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PUBLIC DEFENDER REPRESENTATION IN CHIPS CASES:

A REPORT TO THE LEGISLATURE

January, 1999

John Stuart
Minnesota State Public Defender

1998 Minn. Laws Chap. 367
Art. 1 Sec. 6

INTRODUCTION

The 1998 Legislature directed the State Board of Public Defense to cooperate with the Supreme Court, Conference of Chief Judges, and the Association of Minnesota Counties to prepare a report on issues relating to public defender representation of juveniles and other parties in juvenile court proceedings. (Minn. Laws 1998, Ch. 367, Art. 1, §6.) This is the report. Its focus is on CHIPS (Children in Need of Protection or Services) cases because the provision of counsel to juveniles in delinquency matters was settled by the Legislature in 1994, after the report of the Supreme Court Juvenile Justice Task Force. (Minn. St. §260.155, Subd. 2(b).)

Unlike juveniles accused of delinquency, parties to a CHIPS case do not have a constitutional right to have counsel at public expense. Lassiter v. Dept. Of Social Services, 452 U.S. 18 (1981). In Minnesota several statutes create and govern CHIPS rights to publicly-funded representation. Minn. St. §260.155, Subd. 2 is the main source of the right to counsel; however, it does not establish a uniform or blanket entitlement. The court has discretion to appoint counsel "in any case in which it feels that such an appointment is appropriate."

When alleged CHIPS children do not have lawyers, they should have guardians ad litem. Minn. St. §260.155, Subd. 4. These guardians have extensive duties provided by statute in 1995. Additionally, the Supreme Court has adopted Rules of Guardian ad Litem Procedure, effective January 1, 1999.

In reality, provision of counsel to CHIPS children, and guardians ad litem, has been very uneven. The Supreme Court Foster Care and Adoption Task Force Final Report (January, 1997) found the following differences in appointment rates among the 87 counties:

-- Range of appointment rates of counsel for CHIPS children: 6%-99%.

-- Range of appointment rates of guardians ad litem for CHIPS children: 24%-94%. (See Final Report, pages 97-101.)

Some CHIPS children have a guardian ad litem, some have an attorney, some have both. County funding decisions and local court policies have created these differences.

The main problem that concerns every agency which has looked at this situation is that some CHIPS children do not have either a guardian ad litem OR an attorney. The result is that, while the parents and the county welfare departments may have very effective advocacy for their interests, the child may have none. All the agencies consulted in preparing this report agree that this lack of advocacy for the child's interests must be addressed.

There has not been agreement on how the problem should be solved. Three secondary but important issues remain:

(1) Who should advocate the child's interests? Attorneys? Guardians ad litem? One of each in some cases? One of each in every case?

Assuming the answer is not "one of each in every case," the next question is:

(2) How should representation decisions be made? By pure case-by-case judicial discretion? By implementation of statewide rules or standards?

And, finally, there is the question of funding:

(3) When counsel is appointed for children or guardians ad litem in CHIPS cases, who should pay the cost? The state, through the State Board of Public Defense? The counties? Some new "court appointed civil counsel provider?"

The remainder of this report sets out positions reached by various parties to the discussions of these issues.

*   *   *

I. THE STATE BOARD OF PUBLIC DEFENSE.

The Board is responsible for providing counsel to indigent children in juvenile court cases. Minn. Stat. §611.14. In 1998 the Board supported a bill that would have clarified this responsibility by providing counsel to children over the age of 10. (SF. 2834, 1998.) Younger children, and guardians ad litem, could be represented under local policies, but with county funding.

Continuing to discuss the issue throughout the year, the Board reached the following positions:

-- all alleged CHIPS children should have either counsel or a guardian ad litem. A public defender should not be appointed as counsel for the guardian ad litem.

-- all indigent alleged CHIPS children age 12 and over should have a public defender.

-- indigent alleged CHIPS children under age 12 should have a public defender if the court determines that the child is mature enough to work with the attorney making decisions about the case.

The Board would continue to provide counsel to parents in juvenile court CHIPS proceedings, and to legal guardians, but not to parents in delinquency cases, grandparents (unless they are the legal guardians,) or guardians ad litem. The Board believes these positions provide an appropriate degree of uniformity for a state-funded service, some flexibility for unusual cases, and the possibility for counties to support a higher level of services locally.

II. THE SUPREME COURT.

The Supreme Court has had two policy committees considering this issue. The first, the Foster Care and Adoption Task Force, was not able to resolve the question of whether an alleged CHIPS child should always have counsel. (Final Report, January 1997 pp. 16-17.) As a result they endorsed the existing provision that if there is counsel, counsel must be "effective," which comes into play after the court makes the discretionary decision to appoint a lawyer.

The report of the Task Force discussion of the right to counsel very well illustrates both sides of the debate:

> This issue was subject to vigorous Task Force debate. The majority of Task Force members were of the opinion that pre-verbal and young children cannot utilize legal counsel because these children are too young to express their interests, and the attorney for the child often ends up functioning as a guardian ad litem instead of legal counsel. These Task Force members argued that a guardian ad litem was more appropriate for these children than legal counsel and that counsel could be appointed for the guardian ad litem, when necessary, to represent the guardian ad litem in legal proceedings.
>
> Other Task Force members, especially those who represent children, argued that even young children can benefit from the representation of their legal interests and should have the same right to counsel as adults under a disability do. This is consistent with the American Bar Association Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases ("ABA Standards") which provide that "all children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continues." Under the ABA Standards, "to the extent that a child cannot express a preference, the child's attorney shall make a good faith effort to determine the child's wishes and advocate accordingly or request appointment of a guardian ad litem." The commentary to the ABA Standards provides that once a guardian ad litem is appointed, the child's attorney should continue to represent the child's legal interests.
>
> Task Force members arguing for the position that every child should have legal counsel pointed out that, in all juvenile offender proceedings, the child must be represented by counsel before the court may place the child out of the home,

including into foster care. Because every child in a CHIPS proceeding faces the possibility of out of home placement, these Task Force members argued that every child in a CHIPS proceeding should have legal counsel.

(Final Report, pp. 102-03.)

The second, and current, Supreme Court committee to look at the issue is the Juvenile Protection Rules Committee. This body has concluded taking testimony on its second Draft. Ultimately, Proposed Rules will be submitted to the Court for approval. The Second Draft is, as of September 18, 1998, as follows:

Rule 22.01. Right to Representation

All parties and participants have the right to be represented by counsel in all juvenile protection proceedings. This right attaches no later than when the party or participant first appears in court.

Rule 22.02. Appointment of Counsel

Subdivision 1. Mandatory Appointment for Child Age 12 or over. When a child age 12 or over cannot afford to retain counsel, or pursuant to Rule 23.01 the child does not have the right to a guardian ad litem, the court shall appoint counsel for the child at state expense.

Subd. 2. Discretionary Appointment for Child Under Age 12. The court may, sua sponte or upon the written or on-the-record request of a party or participant, appoint counsel for a child under age 12. When the child cannot afford to retain counsel, the appointment shall be made at state expense. If the court denies a request to appoint counsel for a child under age 12, the court shall make written findings as to the reason for denial.

Subd. 3. Mandatory Appointment for Child's Parent(s) or Legal Custodian(s). When the child's parent who is a party or the legal custodian(s) or, in the case of an Indian child the child's Indian custodian(s), cannot afford to retain counsel, the court shall appoint counsel for the parent who is a party or legal custodian(s) at state expense. Such representation shall include all juvenile protection matters as defined in Rule 2.01(i). Such representation shall not include establishment or enforcement of child support pursuant to Minnesota Statutes §518.551 or cost of care pursuant to Minnesota Statutes §260.251.

Subd. 4. Right to Guardian Ad Litem to Counsel. Upon request of the guardian ad litem the court shall appoint counsel for the guardian ad litem at state expense. Counsel for the guardian ad litem shall not be counsel for the child or for

any other party or participant.

Rule 22.03. Reimbursement.

When counsel is appointed at state expense for a child or a child's parent or legal custodian(s), the court may order, after giving the parent or legal custodian(s) 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(s) depending upon the ability of the person to pay.

This set of rules continues the current policy of discretionary appointment of counsel for alleged CHIPS children under 12. No standards are provided for the exercise of that discretion. There is no reference to the problem of some children being too young to express their interests.

The Rules do, however, attempt to shift the cost of representation of guardians ad litem from counties to the State. Whether this proposal would be an appropriate decision for the judicial branch, as opposed to the Legislature, remains to be seen. Generally the funding of a service created by statute would be determined by the legislative branch. (See Attachment A, letter from Richard Scherman to Judith Nord, October 6, 1998.)

III. THE CONFERENCE OF CHIEF JUDGES.

The Conference, and several of its committees, had extensive discussions of whether or not to support proposals for every alleged CHIPS child to have a lawyer. Eventually this proposal became a motion which was defeated, at the August 21, 1998 meeting, 11-5 with one abstention. On September 8, a resolution passed which supports the Second Draft of the Juvenile Protection Rules Committee to the extent that counsel would be required for children age 12 and over, and could be appointed for younger children by an exercise of discretion.

IV. THE ASSOCIATION OF MINNESOTA COUNTIES.

Although representatives of the Board of Public Defense and the AMC have met to discuss this issue, the main connection with the AMC has been through the State Funding Committee of the Conference of Chief Judges. This Committee has been exploring the possibility of completing the state funding of court functions. The AMC has supported this movement, provided that: changes are complete, help the property taxpayer, do not impact county budgets, and increase clarity and accountability. (Letter, Patricia Conley to State Court Administrator Sue Dosal, June 24, 1998.)

It would be theoretically possible to transfer the funding of representation of guardians ad litem to the state. However, there is extreme variance in the provision of guardian ad litem services now, among the 87 counties. It is unlikely that a transfer of this responsibility could be made that would fall within the parameters of the AMC's principles, unless state standards for

county-funded guardian ad litem programs first establish some degree of uniformity.

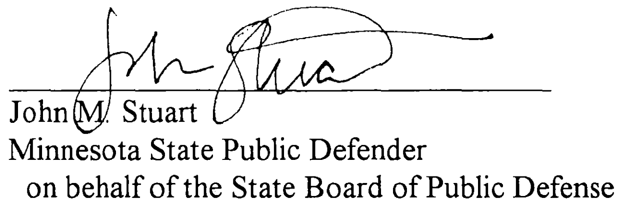
A related possibility proposed by the State Funding Committee is the creation of a "Court-Appointed Attorney Board," state-funded, to take on all the civil court-appointed counsel functions. These would include civil commitments and paternity cases in addition to guardians ad litem. (See Attachment B.)

CONCLUSION

1998 saw many serious discussions of CHIPS representation. Positions were developed that reflect major differences among the parties to the study. The Board of Public Defense seeks more uniformity of practice, and adequate funding. The Juvenile Protection Rules Committee and Conference of Chief Judges wish to preserve judicial discretion. The Association of Minnesota Counties wants to replace a very uneven county funding situation with systematic state funding.

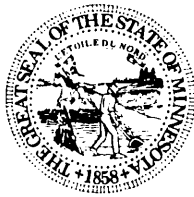
The Board of Public Defense is not seeking statutory change in this area this year. If change is proposed, the Board recommends that discretionary appointments of counsel for indigent alleged CHIPS children under 12 be limited by the requirement that the court must first determine that the child is mature enough to work with the attorney in making decisions about the case.

Respectfully submitted,



John M. Stuart
Minnesota State Public Defender
on behalf of the State Board of Public Defense

Attachment A.



STATE OF MINNESOTA
BOARD OF PUBLIC DEFENSE

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Chief Administrator

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October 6, 1998

Ms. Judith Nord
Minnesota Supreme Court
120 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Second Draft of Proposed Juvenile Protection Rules

Dear Ms. Nord and Committee Members:

Thank you for sending to our office a copy of the Proposed Juvenile Protection Rules. I appreciate the difficult job you are all facing in resolving the competing interests that arise in these important cases.

As Chief Administrator for the Board of Public Defense, I want to express my concern about one aspect of the issue of right to counsel. In the most recent draft of the proposed Rule 22, you have changed the provision in the current Rule 40 that now says that the court may appoint counsel "at public expense" to say "at state expense." This proposed change in the rule has significant cost implications for the Board of Public Defense (we estimate it may potentially exceed several million dollars).

The State of Minnesota currently pays for most public defender services in our state, but not all. This was not an oversight, but was negotiated with all parties, including county governments. While your Committee may wish that the state pay for all public defense services, the Minnesota Legislature has not accepted this course of action, and, in fact, has rejected for several years now the notion of paying state dollars for representation of all parties in juvenile protection cases.

Although I can understand your desire to establish a consistent system of paying for counsel for parties in juvenile protection cases, this issue more appropriately should be referred to the Legislature, which decides such funding issues.

It would be unfortunate for individuals affected by your recommendations, and a disservice to them as well, if your new Rule 22 said that the state were to pay for counsel

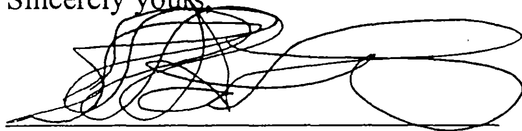
in juvenile protection matters and the Legislature were to decide not to appropriate the money to the Board of Public Defense to provide that service. Who then would provide that service?

The Board of Public Defense shares your concern about providing adequate representation to the parties in juvenile protection cases, but does not agree with your Committee's proposal of changing the wording of the rule from "at public expense" to "at state expense." We would oppose this new wording, as we have in the past, because it does not address the question of adequate funding. Making such a recommendation may seem logical to your Committee members, but such a recommendation operates in a vacuum. This rule change may in fact set up an unfortunate confrontation in the future between the Judicial Branch and the Legislative Branch and affect some of your other recommendations.

In summary, I am respectfully requesting your Committee to address our concern as to future funding to pay for these services. Furthermore, I am requesting that you delay adopting the language of proposed Rule 22 that would allow appointment of counsel "at state expense," until after our agency and your Committee have had the opportunity to present this issue to the Legislature during the 1999 session.

Thank you for consideration of our position on this matter.

Sincerely yours,



Richard F. Scherman
Chief Administrator
Board of Public Defense

RFS/pyj

cc: Senator Allan Spear
Representative Loren Solberg
John Stuart, State Public Defender
Sue Dosal, State Court Administrator

Attachment B.

APPENDIX A

There are several possibilities for managing the civil court appointed attorney function. A separate Court-Appointed Attorney Board could be created to manage the civil court appointed attorney functions remaining at the county level. The Office of State Public Defender could be expanded to include not only those personnel and other associated costs of the public defense of defendants in criminal cases (as presently provided in Minn. Stat. Chapter 611), but also personnel and other associated costs for representation of indigent persons in civil cases as required by statute or caselaw. These cases would include civil commitments and psychopathic personality cases, juvenile protection cases, paternity cases, and representation of wards in guardianship or conservatorship cases.

This obviously represents a significant departure from the current system. However, it would satisfy several important objectives. It would ensure equal access to justice and equal representation of indigent persons across the state. It would relieve the counties of unforeseen costs that are difficult to budget for, particularly in the face of levy limits. By shifting the investigative, expert and witness costs from the courts or counties to the entity seeking reimbursement, it provides greater fiscal responsibility. The party seeking the services would have the responsibility for paying for the requested service. (A similar cost shift could deal with prosecution witness fees).

Creation of a separate court-appointed attorney agency would also serve to better highlight the distinction between the courts and public defense. Too often the issue of state funding of the courts has been painted with a broad brush to include public defender services. While the issue of the cost of public defender type services is an important one, the system should stress that the courts are separate and independent from both the prosecution and defense. Creation of this separate entity would serve to maintain that independence while at the same time provide for the necessary level of representation for indigent persons.

SOURCE: State Funding Committee, Conference of Chief Judges. July, 1998.