indigent. Under § 47-1-111, MCA, therefore, an indigent "parent, guardian, or other person with physical or legal custody of a child or youth" is entitled to counsel upon the State filing a petition for any of the following:

- (i) immediate protection and emergency protective services, as provided in 41-3-427;
- (ii) temporary investigative authority, as provided in 41-3-433;
- (iii) temporary legal custody, as provided in 41-3-442;
- (iv) long-term custody, as provided in 41-3-445;
- (v) termination of the parent-child legal relationship, as provided in 41-3-607;
- (vi) appointment of a guardian pursuant to 41-3-444;
- (vii) a determination that preservation or reunification services need not be provided; or
- (viii) any combination of the provisions of subsections (1)(a)(i) through (1)(a)(vii) or any other relief that may be required for the best interests of the child.

Section 41-3-422(1)(a), MCA. Upon the filing of such a petition, an indigent parent will be appointed counsel and counsel will represent the parent until the proceedings regarding the petition are completed, including the filing of an appeal.

The Montana Supreme Court has concluded that Montana's constitutional right to equal protection found in Article II, section 4, of the Montana Constitution requires that counsel be appointed for indigent parents in termination proceedings. A.W.S. v. A.W., 2014 MT 322, 377 Mont. 234, 339 P.3d 414.

The Montana Supreme Court has agreed with the United States Supreme Court that "[t]he termination of parental rights invokes fundamental liberty interests which must be protected by fundamentally fair procedures." In re Custody & Parental Rights of M.W., 2001 MT 78, 305 Mont. 80, 23 P.3d 206, citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The Montana Supreme Court has also held that "fundamental fairness requires that a parent be represented by counsel at proceedings to terminate parental rights in order to 'have an equal opportunity to present evidence and scrutinize the State's evidence.'" In re Custody & Parental Rights of M.W. (quoting In re A.S.A., J.L.A., G.A. and A.J.A., 258 Mont. 194, 198, 852 P.2d 127, 129 (1993)).

The right to counsel in DN cases is further identified § 41-3-425, MCA (emphasis added):

41-3-425. Right to counsel. (1) Any party involved in a petition filed pursuant to 41-3-422 has the right to counsel in all proceedings held pursuant to the petition.

(2) Except as provided in subsections (3) and (4), the court shall immediately appoint the office of state public defender to assign counsel for:

(a) any indigent parent, guardian, or other person having legal custody of a child or youth in a removal, placement, or termination proceeding pursuant to 41-3-422, pending a determination of eligibility pursuant to 47-1-111;

(b) any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is not appointed for the child or youth; and

(c) any party entitled to counsel at public expense under the federal Indian Child Welfare Act.

(3) When appropriate, the court may appoint the office of state public defender to assign counsel for any child or youth involved in a proceeding under a petition filed pursuant to 41-3-422 when a guardian ad litem is appointed for the child or youth.

(4) When appropriate and in accordance with judicial branch policy, the court may assign counsel at the court's expense for a guardian ad litem or a court-appointed special advocate involved in a proceeding under a petition filed pursuant to 41-3-422.

OPD has suggested amending § 41-3-425, MCA, to provide that a parent who cannot be located or whose identity is unknown is not entitled to be represented by an attorney.

Children

Children do not have a constitutional right to appointment of counsel if they are subject to a abuse and neglect petition. However, under § 41-3-425(2), MCA, children shall receive a court-appointed attorney if the child does not have a guardian ad litem. A child may receive court-appointed counsel even if the child has a guardian ad litem. Section 41-3-425(3), MCA. Attached is a 2012 "report card" on Montana regarding the right to counsel of a child involved in an abuse and neglect proceeding for reference.

Putative Fathers

Putative fathers are entitled to counsel under the Uniform Parentage Act (Title 40, ch. 6, part 1, MCA) to establish or deny paternity.

40-6-119. Right to counsel -- transcript on appeal. (1) At the pretrial hearing and in further proceedings, any party may be represented by counsel. The court shall order the office of state public defender, pursuant to the Montana Public Defender Act, Title 47, chapter 1, to assign counsel for a party who is financially unable to obtain counsel.

Also, a man who is alleged to be a parent whose child is subject to a DN proceeding is entitled to counsel. In some cases the father is unknown. OPD has suggested amending § 41-3-425, MCA, to provide that a parent who cannot be located or whose identity is unknown is not entitled to be represented by an attorney.

CI0425 6132jxc.