

010251

MINNESOTA SUPREME COURT

TASK FORCE

ON

COURT APPOINTED

CIVIL COUNSEL

FINAL REPORT

JANUARY 2, 2001

TASK FORCE ON COURT APPOINTED CIVIL COUNSEL

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EXECUTIVE SUMMARY

I. INTRODUCTION

The 1999 Legislature requested the Minnesota Supreme Court to establish a task force ...to study and make recommendations regarding a system for funding and administering court-appointed attorney functions in civil cases, including attorneys and related personnel for civil commitments and proceedings under Minnesota Statutes, chapter 253B, child protection cases, paternity cases, guardianship or conservatorship cases, and other civil proceedings where indigent persons are entitled to court-appointed counsel. The goal of the task force is to design a system that is independent from court and county administration and funding and that promotes equal access to justice and equal representation for indigent persons across the state.

1999 Minn. Session Law Ch. 216, Art. 7, § 42. Pursuant to this request, the Minnesota Supreme Court established the Task Force on Court Appointed Civil Counsel to address the subject matter and goal noted above. The Task Force considered all civil proceedings where persons are entitled to court appointed counsel, including civil commitment actions and other proceedings under Minn. Stat. § 253B, juvenile protection cases, paternity proceedings, and guardianship and conservatorship cases. In addressing these proceedings, the Task Force considered the services necessary to support a court appointed attorney system including support personnel, expert witnesses and other ancillary services.

In its recommendations, the Task Force considered the creation of an independent court appointed attorney board to manage civil court appointed attorney functions. The Task Force also considered recommendations to improve the current system.

II. OVERALL THEMES

During its deliberations, the Task Force identified numerous themes that influenced the committee as various recommendations were considered. The themes listed below articulate the major factors that must be balanced as a system for providing court appointed civil counsel is established.

- **Need For Appellate Representation:** The current delivery system does not adequately provide for appellate representation as required by the constitution, statutes and case law. A mechanism does not exist by which eligible persons may obtain court appointed civil counsel necessary to exercise their right to appeal. This is of particular concern in the areas of termination of parental rights and civil commitments. Any delivery system must provide representation for good faith appeals statewide and this issue must be addressed during the 2001 Legislative Session.
- **Counsel Required By Law:** The recommendations embodied in this report reflect the legal representation for indigent persons in civil matters as required by the constitution, statutes or case law. These recommendations do not exceed the legal mandates governing the provision of court appointed counsel services at public expense for eligible persons in civil matters.
- **Need For Minimum Standards:** Currently, minimum standards do not exist to provide guidance regarding when civil counsel should be appointed and at what point in the proceeding. By establishing minimum standards, local jurisdictions will be able to consistently provide court appointed counsel in civil proceedings across the state.
- **Retention of Local Discretion:** Due to the differences between case types as well as jurisdictions, there must be local discretion when determining the best delivery method for providing court appointed counsel in civil proceedings.
- **Creation of Limited Central Functions/Administration:** Due to the existence of gaps in service, the lack of training and professional development, and the increased costs of certain proceedings, there is a significant role a centralized office can provide. It is recommended that a central office be identified to address, at a minimum, training needs, appellate functions as needed, and all aspects of civil commitments under Minn. Stat. §253B.185 (governing the commitment of persons alleged to be a sexually dangerous person or a sexually psychopathic personality).

- **Clear Funding and Resource Responsibilities:** Due to the advent of state funding of the court system, it is important to clarify the fiscal responsibilities of the state as well as counties. Currently, the statutes listed in Appendix A require counsel at public expense but fail to designate a funding source. Depending upon the approach selected by the legislature, these statutes must be changed to accurately reflect the entity that must provide court appointed civil counsel and is responsible for any associated costs.
- **Recommendations vs. Options:** Throughout this report, the committee makes policy, administrative and funding recommendations regarding court appointed civil counsel services. The committee recognizes that the ultimate resolution of the policy issues will be made by the Legislature, Supreme Court and to some extent by county government. In those areas where the committee was unable to reach consensus, the committee felt it could best fulfill its mandate by providing options accompanied by a discussion of the strengths and weaknesses of each approach.
- **Court Appointed Counsel vs. Public Defender:** The committee took great care to use the phrase "public defender" when a recommendation gives the duty to provide counsel and the fiscal responsibility to the Board of Public Defense. Otherwise, when the phrase "court appointed counsel" is used, the duty to provide counsel and the fiscal responsibility to fund such services rests with the county and/or state unless specifically provided by a central office.

III. SUMMARY OF RECOMMENDATIONS

Eligibility Criteria

Recommendation: Where an indigency standard or its equivalent is used in juvenile protection, family and civil contempt cases, eligibility for services provided at public expense by court appointed civil counsel should be determined by a uniform standard. A trial judge should make the determination and the standard should mirror the standards used in criminal cases for the appointment of public defenders. See Minn. Rule Crim. Proc. 5.02, subd. 3-5 (2000).

Recommendation: When counsel is provided at public expense in juvenile protection, family and civil contempt cases, the appointment should be subject to judicial review upon a change in a party's financial circumstances. Every party should be under a continuing duty to disclose any changes in the party's financial circumstances that might be relevant to the party's eligibility or reimbursement rate. See Minn. Stat. §611.17. All eligibility forms should include conspicuous notice of this continuing duty. Due to ethical concerns, once civil counsel is appointed, counsel should not be required to disclose to the court when a party's financial circumstances change.

Recommendation: The right to court appointed counsel should not be modified in conservatorship and guardianship cases or civil commitment proceedings and counsel should be automatically appointed unless otherwise provided.

Recommendation: The determination whether a party should be required to contribute to the cost of court appointed counsel should remain with the judge and should be addressed at the time of appointment. To facilitate reimbursement, flat fees governing reimbursement should be established and collection should be implemented by counties or districts in a manner similar to the public defender reimbursement program. Also similar to the public defender reimbursement program, any money collected should be credited to the governmental unit that provided the service. Upon a change of circumstances by a party, reimbursement should be subject to review.

Civil Counsel in Paternity Cases

Recommendation: Indigent parties in paternity cases should continue to receive court appointed counsel for the determination of paternity.

Recommendation: If parties are eligible for court appointed counsel, they should be informed of that right at the time the paternity action is commenced. Parties should be allowed to apply for and be represented by court appointed counsel at the first hearing and before genetic tests are ordered in any paternity action.

Recommendation: The Supreme Court should consider promulgation of a rule similar to Rule 9 of the Special Rules of Procedure Governing Proceedings under the Commitment Act that permits attorneys to decline to pursue any motion or appeal which is frivolous, brought in bad faith or brought to unduly delay proceedings.

Scope of Representation in Paternity Cases

Option A: Minnesota Statute § 257.69 should be amended to limit the scope of representation in paternity matters to the determination of paternity.

Option B: Minnesota Statute § 257.69 should be amended to limit the scope of representation in paternity matters to the determination of paternity and financial issues. Issues of custody and visitation should only be addressed when uncontested by the parties.

Option C: Minnesota Statute § 257.69 should remain as is.

Civil Contempt Proceedings

Recommendation: Pursuant to constitutional principles, indigent respondents should be entitled to court appointed counsel in all civil contempt proceedings.

Recommendation: Defendants in civil contempt proceedings should be entitled to representation by court appointed counsel from the initial hearing (first stage) in all civil contempt matters. Defendants should also be informed of the right to counsel and the method for applying for court appointed counsel in the Order to Show Cause, which commences the initial hearing process. This practice should apply regardless of whether contempt proceedings are initially scheduled in the expedited process or in district court.

Juvenile Protection Matters

Recommendation: The Board of Public Defense should to serve as court appointed counsel in juvenile protection cases and sufficient funds should be allocated for this responsibility.

Recommendation: Public defender appointments to family law issues outside the scope of the child protection matter should not be required.

Recommendation: Unless otherwise required by the Juvenile Protection Rules, only legal custodians whose rights are at stake should be entitled to court appointed counsel in child protection matters.

Recommendation: Unless otherwise required by the Juvenile Protection Rules, the appointment of counsel to children under the age of 10 is discretionary and such appointments should be discouraged. In the event counsel at public expense is appointed to a child under 10, the judge should be required to make a report to the State Court Administrator's Office setting forth the reasons for the appointment.

Recommendation: The appointment of counsel to represent GALs is discretionary under the Juvenile Protection Rules and therefore such appointments should be discouraged. In the event counsel is appointed to represent a GAL at public expense in a juvenile protection proceeding, the court should be fiscally responsible for the appointment.

Recommendation: In order to maximize already scarce resources, courts should consolidate public defender court appearances to the extent possible.

Recommendation: To the extent dispositional advisors supplement legal services delivered by the Board of Public Defense at a lesser cost, sufficient positions and resources should be allocated to adequately provide for these positions throughout the state.

Probate Matters

Recommendation: The current delivery system for providing court appointed counsel in cases involving persons alleged to be mentally ill or mentally ill and dangerous persons is sufficient and the method of appointing counsel under Minn. Stat. §253B.07-.092 and §253B.18 should not be modified.

Recommendation: Due to the lack of training and professional development in this area, a central office should provide training throughout the state for attorneys who represent clients in civil commitment proceedings.

Recommendation: A central office should provide representation at every stage of the proceeding, including trial and appeal, when the petitioner seeks to have a person committed as a sexually dangerous person or a sexually psychopathic personality under Minn. Stat. § 253B.185.

Recommendation: The appointment process of court appointed counsel in guardianship and conservatorship cases is appropriate and should not be modified but additional training throughout the state is required.

Appellate Functions and Administration

Recommendation: When a party to a civil proceeding has the right to counsel at public expense, a mechanism must exist by which an eligible person may obtain court appointed civil counsel at public expense to pursue a good faith appeal. Sufficient funding must be allocated such that this right may be provided.

Recommendation: The right to legal representation at public expense at the appellate level must be provided in juvenile protection matters.

Recommendation: The determination whether to pursue an appeal currently rests with the court appointed trial attorney. This method is appropriate in civil commitment cases (other than SDP/SPP) so long as a grievance procedure is available to parties when trial counsel decides not to pursue an appeal.

Recommendation: When court appointed counsel is required on appeal, the right should be limited to those cases where a good faith basis exists.

Recommendation: A central office should provide relevant training and professional development for attorneys who serve as court appointed civil counsel.

Recommendation: The central office should be available to assist localities with referrals when conflicts of interest arise.

Recommendation: The central office should be designated to develop a grievance procedure to handle complaints concerning the delivery of court appointed counsel services at the local level.

Administrative and Funding Options

Option A: The State Funded Central Office

This option envisions that a Court Appointed Civil Counsel Office would be established to provide limited central functions including: 1) all aspects of SDP/SPP civil commitments, 2) appellate functions for juvenile protection matters, 3) attorney training and professional development, 4) grievance procedures, and 5) conflicts of interest referrals when they arise. The office would also develop and implement standards

necessary to provide effective court appointed civil counsel including financial eligibility, scope of representation and minimum attorney qualifications.

Option B: County Funded with Limited Public Defender

This option envisions that counties will have both administrative and funding responsibility for providing court appointed civil counsel in all civil cases except civil commitments of SDP/SPP and juvenile protection appeals. A limited role is also envisioned for the Board of Public Defense in that civil commitment of SDP/SPP and juvenile protection appeals will be the administrative and fiscal responsibility of the Board of Public Defense.

Option C: Interim Proposal

This option envisions that the Court Appointed Civil Counsel Office would be phased in over a three-year period with time to determine funding and resource needs based on data collected from the counties. The phase in period would also be used to establish a Court Appointed Civil Counsel Board to govern the guidelines necessary to operate a Court Appointed Civil Counsel Program statewide. Finally, throughout the phase in period counties would be responsible for funding court appointed civil counsel. Once the phase in period passes, the Court Appointed Civil Counsel Office would be responsible for funding the program throughout the state.

ELIGIBILITY CRITERIA

I. UNIFORM STANDARD OF INDIGENCY IN JUVENILE PROTECTION AND FAMILY CASES

A. *Legal Authority*

Statutes: **Paternity:** Minn. Stat. §257.69, subd. 1. In all proceedings under sections 257.51 to 257.74, any party may be represented by counsel. The county attorney shall represent the public authority. The court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under sections 257.51 to 257.74.

Juvenile Protection: Minn. Stat. §260C.163, subd. 3. Appointment of counsel. (a) The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court. (b) If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the child who is ten years of age or older or the parents or guardian in any case in which it feels that such an appointment is appropriate. *Amended by 2000 Minn. Session Laws Chap. 357.*

Court Rules: **Expedited Child Support:** Rule 358.02. Interim Expedited Child Support Process Rules, Rules of Family Court Procedure, Rules of Practice in District Court. The child support magistrate must appoint an attorney at public expense for a party who cannot afford to retain an attorney when the case involves:

- (a) Establishment of parentage; or
- (b) Contempt proceedings in which the party is the person who has allegedly failed to comply with the court order or judgment, and incarceration of the party is a possible outcome of the proceedings.

Juvenile Protection Rules: Rule 61.02. Right to Representation.

Subd. 1. Child. (a) **Juvenile Protection Matters.** If the child desires counsel but is financially unable to employ it, the court shall appoint counsel to represent the child in any juvenile protection matter in which the court determines that such appointment is appropriate.

(b) **Truancy, Runaway, and Prostitution Matters.** The court shall appoint counsel for a child who cannot afford to retain counsel if the child, regardless of age, is the subject of a petition based on the statutory grounds that the child is a habitual truant, a runaway, or engaged in prostitution.

Subd. 2. **Parent or Legal Custodian.** (a) **Juvenile Protection Matters.** If the child's parent or legal custodian desires counsel but is financially unable to employ it, the court shall appoint counsel to represent the parent or legal custodian in any juvenile protection matter in which the court determines that such appointment is appropriate.

(b) **Indian Custodian.** In any juvenile protection matter involving an Indian child, if the child's parent or Indian custodian is unable to afford it, the court shall appoint counsel to represent the parent or Indian custodian.

Case Law: **Civil Contempt.** Cox v. Slama, 355 N.W.2d 401 (Minn. 1984). Counsel must be appointed for indigent obligor facing civil contempt for failure to pay child support. Right to counsel attaches when the court reaches a point in the proceeding that incarceration is a real possibility. Once counsel is appointed, a trial *de novo* must be held.

B. Indigency Standard in Juvenile Protection, Family and Civil Contempt Cases

Recommendation: Where an indigency standard or its equivalent is used, eligibility for services provided at public expense by court appointed civil counsel should be determined by a uniform standard. A trial judge should make the determination and the standard should mirror the standards used in criminal cases for the appointment of public defenders. See Minn. Rule Crim. Proc. 5.02, subd. 3-5 (2000).

Background: There is a lack of uniformity among juvenile protection, family and civil contempt cases regarding eligibility criteria for who qualifies for services. In paternity cases, the court is required to appoint counsel when a party is "unable to pay timely." In the expedited process for child support, the court is required to appoint counsel when a party "cannot afford to retain counsel." In civil contempt cases, an indigency standard is used to determine whether a party should receive court appointed counsel. Finally, in juvenile protection cases, the type of proceeding, the party as well as the financial eligibility of the party are factors to be considered when the court determines whether a party is entitled to court appointed counsel. To be financially eligible in a juvenile protection proceeding, a party must be "financially unable to employ" counsel or unable to "afford to retain counsel." In some situations, the court must appoint counsel for a juvenile even if the parent may be able to afford counsel but refuses to provide counsel.

Comment: Due to this lack of uniformity, confusion exists as to when a party qualifies for court appointed counsel in juvenile protection, family and civil contempt cases. Such

confusion contributes to inconsistencies between judges and between jurisdictions. By implementing a uniform standard of indigency, clear eligibility standards will be established for these proceedings. It is further recommended that the eligibility criteria mirror the criminal standards. The benefits of such a uniform standard are twofold.

First, a uniform standard that mirrors the criminal criteria will enable judges to appoint counsel based on clear and well-established criteria. Moreover, judges can make a decision quickly and appropriately when to appoint counsel because judges are familiar with the current two-page form used in criminal cases as well as the factors relevant to a determination of indigency.

Second, a uniform standard will enhance consistency across the state as to who receives the services of court appointed counsel in juvenile protection, family and civil contempt proceedings. Currently, the eligibility criterion differs depending upon the case type. By implementing a uniform standard of indigency, the appointment of counsel in juvenile protection, family and civil contempt proceedings will have greater consistency across the state and already scarce resources will be used more effectively statewide.

Fiscal Impact. Unknown. It is expected that use of a uniform standard based on the criminal rules criteria may slightly reduce the number of adults qualifying for court appointed civil counsel. There is no expected change in the appointments of counsel for juveniles.

C. Duty to Disclose Upon Change of Financial Circumstances and Judicial Review

Recommendation: When counsel is provided at public expense, the appointment should be subject to judicial review upon a change in a party's financial circumstances. Every party should be under a continuing duty to disclose any changes in the party's financial circumstances that might be relevant to the party's eligibility or reimbursement rate. See Minn. Stat. §611.17. All eligibility forms should include conspicuous notice of this continuing duty. Due to ethical concerns, once civil counsel is appointed, counsel should not be required to disclose to the court when a party's financial circumstances change.

Background: Minn. Stat. §611.17 governs the financial inquiry when the court determines whether a defendant is eligible for a public defender in criminal cases. The statute further states that the applicant is "under a continuing duty while represented by a public defender to disclose any changes in the applicant's financial circumstances that might be relevant to the applicant's eligibility for a public defender." The statute further requires that the eligibility forms "must contain conspicuous notice of the applicant's continuing duty to disclose to the court changes in the applicant's financial circumstances." Minn. Stat. §611.17 (b) (2000).

Minn. Stat. §611.20 also establishes a duty to disclose upon the public defender. The statute states that "if any time after appointment a public defender should have reason to believe that a defendant is financially able to obtain counsel or to make partial payment for counsel, it shall be the public defender's duty to so advise the court so that appropriate action may be taken." Minn. Stat. §611.20, subd. 1 (2000).

Comment: The committee recommends that as part of the financial inquiry to determine whether a party is entitled to civil counsel at public expense, the court should inform the party that he/she is under a continuing duty to disclose changes in the party's financial circumstances that may affect a party's eligibility for court appointed counsel or may require reimbursement of services provided. Upon the appointment of civil counsel at public expense, the court should provide notice of the client's continuing duty to disclose any change in financial circumstances that may affect eligibility or reimburse and conspicuous notice should be included in all eligibility forms.

The committee also recommends that the public defender duty established under Minn. Stat. §611.20 should not be extended to court appointed civil counsel because of ethical considerations. Specifically, a public defender's duty to disclose under Minn. Stat. §611.20 may at times conflict with Rules of Profession Conduct regarding attorney-client privilege and confidentiality. The committee does not want to perpetuate this conflict by imposing a similar duty upon court appointed civil counsel.

Fiscal Impact: None.

II. UNIFORM ELIGIBILITY IN PROBATE MATTERS

A. *Legal Authority*

Statutes: **Civil Commitment:** Minn. Stat. §253B.07, subd. 2c. A patient has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed.

Conservatorship and Guardianship: Minn. Stat. §525.5501, subd. 1. A proposed ward or conservatee has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint counsel to represent the proposed ward or conservatee for the initial proceeding held pursuant to section 525.551 if neither the proposed ward or conservatee nor others provide counsel unless in a meeting with a visitor the proposed ward or conservatee specifically waives the right to counsel. Counsel must be appointed immediately after any petition under this chapter is served under section 525.55.

Counsel has the full right of subpoena. In all proceedings under this chapter, counsel shall:

- (1) consult with the proposed ward or proposed conservatee before any hearing;
- (2) be given adequate time to prepare for all hearings; and
- (3) continue to represent the person throughout any proceedings under section 525.551 unless released as counsel by the court.

The court need not appoint counsel to represent the proposed ward or conservatee on a voluntary petition and the court may remove a court-appointed attorney at any time if the court finds that the proposed ward or conservatee has made a knowing and intelligent waiver of the right to counsel or has obtained private counsel.

Subd. 2. **Filing fee surcharge.** A person who pays a filing fee for a petition or application under this chapter and chapter 524 shall pay a surcharge of \$20, in addition to the filing fee and other surcharges imposed by law. The court administrator shall transmit the surcharge to the county treasurer for deposit in the county treasury.

Subd. 3. **Payment of counsel.** A proposed ward or conservatee shall pay the costs of counsel out of assets of, or available to, the ward or conservatee. If the proposed ward or conservatee is indigent, the costs of counsel shall be paid by the county from amounts deposited in the county treasury under subdivision 2.

Subd. 4. **Exclusion.** This section does not apply in the counties that make up the eighth judicial district.

Minn. Stat. §525.703, Costs. Subd. 2. Lawyer or health professional. In proceedings under sections 525.54 to 525.702 a lawyer or health professional rendering necessary services with regard to the appointment of a guardian or conservator, the administration of the ward's or conservatee's estate or personal affairs or the restoration of that person's capacity, shall be entitled to reasonable

compensation from the estate of the ward or conservatee or from the county having jurisdiction over the proceedings if the ward or conservatee is indigent.

B. Automatic Appointment Unless Otherwise Provided

Recommendation: The right to court appointed counsel should not be modified in conservatorship and guardianship cases or civil commitment proceedings.

Background: In probate matters, an indigency standard is not used. Rather, in conservatorship and guardianship cases, the court is required to appoint counsel unless counsel is provided by the party or others or the right to counsel is specifically waived by the party. Similarly, in civil commitment proceedings, an individual automatically receives court appointed counsel unless the proposed patient provides counsel.

Comment: In probate matters, the current method of providing court appointed counsel unless otherwise provided by the party is appropriate. Although probate proceedings are civil in nature, they may result in the loss of liberty and are analogous to the right to counsel standard employed in criminal cases.

It is also important to recognize the circumstances of the parties in these cases. Specifically, most civil commitment cases require the courts to balance the civil rights and liberties of the person against the extent of the governmental intrusion necessary to address mental health needs of the individual. For many individuals in need of civil commitment due to mental health needs, there is concern that the individual may not have the capacity to waive or retain counsel thereby necessitating the automatic appointment of counsel. Similarly, persons requiring the protection of a guardian or conservator often involve those who lack the capacity such that a substitute decision maker is needed. To protect the interests of the ward or guardian until a substitute decision maker is identified, the court is required to appoint counsel. Foremost in the protection of the individual interests of the client are the procedural protections provided by court appointed counsel.

Fiscal Impact. The fiscal responsibility remains with the office that currently handles these cases (either the county or Board of Public Defense) and it is not anticipated that costs will increase. This recommendation clarifies that counties are responsible for the cost of court appointed counsel in probate matters other than SDP/SPP civil commitments. Any surcharge collected under Minn. Stat. 525.5501 should be forwarded to the entity that provides counsel and the exclusion of the Eighth District from receiving such surcharges should be eliminated. *See* Minn. Stat. §525.5501, subd. 4.

III. REIMBURSEMENT BY REPRESENTED PARTIES

A. Legal Authority

Statutes: ***Paternity:*** Minnesota Statute § 257.69 Subd. 2. The court shall require a party to pay part of the fees of court appointed civil counsel according to the party's ability to pay.

Public Defender: Minn. Stat. § 611.20, Subd. 4. A court shall order a defendant who is employed when a public defender is appointed, or who becomes employed while represented by a public defender, to reimburse the state for the cost of the public defender. If reimbursement is required under this subdivision, the court shall order the reimbursement when a public defender is first appointed or as soon as possible after the court determines that reimbursement is required. The court may accept partial reimbursement from the defendant if the defendant's financial circumstances warrant a reduced reimbursement schedule....

B. Establish a Civil Counsel Reimbursement Program

Recommendation: The determination whether a party should be required to contribute to the cost of court appointed counsel should remain with the judge and should be addressed at the time of appointment. To facilitate reimbursement, flat fees governing reimbursement should be established and collection should be implemented by counties or districts in a manner similar to the public defender reimbursement program. Also similar to the public defender reimbursement program, any money collected should be credited to the governmental unit that provided the service. Upon a change of circumstances by a party, reimbursement should be subject to review.

Comment: Committee members agree that by implementing a civil counsel reimbursement program statewide, counties and districts will be able to recoup some of the costs associated with appointing civil counsel. Although such a program would not generate sufficient funds to finance the civil counsel program, it would help to offset costs. Moreover, an effective reimbursement program promotes the efficiency of the court calendar in cases where a party would need a continuance to retain counsel but would otherwise resolve the matter. In these cases, the court may appoint counsel but require the party to reimburse for the services provided.

Similar to the public defender reimbursement program, a determination as to whether a person must contribute to the cost of court appointed counsel should rest with judge. It should be noted that judges may not order reimbursement in all cases for numerous reasons including whether public policy would favor applying any financial resources available to a person of limited means towards payment of child support or reimbursement of public assistance in lieu of or before reimbursement for counsel.

A civil counsel reimbursement program should be structured to facilitate the imposition and collections of fees. First, reimbursements should be based on a flat fee that varies depending upon the type of proceeding involved and the complexity of the case. Second, a flat fee reimbursement schedule that can be imposed immediately upon the appointment of counsel facilitates collection because the fee is imposed by the court up front and eliminates the need for an additional hearing to determine the reimbursement amount. Finally, jurisdictions with a screener/collector should use the position to facilitate the collection of any reimbursements imposed.

Fiscal Impact. Unknown. The fiscal impact will be contingent on the number of persons financially able to reimburse for services.

FAMILY COURT CASES

I. PATERNITY

A. *Legal Authority*

Statute: Minn. Stat. §257.69, subd. 1. **Representation by Counsel.** In all proceedings under sections 257.51 to 257.74, any party may be represented by counsel. The county attorney shall represent the public authority. The court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under sections 257.51 to 257.74.

Court Rules: Rule 358.02. **Interim Expedited Child Support Process Rules**, Rules of Family Court Procedure, Rules of Practice in District Court (Appointment of Attorney at Public Expense) The child support magistrate must appoint an attorney at public expense for a party who cannot afford to retain an attorney when the case involves:

- (a) Establishment of parentage; or
- (b) Contempt proceedings in which the party is the person who has allegedly failed to comply with a court order or judgment, and incarceration of the party is a possible outcome of the proceeding.

Case Law: Hepfel v. Bashaw, 279 N.W.2d 341 (Minn. 1976). Pending legislative resolution and considering the interests of the illegitimate child as well as those of the mother and putative father, the Supreme Court exercised its supervisory authority to ensure the fair administration of adversary system of justice by holding that counsel must be provided to indigent parties in paternity adjudications.

Ramsey County Public Defender v. Fleming, 294 N.W.2d 275 (Minn. 1980). Where plaintiff is represented by county attorney, paternity defendant must be informed of right to court-appointed counsel before the defendant is required to admit or deny paternity.

McNeal v. Swain, 477 N.W.2d 531 (Minn. Ct. App. 1991). Defendant's court-appointed counsel was dismissed prior to determination of past support. The Court of Appeals held that a determination of past support is part of the paternity proceeding under Minn. Stat. §257.69 and therefore, if eligible, the defendant should continue to have court-appointed counsel of post-adjudication hearing to determine any past support obligations.

Lattourell v. Dempsey, 518 N.W.2d 564 (Minn. 1994). Because custody and visitation determinations are "proceedings" under the Parentage Act, indigent parties are entitled to court appointed counsel on issues of custody and visitation although paternity was already admitted and established.

B. Who is entitled to representation?

Recommendation: Indigent parties in paternity cases should continue to receive court appointed counsel for the determination of paternity.

Background: Under the current paternity statute, counsel at public expense must be afforded to any party "unable to timely pay". In practice, this includes the mother, the alleged father, a grandparent who is joined for purposes of genetic testing, or a child if joined as a party. In Hepfel v. Bashaw, 279 N.W. 341 (1976), the Minnesota Supreme Court stated that "where both parties to a paternity proceeding satisfy the standards of indigency which would invoke the provisions of §257.254 to allow the county attorney to represent the plaintiff, the defendant should likewise be appointed counsel."

For many years, the practice was for the county attorney to represent the mother as well as the county, and for indigent fathers to be appointed counsel. In 1995, Minnesota Statute §257.69 was amended to provide that the county attorney solely represents the public authority (the child support agency) and is prohibited from representing either parent. This amendment was brought about due to changes in federal law that require a child support agency to attempt to establish paternity (as well as support) upon application of either parent, regardless of the indigency of the parties, and regardless of who is the custodial parent. There was also growing recognition of the conflicts of interest that arise when the county attorney is required to represent both the public agency and one of the parents.

When the statute was amended to clarify that county attorneys do not represent the mother, some but not all courts began to appoint court appointed counsel for the mother who makes application for court appointed counsel and who meets the court's indigency requirements. Other courts never appoint counsel for the mother. Other courts appoint if a conflict of interest develops between the interests of the mother and the interests of the child support agency. Even fewer courts appoint counsel for other parties, though most paternity cases involve only three parties – the county, the mother, and the alleged father.

Comment: The recommendation to continue the appointment of counsel in paternity cases reflects current case law under Hepfel v. Bashaw, 279 N.W. 341 (1976). In addition, the committee agrees that court appointed counsel provides critical information and advice to the

client during the initial stages of the paternity proceeding. By providing basic information and representation at the outset, cases are more likely to be resolved by settlement thereby conserving resources.

The committee spent considerable time discussing whether it was appropriate to continue to require court appointed counsel in paternity cases. The argument for elimination of court appointed counsel is that the determination of paternity is much more certain now than it was in 1976 due to the refinement and widespread use of paternity genetic testing. Today, few cases go to trial on the issue of paternity. Rather, the contested issues are more likely to be child support, custody and visitation. These issues are similar to the central issues in dissolution proceedings where there is no right to counsel. The situation underlying the holding in Hepfel v. Bashaw no longer exists in that one party is represented and the other is not because county attorneys no longer represent mothers in paternity actions.

Elimination of court appointed counsel in paternity cases, however, would have a significant negative impact. First, such an action would be contrary to case law. Second, without court appointed counsel, paternity actions may be prolonged because settlements cannot be reached, the court may be required to explain the paternity proceedings to pro se defendants, and the parties understanding of the long-term legal implications of the paternity action will be diminished. Third, it is anticipated that elimination of court appointed counsel in paternity actions would create additional work for legal services organizations, who are concerned that they would not receive the additional funding necessary to represent indigent clients who are currently represented by court appointed counsel.

The committee agrees that appointed civil counsel in paternity cases is required under current case law and facilitates settlements by providing explanations of the legal proceedings and legal advice during the early stages. Consequently, paternity actions are resolved in a timely manner and fewer resources are expended.

Fiscal Impact. None. The fiscal responsibility of providing court appointed civil counsel in paternity cases remains with the county.

C. When should counsel be appointed in paternity cases?

Recommendation: If parties are eligible for court appointed counsel, they should be informed of that right at the time the paternity action is commenced. Parties should be allowed to apply for and be represented by court appointed counsel at the first hearing and before genetic tests are ordered in any paternity action.

Comment: Under the former administrative process for child support establishment, counsel could not be appointed until after genetic test results were available. Thus, in counties that elected to handle paternity cases in administrative process, indigent parties were not appointed counsel as early in the proceedings as in counties where the actions were commenced in district court. Under the new expedited child support process, this distinction is eliminated. To encourage consistency throughout the state and regardless of whether a paternity action is initiated in district court or through the expedited process, the committee recommends that notice of the right to counsel be given to the parties upon the commencement of the action. Once the action is commenced, the court or magistrate should appoint civil counsel by the first hearing.

Fiscal Impact. None. This recommendation clarifies when counsel should be appointed in paternity hearings initiated in district court or under the expedited process.

D. Should the scope of representation be limited in paternity cases?

Option A: Minnesota Statute § 257.69 should be amended to limit the scope of representation in paternity matters to the determination of paternity.

Option B: Minnesota Statute § 257.69 should be amended to limit the scope of representation in paternity matters to the determination of paternity and financial issues. Issues of custody and visitation should only be addressed when uncontested by the parties.

Option C: Minnesota Statute § 257.69 should remain as is.

Background: Based on case law interpreting Minnesota Statute §257.66, representation in paternity matters encompasses all issues covered in Minn. Stat. §§ 257.71 to 257.74. Thus, a paternity judgment must determine paternity and address financial issues such as current and past child support, reasonable expenses of the mother's pregnancy and confinement, and the mother's lost wages due to medical necessity. (McNeal v. Swain, 477 N.W.2d 531 (Minn. Ct. App. 1991) (requiring counsel to represent parties on the determination of support). A paternity determination must also address custody, visitation and the child's name as required by Lattourell v. Dempsey, 518 N.W.2d 564 (Minn. 1994).

Comments: The option to limit by legislation the scope of representation in paternity matters is appropriate because the case law is based on the interpretation of the statute and is not founded upon constitutional principles. Thus, the current requirement of counsel to represent indigent parties on custody and visitation issues in paternity proceedings may be amended by statute. Although the committee agrees that the scope of representation in paternity matters could be limited, the committee did not reach consensus as to what issues should be within the scope of representation. The three options outlined above reflect possible approaches.

Option A limits the scope of representation solely to the determination of paternity. Under this option, once paternity is established, representation by court appointed counsel would not extend to other issues such as the establishment of custody, child support or post adjudication proceedings involving modification of support, custody or visitation. Committee members favoring this option argue that parties are not entitled to court appointed counsel when they are involved in marital dissolutions or actions to establish custody or visitation under Minn. Stat. §518 after paternity has been administratively determined. In these actions, parties who are similarly situated as those in paternity cases do not have the right to counsel at public expense on issues involving custody, visitation or child support. Some members contend that there is not a rational basis for the distinction.

Option B limits the scope of representation to the determination of paternity and financial issues. Many committee members agree that the current practice of court appointed counsel representing clients on financial issues works well because such issues are often part and parcel of the paternity settlement. In addition, the public authority is often involved in the majority of paternity proceedings and can adequately represent the county on support issues. Committee

members also agree that it is reasonable and practicable to have the parties represented on custody and visitation issues, but only when uncontested.

However, as reflected under Option C, some members of the Task Force voiced concern that limiting the scope of representation in paternity matters would be contrary to the public interest for many reasons. First, amending Minn. Stat. §257.69 to limit the scope of representation in paternity matters would be contrary to the goal of promoting equal access to the legal system. It would further increase the perception that the courts will only work for those wealthy enough to retain an attorney to advocate their position. In order to have a meaningful opportunity to litigate the issues of child support, custody and visitation, a party should have access to competent legal counsel.

Second, proposals A and B would have a greater negative impact on women and people of color than other demographic groups. The Supreme Court's Task Force for Gender Fairness in the Courts stated in its final report that the inability to obtain counsel affect women more severely than men. The Gender Fairness Task Force found that 71% of the people applying for free legal services at legal aid programs were women. The report also found that the percentage was close to the ratio of women to men in the poverty population. There is a substantial likelihood that this change would result in privately represented fathers litigating custody, visitation and child support issues against pro se mothers. The resulting inequity would be contrary to the findings of the Gender Fairness Task Force to increase the availability of counsel in family law matters.

Third, proposals A and B would result in an increased number of pro se litigants using the court system. The parties would be forced to navigate the legal process by themselves often requesting assistance from overburdened court staff or the judges themselves. Family law proceedings often involve complex issues. The court must consider specific legal standards and statutory factors in its decision making process. Pro se clients unfamiliar with these issues will become frustrated and question the validity of the final decision.

Finally, proposals A and B will result in an increase in the number of applicants requesting the assistance of legal services programs. Legal services programs currently provide low income clients with legal representation in family court proceedings. There is insufficient funding to currently assist everyone that is financially eligible for these services. In the Minnesota State Bar Association study on the unmet need for legal assistance, the MSBA found

that legal aid was only able to provide representation to 27% of the income eligible applicants who needed assistance with a family law problem. These findings are reinforced by the Minnesota Supreme Court Gender Fairness Task Force report which called for an increase in state funding for legal assistance to low income people in family law matters. A similar increase would be necessary to meet the increased demand for services should Minn. Stat. Sec. 257.69 be amended to restrict representation.

Fiscal Impact. The fiscal responsibility of providing court appointed civil counsel in paternity matters remains with the counties. It is expected that the fiscal impact of the options listed above will differ. Specifically, under Options A and B, the fiscal impacts are unknown although both options will likely reduce the involvement of court appointed counsel in paternity cases. Under Option C, there is no expected change.

E. Limit Representation to Good Faith Claims

Recommendation: The Supreme Court should consider promulgation of a rule similar to Rule 9 of the Special Rules of Procedure Governing Proceedings under the Commitment Act that permits attorneys to decline to pursue any motion or appeal which is frivolous, brought in bad faith or brought to unduly delay proceedings.

Comment: Committee members agree that the attorney in paternity cases should not be required to represent a party in a paternity case at trial, file an appeal or represent a party on a custody or visitation issue if there is insufficient basis for proceeding. By promulgating a rule similar to Rule 9 of the Commitment Act, there would be clear direction to practitioners that limits the obligation of the attorney to represent a party on issues the attorney considers to be frivolous, brought in bad faith, or to unduly delay proceedings.

Fiscal Impact. None.

II. CIVIL CONTEMPT PROCEEDINGS

A. *Legal Authority*

Case Law: Cox v. Slama, 355 N.W.2d 401 (Minn. 1984). Counsel must be appointed for indigent obligor facing civil contempt for failure to pay child support. Right to counsel attaches when the court reaches a point in the proceeding that incarceration is a real possibility. Once counsel is appointed, a trial *de novo* must be held.

Barth v. Barth, 356 N.W.2d 743 (Minn. Ct. App. 1984). Indigent obligor's right to counsel attaches before entry of a conditional order for incarceration.

Prebil v. Juergens, 278 N.W.2d 652 (Minn. Ct. App. 1985). Contempt finding improper when court failed to consider appointment of counsel at contempt hearing when father said he could not afford counsel.

B. *At what civil contempt proceedings should counsel be required?*

Recommendation: Pursuant to constitutional principles, indigent respondents should be entitled to court appointed counsel in all civil contempt proceedings.

Comment: Civil contempt actions are most often initiated for failure to pay child support. However, the rationale behind the Minnesota Supreme Court decision in Cox v. Slama applies equally to other civil contempt cases. Thus, the committee recognizes that case law, based on constitutional principles, requires the appointment of counsel in all civil contempt proceedings. It is anticipated, however, that the majority of civil contempt cases will continue to be initiated for nonpayment of child support.

Fiscal Impact. Unknown. This recommendation clarifies that counsel is required and remains the responsibility of the county. It is not known whether it will result in an increased number of appointments in non-child support cases.

C. *When should counsel be appointed?*

Recommendation: Defendants in civil contempt proceedings should be entitled to representation by court appointed counsel from the initial hearing (first stage) in all civil contempt matters. Defendants should also be

informed of the right to counsel and the method for applying for court appointed counsel in the Order to Show Cause, which commences the initial hearing process. This practice should apply regardless of whether contempt proceedings are initially scheduled in the expedited process or in district court.

Background: Civil contempt proceedings involve two stages. At the initial hearing (first stage), the court makes a determination as to whether the person has willfully failed to comply with a court order. If the court so finds, the person is in civil contempt of court and the court sets conditions that the person must meet to avoid incarceration. At a subsequent hearing (second stage), if the person fails to meet the conditions and the court determines that the person had the ability to meet those terms, the court may order incarceration. If the sentence is executed, the person must be given the means to obtain release from incarceration.

Practices vary between jurisdictions as to when counsel is appointed. Some counties commence child support contempt matters in the expedited child support process (formerly the administrative process). The Interim Expedited rules allow uncontested contempt matters to be heard by child support magistrates. In those counties, obligors stipulate that they are in civil contempt of court, and agree to conditions to "purge" themselves of contempt. Court appointed counsel are not generally appointed at this stage. If the county wishes to proceed with sentencing, the matter is transferred to district court where counsel must be appointed.

Where civil contempt matters begin in district court, case law requires appointment of counsel for indigent defendants "at the point in the proceeding when incarceration is a real possibility". If counsel is not appointed prior to the time that incarceration is imminent, a trial de novo is required before a contemnor can be incarcerated.

Comment: The ultimate decision to execute a sentence relies primarily on the determinations made at the initial hearing concerning whether or not a person is in civil contempt of court and what purge conditions apply. If the contemnor did not have counsel to explain the consequences of admitting contempt, to explain what is meant by willful noncompliance with an order, and lacks knowledge of the legal requirements for a determination of contempt, (Hopp v. Hopp, 156 N.W.2d 212 (Minn. 1968), the person may admit to contempt when a defense to

noncompliance exists or purge conditions may be agreed to that are unlikely to be met. Having so agreed at the first stage hearing, the person is greatly disadvantaged at the second stage hearing when facing possible incarceration.

The committee does not believe that appointment of counsel at the first hearing will greatly increase overall costs. It is anticipated that appointment of counsel at the initial hearing will eliminate the need for de novo trials on the issue of contempt at later stages but before incarceration is imposed. The total number of hearings in a contempt case may be fewer if counsel is appointed from the beginning to advise the defendant, thereby reducing overall costs.

Fiscal Impact. Unknown although there will be increased representation during the initial contempt proceedings, the overall cost may be neutral because a trial de novo will not be required when a contempt finding is made.

JUVENILE PROTECTION MATTERS

I. PROVIDING REPRESENTATION IN JUVENILE PROTECTION MATTERS

A. *Legal Authority*

Statute: Minn. Stat. §260C.163, subd. 3. **Appointment of counsel.** (a) The child, parent, guardian or custodian has the right to effective assistance of counsel in connection with a proceeding in juvenile court. (b) If they desire counsel but are unable to employ it, the court shall appoint counsel to represent the child who is ten years of age or older or the parents or guardian in any case in which it feels that such an appointment is appropriate. (Amended by 2000 Minn. Session Laws Chap. 357.)

Minn. Stat. §260C.331, Subd. 5. **Attorneys fees.** In proceedings in which the court has appointed counsel pursuant to section 260C.163, subdivision 3, for a minor unable to employ counsel, the court may inquire into the ability of the parents to pay for such counsel's services and, after giving the parents a reasonable opportunity to be heard, may order the parents to pay attorneys fees.

Subd. 6. **Guardian ad litem fees.** (a) In proceedings in which the court appoints a guardian ad litem pursuant to section 260C.163, subdivision 5, clause (a), the court may inquire into the ability of the parents to pay for the guardian ad litem's services and, after giving the parents a reasonable opportunity to be heard, may order the parents to pay guardian fees

Court Rules: Rule 61. **Juvenile Protection Rules.**

Rule 61.01. **Right to Representation.** Every party and participant has the right to be represented by counsel in every juvenile protection matter. This right attaches no later than when the party or participant first appears in court.

Rule 61.02. **Appointment of Counsel. Subdivision 1. Child.**

(a) **Juvenile Protection Matters.** If the child desires counsel but is financially unable to employ it, the court shall appoint counsel to represent the child in any juvenile protection matter in which the court determines that such appointment is appropriate.

(b) **Truancy, Runaway, and Prostitution Matters.** The court shall appoint counsel for a child who cannot afford to retain counsel if the child, regardless of age, is the subject of a petition based on the statutory grounds that the child is a habitual truant, a runaway, or engaged in prostitution.

(c) **Indian Child.** In any juvenile protection matter involving an Indian child, the court may, in its discretion, appoint counsel for an Indian child upon a finding that such appointment is in the best interests of the child.

Subd. 2. **Parent or Legal Custodian.**

(a) **Juvenile Protection Matters.** If the child's parent or legal custodian desires counsel but is financially unable to employ it, the court shall

appoint counsel to represent the parent or legal custodian in any juvenile protection matter in which the court determines that such appointment is appropriate.

(b) Indian Custodian. In any juvenile protection matter involving an Indian child, if the child's parent or Indian custodian is unable to afford it, the court shall appoint counsel to represent the parent or Indian custodian.

Subd. 3. Guardian Ad Litem. The court may appoint separate counsel for the guardian ad litem if necessary.

Rule 61.03. Reimbursement

When counsel is appointed for a child or a child's parent or legal custodian, the court may order, after giving the parent or legal custodian reasonable opportunity to be heard, that the fees and expenses of court appointed counsel shall be reimbursed in whole or in part by the parent or legal custodian depending upon the ability of the person to pay.

Rule 61.04. Notice of Right to Representation

Any child, parent, or legal custodian who appears in court and is not represented by counsel shall be advised by the court on the record of the right to representation pursuant to Rule 61.

Case Law: Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding but due process may require the appointment of counsel when, upon balancing relevant factors, the parent's interests are at their strongest and the state's interests are at their weakest.

B. Who should provide representation in juvenile protection matters?

Recommendation: The Board of Public Defense should to serve as court appointed counsel in juvenile protection cases and sufficient funds should be allocated for this responsibility.

Background: Consistent with the Juvenile Protection Rules, juvenile protections matters include child protection cases, termination of parental rights cases and permanency cases (e.g. motions for long-term foster care and motions to transfer legal custody to a relative). At the trial level, the Board of Public Defense provides legal representation in juvenile protection matters and legal representation is state funded. There is an exception to state funding in Hennepin County, where the county contributes to the cost of public defense.

Comment: The committee agrees that current court appointed representation on juvenile protections matters by the Board of Public Defense is efficient at the trial level and should not be modified. The recommendations identified below, if implemented, should decrease the cost of service by public defenders at the trial level.

Fiscal Impact. Increased costs are expected to the Board of Public Defense in order to provide adequate representation and staffing.

II. SCOPE OF REPRESENTATION IN JUVENILE PROTECTION MATTERS

A. *Should issues be limited when concurrent family law issues exist?*

Recommendation: Public defender appointments to family law issues outside the scope of the child protection matter should not be required.

Background: When family law matters arise concurrently with a juvenile protection matter, some judges may order public defenders to represent parties on the family law issues in addition to the juvenile protection matters. This results in the appointment of a publicly funded attorney where none is required by law. However, it is not clear whether this practice is widespread or only occurs in a limited number of jurisdictions.

Comment: The committee recognizes that consolidating family law issues and juvenile protection issues before one judge saves judicial resources. However, by appointing public defenders to family law matters, the public defender system expends already scarce resources in an area where there is no legal mandate. The practice of requiring court appointed counsel in juvenile protection matters to also represent the party in family matter should be discouraged.

Fiscal Impact. Decreased costs are expected where judges appoint counsel on family law matters.

B. *Who is entitled to appointed counsel in child protection cases?*

Recommendation: Unless otherwise required by the Juvenile Protection Rules, only legal custodians whose rights are at stake should be entitled to court appointed counsel in child protection matters.

Background: Child protection cases are different from termination of parental rights and permanency cases in that only the rights of the current legal custodian are affected. In a child protection case, the responding party is the legal custodian. The court has discretion to limit appointment of a public defender to the legal custodian. The court, however, often appoints attorneys to represent other non -parties such as children, unadjudicated fathers, non-custodial parents and other relatives.

Comment: To the extent the court appoints counsel to individuals other than the legal custodian, these appointments deplete the resources available for the actual legal custodian whose rights are at stake. For this reason, the committee recommends that these appointments should be discouraged. In the event the court appoints counsel in these cases, it should be clarified in the statutes as to who is fiscally responsible for such appointments.

Fiscal Impact. Negligible. This recommendation clarifies who receives counsel at public expense.

C. Appointment of Counsel to Children Under 10

Recommendation: Unless otherwise required by the Juvenile Protection Rules, the appointment of counsel to children under the age of 10 is discretionary and such appointments should be discouraged. In the event counsel at public expense is appointed to a child under 10, the judge should be required to make a report to the State Court Administrator's Office setting forth the reasons for the appointment.

Comment: When a child is alleged to be a habitual truant, runaway or engaged in prostitution, the court is required to appoint counsel at public expense under the Juvenile Protection Rule 61.02 (b). Pursuant to Minn. Session Laws Chap. 357, public defenders may not

represent children under the age of 10. The committee recommends that when the court is required by the rules to appoint counsel to represent a child under the age of 10, the cost of counsel should be paid by the court. Furthermore, the committee recommends that the judge appointing counsel should be required to set forth the reasons for the appointment in a report to the State Court Administrator's Office.

D. Representation for Guardians Ad Litem (GAL)

Recommendation: The appointment of counsel to represent GALs is discretionary under the Juvenile Protection Rules and therefore such appointments should be discouraged. In the event counsel is appointed to represent a GAL at public expense in a juvenile protection proceeding, the court should be fiscally responsible for the appointment.

Comment: In juvenile protection proceedings, the role of the GAL is to advocate for the best interests of the child. Under Rule 61.02, subd. 3 of the Juvenile Protection Rules, the court may appoint counsel for GAL if necessary. In most cases, the committee believes that GALs provide an important perspective to the court similar to role of an expert witness in other circumstances. Because the appointment of counsel is discretionary under the rules and because the role of the GAL is to advocate to the court for the best interests of the child, the committee recommends that the cost of such representation should be the responsibility of the courts.

Fiscal Impact: Unknown due to the advent of new guardian ad litem rules.

III. MAXIMIZING RESOURCES

A. Scheduling Juvenile Protection Matters in Greater Minnesota

Recommendation: In order to maximize already scarce resources, courts should consolidate public defender court appearances to the extent possible.

Background: Currently, juvenile protection matters are scheduled around other court proceedings. Consequently, public defenders in greater Minnesota experience extensive travel time in order to attend these court appearances.

Comment: Since the state funds both public defender services and state courts, it is imperative that both organizations work together to maximize resources. To this end, public defender services are most cost effective when court appearances are consolidated. By establishing a calendar that sets all public defender appearances together, regardless of case type, resource benefits will be realized and public defender travel time will be reduced. Each county should consider implementing such a calendaring system.

Fiscal Impact. A reduction in mileage costs are expected for the Board of Public Defense.

B. Dispositional Advisers in Juvenile Protection Cases

Recommendation: To the extent dispositional advisers supplement legal services delivered by the Board of Public Defense at a lesser cost, sufficient positions and resources should be allocated to adequately provide for these positions throughout the state.

Background: A large part of legal representation in juvenile protection matters involves the determination, location and delivery of appropriate social services to the juvenile. Most often, the assessment and determination of the appropriate social services remains the responsibility of the lawyer. In order to provide expertise in this area to the lawyer, the Board of Public Defense relies on dispositional advisers (licensed social workers) to assess recommend the appropriate social services for each case.

Comment: The committee recommends that the use of dispositional advisers be expanded throughout the state due to the expertise and cost effectiveness of such specialists. First, courts that rely on dispositional advisers, in addition to social service agency workers, are provided service options which might not otherwise be presented to the court because

dispositional advisors are familiar with the programs available in each district. Second, dispositional advisors are able to provide expertise when recommending the appropriate services in each case. Finally, dispositional advisors significantly reduce the amount of time lawyers spend on CHIPS cases. Dispositional advisors provide services that would otherwise be provided by the lawyer but provide the services at a lower cost. The services include client interviews, client contact, defining necessary services, locating appropriate services, referring clients to service providers, defining on-going service issues for the lawyer and obtaining information from service providers.

Fiscal Impact. Cost savings are expected overall but increased costs are anticipated for the Board of Public Defense in order to fund dispositional advisor positions.

PROBATE CASES

I. CIVIL COMMITMENTS UNDER MINN. STAT. §253B.07-.09

A. *Legal Authority*

Statute: Minn. Stat. §253B.07, subd. 2c. **Right to Counsel.** A patient has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed. In all proceedings under this chapter, the attorney shall:

- (1) Consult with the person prior to any hearing;
- (2) Be given adequate time and access to records to prepare for all hearings;
- (3) Continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and
- (4) Be a vigorous advocate on behalf of the person.

Court Rule: Rule 9. **Civil Commitment Act – Rules. Appointment and Role of Counsel.** Immediately upon the filing of a petition for commitment or early intervention the court shall appoint a qualified attorney to represent the respondent at public expense at any subsequent proceeding under this chapter. The attorney shall represent the respondent until the court dismisses the petition or the commitment and discharges the attorney.

The respondent may employ private counsel at the respondent's expense. If private counsel is employed, the court shall discharge the appointed attorney...

B. *Current Delivery Method Appropriate*

Recommendation: The current delivery system for providing court appointed counsel in cases involving persons alleged to be mentally ill or mentally ill and dangerous persons is sufficient and the method of appointing counsel under Minn. Stat. §253B.07-.092 and §253B.18 should not be modified.

Background: Upon filing a civil commitment petition under Minnesota Statute §§ 253B.07 to 253B.09, the court may place an individual on judicial hold or the person may already be on an emergency hold. Within 72 hours of being placed on hold, a preliminary hearing must be held to determine whether the hold should continue. The right to counsel

attaches when the petition is filed and the person must meet with court appointed counsel prior to this preliminary hearing. Before a full commitment hearing, the person must have an examination by a court appointed doctor. There is a right to a second examination by a doctor of the person's choice and both examinations are paid for by the county.

Similarly, under Minn. Stat. §253B.18, the filing of a petition alleging that a person is mentally ill and dangerous to the public requires the court to hear the petition as provided above. The statute imposes additional review and treatment requirements, however, if the court finds by clear and convincing evidence that the person is mentally ill and dangerous to the public.

Currently, the method of providing counsel in civil commitment proceedings is determined locally. Effective delivery methods include contract attorneys, public defenders, attorney panels and hourly representation. The committee believes that except in the area of appeals, quality representation is provided throughout the state regardless of the delivery system.

Comment: For civil commitment proceedings initiated under Minnesota Statutes §§253B.07-.092, the current system of providing court appointed counsel is appropriate and should not be modified. The appointment of local counsel for persons alleged to be mentally ill and dangerous is also sufficient and should not be modified because the treatment issues involved are most similar to those issues faced by persons with mental illness even though the commitment may be indeterminate. Specifically, the skills required for an attorney to work effectively with a client with major mental illness facing commitment and to effectively present relevant treatment issues and alternatives to commitment are the same for both mental illness commitments and mentally ill and dangerous proceedings. Clients with mental illness facing commitment as mentally ill and dangerous will be well served by attorneys who have experience working with people with serious and persistent mental illness.

Fiscal Impact. No increased costs. Recognizing that the Eighth District is an exception, this recommendation clarifies that counties are responsible for providing representation.

C. Practitioners Require Effective Training

Recommendation: Due to the lack of training and professional development in this area, a central office should provide training throughout the state for attorneys who represent clients in civil commitment proceedings.

Comment: Currently, few courses are offered to provide practitioners with effective training and professional development in the area of civil commitments. In light of the mental health and legal expertise needed to effectively represent clients in this area, the committee recommends that attorney training be developed and offered on a regular basis throughout the state that specifically addresses civil commitment issues. The responsibility for providing such training should be assumed by a central office. In the event a central office is not established, Minnesota Continuing Legal Education should be encouraged to offer affordable training addressing these issues and provide the courses throughout the state.

Fiscal Impact: The cost of providing training statewide regarding civil commitment issues would be assumed by a central office if established.

II. CIVIL COMMITMENTS UNDER MINN. STAT. 253B.185 (SDP/SPP)

A. Legal Authority

Statute: See Minn. Stat. §253B.07 set forth above.

Court Rule: See Rule 9, Minnesota Civil Commitment Act – Rules set forth above.

B. Representation Should Be Provided by a Central Office

Recommendation: A central office should provide representation at every stage of the proceeding, including trial and appeal, when the petitioner seeks to have a person committed as a sexually dangerous person or a sexually psychopathic personality under Minn. Stat. § 253B.185.

Background: Under Minn. Stat. §253B.185, proceedings to commit a person as a sexually dangerous person or a sexually psychopathic personality (SDP/SPP) involve complex legal, medical and evidentiary issues. Due to the specialized nature of these proceedings, many practitioners around the state do not have sufficient experience in this field to provide adequate

representation to the client. Moreover, the use of expert witnesses and investigative costs generates substantial costs for counties when these cases occur.

Comment: The delivery of qualified counsel with expertise in the area would enhance the representation provided to persons committed under this statute. Moreover, the use of a centralized office would reduce costs through economies of scale since a single office would handle these cases statewide. The use of a central office would also eliminate the local costs for ancillary services, especially costs for expert witnesses, which can be substantial in these cases. It is anticipated that the caseload for these petitions would average approximately twenty to twenty-five per year.

Fiscal Impact. The state will have an increase in costs by assuming fiscal responsibility for civil commitments under Minn. Stat. §253B.185 and counties will realize cost savings in this area.

III. CONSERVATORSHIP AND GUARDIANSHIP

A. *Legal Authority*

Statute: Minn. Stat. § 525.5501, subd. 1. **Right to counsel.** A proposed ward or conservatee has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint counsel to represent the proposed ward or conservatee for the initial proceeding held pursuant to section 525.551 if neither the proposed ward or conservatee nor others provide counsel unless in a meeting with a visitor the proposed ward or conservatee specifically waives the right to counsel. Counsel must be appointed immediately after any petition under this chapter is served under section 525.55.

Subd. 2. **Filing fee surcharge.** A person who pays a filing fee for a petition or application under this chapter and chapter 524 shall pay a surcharge of \$20, in addition to the filing fee and other surcharges imposed by law. The court administrator shall transmit the surcharge to the county treasurer for deposit in the county treasury.

Subd. 3. **Payment of counsel.** A proposed ward or conservatee shall pay the costs of counsel out of assets of, or available to, the ward or conservatee. If the proposed ward or conservatee is indigent, the costs of counsel shall be paid by the county from amounts deposited in the county treasury under subdivision 2.

Subd. 4. **Exclusion.** This section does not apply in the counties that make up the eighth judicial district.

Minn. Stat. §525.703, **Costs**. Subd. 2. Lawyer or health professional. In proceedings under sections 525.54 to 525.702 a lawyer or health professional rendering necessary services with regard to the appointment of a guardian or conservator, the administration of the ward's or conservatee's estate or personal affairs or the restoration of that person's capacity, shall be entitled to reasonable compensation from the estate of the ward or conservatee or from the county having jurisdiction over the proceedings if the ward or conservatee is indigent.

B. Current Delivery Method Appropriate

Recommendation: The appointment process of court appointed counsel in guardianship and conservatorship cases is appropriate and should not be modified but additional training throughout the state is required.

Background: A proposed ward or conservatee has the right to be represented by an attorney at any proceeding under Minnesota Statute § 525.539 et seq. The court must appoint counsel for the initial hearing unless: a) the proposed ward or conservatee or others provide counsel; or b) the proposed ward or conservatee specifically waives the right to counsel at the meeting with the Court Visitor.

The Court Visitor meets with the proposed ward or conservatee at least 14 days before the scheduled hearing to explain the process. At this meeting, the Court Visitor gives the proposed ward or conservatee a copy of the Petition and Order for Hearing as well as an Order Appointing Counsel unless specifically waived by the ward or conservatee. The Court Visitor prepares a written report for the court regarding the appropriateness of the petition.

Comment: Currently, the process by which the court appoints counsel in conservatorship and guardianship cases works well in conjunction with the Court Visitor program. Thus, the current delivery method of appointing counsel in conservatorship and guardianship cases is appropriate and should not be modified. The committee recommends, however, that attorney training be developed and offered on a regular basis throughout the state that specifically addresses conservator and guardianship issues. To date, few courses have been offered in this area and are limited to the metropolitan area. The responsibility for providing such training should be assumed by a central office. In the event a central office is not established, Minnesota Continuing Legal Education is encouraged to provide training in this area.

Fiscal Impact. None. This recommendation clarifies that counties are responsible for providing counsel in conservatorship and guardianship cases while the training will be the responsibility of a central office if established.

APPELLATE FUNCTIONS & ADMINISTRATION

I. RIGHT TO APPEAL MUST BE PROVIDED FOR ALL CASE TYPES

Recommendation: When a party to a civil proceeding has the right to counsel at public expense, a mechanism must exist by which an eligible person may obtain court appointed civil counsel at public expense to pursue a good faith appeal. Sufficient funding must be allocated such that this right may be provided.

Comment: The current delivery system of providing court appointed civil counsel does not adequately address the need for appellate representation as required by the constitution, statutes and case law. A mechanism does not exist by which persons may exercise their right to appeal and this is of particular concern in the areas of termination of parental rights and civil commitments. Currently, a gap exists in the provision of legal representation at the appellate level in civil matters where parties are entitled to counsel at public expense. The lack of consistent statewide funding also results in an unacceptable, and potentially actionable, discrepancy in appellate legal representation. The lack of representation and funding for appellate functions is of great concern to the committee. Any delivery system must provide representation for good faith appeals in order for the right to be vindicated. Except for juvenile protection matters, (see discussion below), the committee recommends that the entity responsible for providing court appointed counsel at trial should also provide any necessary appellate functions.

Fiscal Impact. Increased costs are expected to the entity responsible for providing counsel at trial.

II. RIGHT TO APPEAL IN JUVENILE PROTECTION MATTERS

A. *Legal Authority*

Statute: Minn. Stat. §260C.415, subd. 1. Persons entitled to appeal; procedure. An appeal may be taken by the aggrieved person from a final order of the juvenile court affecting a substantial right of the aggrieved person, including but not limited to an order adjudging a child to be in need of protection or services, neglected and in foster care.

B. Appellate Representation Must Be Provided

Recommendation: The right to legal representation at public expense at the appellate level must be provided in juvenile protection matters.

Background: Parties are granted the right to appeal in termination of parental rights cases and child protection cases but the current system does not provide a mechanism by which such representation can be accessed by the parties. In addition, appellate representation is not funded on a statewide basis. Representation is available in Hennepin County through the Board of Public Defense, but only in Hennepin County. Representation is available in Hennepin County because the county contributes to the cost of public defense. Other than Hennepin County, a person seeking appellate relief must petition the trial judge for funds to pay a private attorney.

Comment: The committee agrees that the Board of Public Defense is the best service provider for appellate legal representation in juvenile protection matters. **The committee insists that adequate additional funding must be allocated to the Board of Public Defense for provision of this service.** An amendment to Minn. Stat. §611.20 is also necessary to allow for the provision of appellate representation in juvenile protection matters by the Board of Public Defense. It is anticipated that appeals will occur only in contested termination of parental rights cases because other remedies are available in non-termination cases (e.g., a family court petition to regain custody) and because the right to appeal is discretionary in non-termination matters.

Fiscal Impact. Increased costs to the Board of Public Defense are expected.

III. RIGHT TO APPEAL IN PROBATE MATTERS

A. Legal Authority

Statute: Minn. Stat. 253B.23, subd. 7. Appeal. The commissioner or any other aggrieved party may appeal to the court of appeals from any order entered under this chapter as in other civil cases. Any district court order or judgment under this chapter or related case law may be appealed within 60 days after the date of filing of the order or entry of judgment. A judgment under section 253B.18, subdivision 1, may be appealed within 60 days after the date of the order entered under section 253B.18, subdivision 2.

Court Rules: Rule 9. Civil Commitment Act - Rules. Appointment of Counsel and Role of Counsel. Counsel for the respondent is not required to file an appeal or commence any proceedings under Minn. Stat. §253B if, in the opinion of counsel, there is an insufficient basis for proceeding.

B. Current Appeal Process Appropriate

Recommendation: The determination whether to pursue an appeal currently rests with the court appointed trial attorney. This method is appropriate in civil commitment cases (other than SDP/SPP) so long as a grievance procedure is available to parties when trial counsel decides not to pursue an appeal.

Comment: The committee recommends that trial counsel continue to determine whether an appeal is appropriate in all civil commitment matters other than SDP/SPP. The determination whether a party is eligible for appellate counsel at public expense should be made by a judge using existing indigency and *in forma pauperis* standards. The judge should not address whether the appeal is made in good faith as such a determination rests solely with trial counsel.

Fiscal Impact. Increased costs to counties when trial counsel determines that a good faith appeal exists.

C. Good Faith Basis for Appeal

Recommendation: When court appointed counsel is required on appeal, the right should be limited to those cases where a good faith basis exists.

Comment: Parties should not be entitled to an appeal if there is not a reasonable basis to challenge the lower court order. The trial attorney must be given the discretion to determine whether there is a good faith basis for appeal.

Fiscal Impact. None.

IV. TRAINING AND PROFESSIONAL DEVELOPMENT

Recommendation: A central office should provide relevant training and professional development for attorneys who serve as court appointed civil counsel..

Comment: Due to the diverse issues and the various delivery models at the local level, there is little support for the providers of court appointed civil counsel services across the state. In order to provide effective assistance of counsel, it is recommended that a central office be designated to develop training programs for court appointed counsel services. In addition, such training efforts will encourage consistency and uniformity across the state.

Fiscal Impact. Increased costs to the state if a central office is established.

V. CONFLICTS OF INTEREST

Recommendation: The central office should be available to assist localities with referrals when conflicts of interest arise.

Comment: Due to the number of parties that may require court appointed counsel in civil proceedings, it is necessary to address conflicts of interest when they arise. The committee agrees that especially in the area of family court cases, numerous parties may require counsel. Since court appointed counsel is determined at the local level, local services may not be able to address conflicts when numerous parties require representation. For this reason, the committee recommends that a central office be designated to provide referrals when such conflicts arise. It is also anticipated that conflicts will be rare and cost of providing referrals is negligible.

Fiscal Impact. Negligible. Any costs would be assumed by a central office if established.

VI. GRIEVANCE PROCEDURES

Recommendation: The central office should be designated to develop a grievance procedure to handle complaints concerning the delivery of court appointed counsel services at the local level.

Fiscal Impact. Negligible and funding would be provided by a central office if established.

ADMINISTRATIVE AND FUNDING OPTIONS

Background: Currently, there is no clear system of providing or funding court appointed civil counsel services in Minnesota. Rather, the courts work with contract attorneys, public defenders and local jurisdictions to meet constitutional and statutory requirements in an ad hoc fashion. The result is a disparity of service between jurisdictions and vast differences in how these cases are handled statewide.

The lack of a clear funding apparatus has also created a potentially actionable situation because a party may have the right to appeal but no means by which to exercise that right of appeal. For example, in a termination of parental rights case, a party may have a claim on appeal but no means to vindicate this right in a jurisdiction other than Hennepin County.

Finally, the cost of providing court appointed counsel in some cases has increased significantly thereby creating unexpected financial burdens to municipalities. For example, court appointed counsel in the commitment of a sexually dangerous person typically results in legal fees in excess of \$50,000. These additional costs were not anticipated since the statute was recently enacted and these costs are expected to continue.

In light of these administrative and funding concerns, the committee recognizes that it is imperative that the legislature establish a clear funding mechanism for court appointed civil counsel services. Moreover, many of the policy and administrative recommendations made in this report will only be effective if sufficient funding resources are provided by the legislature. Finally, it is important to note that the adoption of recommendations found elsewhere in this report may be contingent upon the funding option ultimately selected by the legislature.

The committee, however, was unable to reach consensus on a specific funding approach and submits several options available to the legislature. These options are accompanied by what the committee considers the strengths and weaknesses of each proposal.

I. OPTION A: STATE FUNDED CENTRAL OFFICE

This option envisions that the Legislature establish a Court Appointed Civil Counsel Office to provide limited central functions including: 1) all aspects of SDP/SPP civil commitments, 2) appellate functions for juvenile protection matters, 3) attorney training and

professional development, 4) grievance procedures, and 5) conflicts of interest referrals when they arise. The office would also develop and implement standards necessary to provide effective court appointed civil counsel including financial eligibility, scope of representation and minimum attorney qualifications. Based on historical experience and the lack of adequate data, the committee further recommends that the Legislature establish a task force to address budgetary issues prior to implementation. The task force should gather caseflow data and resource information in order to forecast a comprehensive budget prior to implementation.

Strengths. A centralized office could provide consistent standards throughout the state and address any disparity of service under the current system. A central office will also maximize resources by providing legal experts to address certain appellate functions, SDP/SPP commitments, and other areas requiring specialization. Finally, a centralized office would provide much needed training for attorneys who serve as court appointed civil counsel.

Weaknesses. A centralized program would reduce some local discretion and control available under the current system. A centralized office would also create another state office that would require administrative support. A final weakness is that only rough estimates exist regarding the funding necessary to operate a Court Appointed Civil Counsel Office. Due to the numerous funding sources under the current program and the lack of accurate data regarding the appointment of civil counsel, there is little data to estimate the operating costs of a central office.

II. OPTION B: COUNTY FUNDED WITH LIMITED PUBLIC DEFENDER

This option envisions that counties will have both administrative and funding responsibility for providing court appointed civil counsel in all civil cases except civil commitments of SDP/SPP and juvenile protection appeals. A limited role is also envisioned for the Board of Public Defense in that civil commitment of SDP/SPP and juvenile protection appeals will be the administrative and fiscal responsibility of the Board of Public Defense.

Strengths. A benefit of this proposal allows existing agencies to be responsible for providing court appointed counsel. Counties will also retain local control and discretion when providing court appointed counsel services. Finally, there will be little disruption to the current

system of providing court appointed counsel in civil matters although there will be significant budgetary changes due to the clarification of who is fiscally responsible for providing civil counsel at public expense.

Weaknesses. First, numerous recommendations for central administrative functions would not be implemented due to the limited role of the Board of Public Defense. Specifically, this option does not address the need for minimum standards, adequate training of attorneys, grievance procedures, or conflict of interest issues. Second, the disparity of service between jurisdictions would continue because counties retain local discretion and no statewide office would exist to establish minimum standards or requirements. Finally, the budgetary impact is unknown although it is anticipated that any costs could be ascertained through the completion of a detailed fiscal note prior to implementation.

III. OPTION C: INTERIM PROPOSAL

This option envisions that the Court Appointed Civil Counsel Office would be phased in over a three-year period. The phase in period would be used to gather sufficient funding and resource data from the counties regarding the costs of providing court appointed civil counsel. Additional data could be gathered regarding the anticipated demand for such services under the recommendations provided in this report. The phase in period would also be used to establish a Court Appointed Civil Counsel Board to govern the guidelines necessary to operate a Court Appointed Civil Counsel Program statewide. Finally, throughout the phase in period counties would be responsible for funding court appointed civil counsel. Once the phase in period passes, the Court Appointed Civil Counsel Office would be responsible for funding the program throughout the state.

Strengths. This approach allows sufficient time for an Interim Committee to gather data regarding the demand and costs of a Court Appointed Civil Counsel Program. Currently, accurate data does not exist. Although the fiscal benefit to the counties would not be immediate, the counties would be assured that the costs associated with providing court appointed civil counsel would transition to the state after the phase in period. Finally, this approach would

provide sufficient time for the state to determine the best delivery approach in this context and provide accurate funding estimates.

Weaknesses. This proposal provides no immediate relief to counties. Any disparity of service between jurisdictions will continue as well as any gaps in service identified in this report.

APPENDIX A

FUNDING STATUTES AFFECTING COURT APPOINTED CIVIL COUNSEL

Probate

253B.07	Right to counsel at public expense for civil commitment proceedings
253B.19	Legal representation for judicial appeal panel proceedings and appeals to Court of Appeals
253B.23	Appeals to Court of Appeals
525.5501	Right to counsel at public expense for proposed ward/conservatee
525.703	Costs for lawyer or health professional in guardianships/conservatorships

Paternity

257.69	Representation by Counsel for Paternity Cases
257.69	Psychological exams and other expert witness fees for parentage proceedings

Juvenile Protection

260C.163	Appointment of counsel to parties involved in juvenile protection proceedings
260C.331	Court expenses and attorney fees in juvenile protection proceedings
260.56	Fees for counsel or guardian ad litem for juvenile in Interstate Compact on Juveniles proceedings

Other

563.01	In Forma Pauperis proceedings costs
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**APPENDIX B: PUBLIC DEFENDER NOTICE
RIGHT TO APPEAL IN JUVENILE PROTECTION MATTERS**

Date

Client Name
Client Address
Address
Address

Dear _____,

I am sorry to advise you that we have received the judge's ruling in your termination of parental rights case and that the court has ordered that your parental rights to *(names of children)* _____ are terminated.

I understand that you may decide to appeal this decision. This is your right. Unfortunately, the Public Defender's office does not represent people in these types of appeals. If you cannot afford representation by a private attorney and you want to have an attorney help you with the appeal, you should write to the trial judge and request appointment of counsel to represent you. The letter should be addressed to the Honorable *(name of Judge)* _____ and mailed to *(mailing address of judge)* _____

You should include the following in your letter:

- a. your name and mailing address;
- b. the fact that you want to appeal the termination of parental rights decision;
- c. that you want an attorney appointed to represent you in that appeal;
- d. the fact that your attorney was given notice of the order on _____; and
- e. the fact that you cannot afford to hire a private attorney.

It is very important that you make this decision and send this letter as soon as possible. This is because in most instances, you lose your right of appeal after 30 days. In your case, the 30 days will be up on *(date)* _____. It will take some time for the judge to make an appointment of counsel and then it will take more time for the new attorney to get the appeal ready to file. Do not wait until the last minute.

If you have any questions about these instructions, call me. I wish you the very best regardless of your decision.

Sincerely,

Public Defender