



Montana Legislative Services Division
Office of Research and Policy Analysis
David D. Bohyer, Director

April 14, 2016

TO: Members of the Task Force on State Public Defender Operations
FROM: Dave Bohyer
RE: Guidelines regarding attorneys for absentee parent(s) in dependent neglect cases

At the February 1, 2016 meeting of the Task Force, Rep. Dudik requested staff to report on guidelines provided by the American Bar Association (ABA) or the National Association of Counsel for Children (NACC) regarding the appointment of attorneys for absentee parent(s) in dependent neglect cases. This memorandum responds to the request.

I initially consulted the respective web sites for the ABA and for the NACC, each of which contains a lot of information. After accessing, searching, and in some cases, reading a number of potentially relevant documents on the sites, I was unable to identify any guideline that specifically addresses the appointment of a public defender attorney for an absentee parent, including a putative father. As such, I contacted Ms. Cynthia G. Swan, Director – Section of Family Law, American Bar Association, and Mr. Kendall Marlowe, Executive Director, National Association of Counsel for Children, and asked each of them if their organization had guidelines on the appointment of a public defender attorney for an absentee parent, including a putative father.

In response to my request for information, Richard Collins of the ABA, identified several ABA documents that speak in general to legal representation for parents and children involved in DN cases, but nothing specifically regarding the appointment of attorneys for absentee parent(s) in dependent neglect cases. I have included as an attachment references to the documents that Mr. Collins identified.

As of this writing, I have not received a response from Mr. Marlow, NACC. I will provide to the Task Force any information I may ultimately receive from the NACC.

References

The most comprehensive reference I was able to find is *Standards for Attorneys Representing Parents in Abuse and Neglect Cases* published by the ABA (1996). Although the *Standards* don't specifically address whether a public defender attorney should be appointed for an absentee parent, they provide guidance for attorneys, both public defenders and others, who represent parents in DN cases. The 46-page document lists, describes, and comments on 44 obligations of the parent's attorney, 11 recommendations for the attorney's manager, and 11 recommendations to the courts in relation to DN cases. On the related topic of the complexity and time-consuming nature of DN cases, the attorney's obligations, in particular, detailed in the *Standards* illuminate some of the back story as to how and why a committed (public defender) attorney who represents a parent invests as much time and energy as is often the case.

The NACC has also posted a number of documents relating to legal counsel in DN cases, but I was unable to identify any guideline, recommendation, or policy from the NACC that specifically addresses whether a public defender attorney should be appointed for an absentee parent. The NACC, in pursuit of its primary mission of ensuring the provision of legal counsel to children,

includes *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, published by the ABA (1996) and as amended by the NACC (1999). As with the *Standards for Attorneys Representing Parents*, the *Standards of Practice for Lawyers Who Represent Children* provide additional, parallel insight into how and why a committed (public defender) attorney who represents a child invests as much time and energy as he or she does.

Another reference that, in part, offers insight and recommendations regarding the participation of legal counsel in DN cases is *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, published by the U.S. Department of Health and Human Services, Administration for Children and Families, June 1999. The *Guidelines* specifically state that a child's biological parents should have legal counsel to consult in DN proceedings, even when the parent(s) is indigent, but there is no guideline regarding providing legal counsel for the parent if the parent is absent.¹

4. Parents Need Counsel in All Court Proceedings: We recommend that States guarantee that counsel represent biological parents (or legal guardians) at all court hearings, including at the preliminary protective proceeding. Such representation should be provided at government expense when the parent or guardian is indigent.

Commentary (sic, taken directly from the Guidelines)

Because of the critical importance of the very first court appearance, it is essential that parents have competent legal representation at the preliminary protective proceeding. Competent representation would probably mean providing the parents an opportunity to meet with their counsel at least an hour before the preliminary hearing. If, after entering orders necessary for the immediate protection of the child, the court needs to adjourn the preliminary proceeding for appearance of counsel, the delay should be limited to a day or two.

In representing parents, it is important for legal representatives to remain involved in the case throughout the process. They should also include parents at all stages, and provide a thorough explanation of the process (for example, give them a set of definitions and an outline of the court process so they understand what will happen in court). In addition, when there is a conflict of interest, separate counsel should be appointed for each parent because one attorney cannot represent the interests of both parents. This is true in many juvenile dependency matters, abuse or domestic violence cases, and in other situations when parents are not living together or have distinctly different perspectives.²

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¹ *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Department of Health and Human Services, Administration for Children and Families, June 1999. Note that the *Guidelines* recommend that the child services agency diligently attempt to locate an absentee parent and that the court ensure that the agency has performed due diligence in locating an absent parent, including a putative father. See e.g., guideline 14 in Chapter IV: Court Process, pp. IV 10-11.

² *Ibid.*, pp. VII 5-6. See all of Chapter VII: Standards for Legal Representation of Children, Parents and the Child Welfare Agency, in the complete *Guidelines* document online at <https://ia802607.us.archive.org/20/items/guidelinesforpub00duqu/guidelinesforpub00duqu.pdf>.

References Provided by Richard Collins, American Bar Association

- **Chief Public Defender/Acceptance of Clients.** Urges state, territorial and tribal governments to enact legislation to prohibit the retaliatory discharge of a Chief Public Defender or other head of an indigent defense services provider because of his or her good faith effort to control acceptance of more clients than the office can competently and diligently represent, in accordance with their ethical obligations. 13M104C
- **Putative and Unknown Fathers Act.** Attempt to codify U.S. Supreme Court decisions in this area. Seek to protect the child and his or her emotional and financial interest in having a father, the security of adoption, and the privacy of the mother and child - all while meeting constitutional requirements and dealing fairly with unwed fathers. Approved. 89M113A
http://www.americanbar.org/content/dam/aba/directories/policy/1989_my_113a.authcheckdam.pdf
- Adopt **Standards of Practice for Representing a Child in Abuse and Neglect Cases**, including preface and commentary, dated November 1995. 96M112A
http://www.americanbar.org/content/dam/aba/directories/policy/1996_my_112a.authcheckdam.pdf
- **Child Welfare Agency, Standards of Practice for Lawyers Representing.** Adopts Standards of Practice for Lawyers Representing Child Welfare Agencies, dated August 2004, which focus on improving representation of the child welfare system in abuse and neglect cases so that children and families are better served by the legal system. 04A105
http://www.americanbar.org/content/dam/aba/directories/policy/2004_am_105.authcheckdam.pdf
- **Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases.** Adopts Standards dated August 2006, which promote quality representation and uniformity of practice throughout the country for parents' attorneys in child abuse and neglect cases. 06A114
http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_114.authcheckdam.pdf
- **Standards for Child Abuse and Neglect Proceedings.** Adopts the black letter Principles and Standards of the Judicial Excellence in Child Abuse and Neglect Proceedings: Principles and Standards for Court Organization, Judicial Selection and Assignment, Judicial Administration and Judicial Education, dated August 2010, to improve, at the state and local levels, the quality of judicial practice, and court processes, related to civil child abuse and neglect cases. 10A102
http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_102.authcheckdam.pdf