

## PROPOSED STANDARD XXII

### Representation of Children in Dependent/ Neglect Cases (Expressed Wishes)

#### **GOALS:**

- A. To actively and professionally advocate for children who are the subject of actions under the Child Abuse and Neglect laws of Montana and afford them every legal opportunity to state their expressed wishes in case and to protect their due process rights.
- B. To serve the expressed wishes of the child and be independent from the court and other participants in the litigation, including the child's parents or guardians, and be unprejudiced and uncompromised in representing the child. Attorneys representing children shall comply with the general standards for public defenders as well as specific standards.
- C. To exercise independent and professional judgment in carrying out the duties assigned by the court and to participate fully in the case on behalf of the child. Attorneys representing a child subject to Child Abuse and Neglect law proceedings shall comply with the general standards for public defenders providing representation of an adult charged with violations, as well as the specific Standards contained herein.
- D. To recognize that children are at a critical stage of development and that skilled juvenile advocacy will positively impact the course of children's lives through holistic representation.
- E. **PARTICIPATION IN PROCEEDINGS** - It is a goal that each child who is the subject of an abuse and neglect proceeding has the right to attend and fully participate in all hearings related to his or her case.

#### **DEFINITIONS:**

- a. Abuse and neglect proceeding: a court proceeding under Title 41, Chapter 3, Part 4, MCA for the protection of a child from abuse or neglect or a court proceeding under Title 41, Chapter 3, Part 6, MCA in which termination of parental rights is at issue. These proceedings include:
  - i. Abuse;
  - ii. Neglect

- iii. Child in voluntary placement in state care;
  - iv. Termination of parental rights;
  - v. Permanency hearings; and
  - vi. Post termination of parental rights through adoption or other permanency proceeding.
- b. Best interest advocate: an individual, not functioning or intended to function as the child's lawyer, appointed by the court to assist the court in determining the best interests of the child.
  - c. Child: any person under the age of 18.
  - d. Child's lawyer (or lawyer for the children) : a lawyer who provides legal services for a child and who owes the same duties, including undivided loyalty, confidentiality and competent representation, to the child as is due an adult child.
  - e. Developmental level: a measure of the ability to communicate and understand others, taking into account such factors as age, mental capacity, level of education, cultural background, and degree of language acquisition.<sup>1</sup>

**TRAINING:**

- a. To be eligible for assignment to represent children in these court proceedings, counsel shall receive a minimum of sixteen (16) hours of training in representing children of which at least four (4) hours were devoted to the Indian Child Welfare Act.
- b. Counsel shall be knowledgeable in the following areas:
  - i. Legislation and case law on abuse and neglect, termination of parental rights, and adoption of children, including those with special needs;
  - ii. Child and adolescent development;
  - iii. Child welfare and family preservation services available in the community and the problems they are designed to address;
  - iv. Services and treatment options for child both locally and statewide;

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<sup>1</sup> See Commentary 1 (from ABA Standards)

- v. Services the State will and won't routinely pay for;
- vi. The structure and functioning of Child and Family Services of the Department of Public Health and Human Services;
- vii. Local experts who can provide attorneys with consultation and testimony on the reasonableness and appropriateness of efforts to maintain or return the child to the home;
- viii. Local and state experts who can provide attorneys with consultation and testimony of the special needs of Indian children and cultural differences;
- ix. Basic knowledge of brain development and the effect of trauma on brain development;
- x. Basic knowledge of mental health issues;
- xi. Substance abuse issues;
- xii. Special education laws, rights and remedies;
- xiii. School related issues including school disciplinary procedures, zero tolerance policies, and IEP's; and
- xiv. Basic knowledge of disability issues and rights. (from OPD Standards for parents and juveniles)

#### **QUALIFICATIONS OF THE CHILD'S LAWYER.**

- a. The court shall appoint as the child's lawyer an individual who is qualified through training and experience, according to standards established by the OPD Commission.
- b. Lawyers for children shall receive initial training and annual continuing legal education that is specific to child welfare law. Lawyers for children shall be familiar with all relevant federal, state, and local applicable laws.
- c. Lawyers for children shall not be appointed to new cases when their present caseload exceeds more than a reasonable number given the jurisdiction, the percent

of the lawyer's practice spent on abuse and neglect cases, the complexity of the case, and other relevant factors.<sup>2</sup>

#### **DUTIES OF CHILD'S LAWYER AND SCOPE OF REPRESENTATION**

- a. A child's lawyer shall participate in any proceeding concerning the child with the same rights and obligations as any other lawyer for a party to the proceeding.
- b. The duties of a child's lawyer include, but are not limited to:
  - i. Meeting with the child prior to each hearing and for at least one in-person meeting every quarter;
  - ii. Taking all steps reasonably necessary to represent the child in the proceeding, including but not limited to: interviewing and counseling the child, preparing a case theory and strategy, preparing for and participating in negotiations and hearings, drafting and submitting motions, memoranda and orders, and such other steps as established by the applicable standards of practice for lawyers acting on behalf of children in this jurisdiction;
  - iii. Prior to every hearing, investigating and taking necessary legal action regarding the child's medical, mental health, social, education, and overall well-being;
  - iv. Visiting the home, residence, or any prospective residence of the child, including each time the placement is changed;
  - v. Reviewing and accepting or declining, after consultation with the child, any proposed stipulation for an order affecting the child and explaining to the court the basis for any opposition;
  - vi. Taking action the lawyer considers appropriate to expedite the proceeding and the resolution of contested issues;
  - vii. Where appropriate, after consultation with the child, discussing the possibility of settlement or the use of alternative forms of dispute resolution and participating in such processes to the extent permitted under the law of this state;

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<sup>2</sup> See Commentary 2 (from ABA Standards)

- viii. Where appropriate and consistent with both confidentiality and the child's legal interests, consulting with the best interests advocate;
  - ix. Seeking court orders or taking any other necessary steps in accordance with the child's direction to ensure that the child's health, mental health, educational, developmental, cultural and placement needs are met; and
  - x. Representing the child in all proceedings affecting the issues before the court, including hearings on appeal or referring the child's case to the appropriate appellate counsel as provided for by/mandated by law.<sup>3</sup>
- c. When the child is capable of directing the representation by expressing his or her objectives, the child's lawyer shall maintain a normal child-lawyer relationship with the child in accordance with the rules of professional conduct. In a developmentally appropriate manner, the lawyer shall elicit the child's wishes and advise the child as to options.<sup>4</sup>
- d. The child's lawyer shall determine whether the child has diminished capacity pursuant to the Montana Rules of Professional Conduct (Rule 1.14).<sup>5</sup> In making the determination, the lawyer should consult the child and may consult other individuals or entities that can provide the child's lawyer with the information and assistance necessary to determine the child's ability to direct the representation.
- i. When a child has diminished capacity, the child's lawyer shall make a good faith effort to determine the child's needs and wishes. The lawyer shall, as far as reasonably possible, maintain a normal child-lawyer relationship with the child. During a temporary period or on a particular issue where a normal child-lawyer relationship is not reasonably possible to maintain, the child's lawyer shall make a substituted judgment determination includes determining what the child would decide if he or she were capable of making an adequately considered decision, and representing the child in accordance with that determination. The lawyer should take direction from the child as the child develops the capacity to direct the lawyer. The lawyer shall advise the court of the determination of diminished capacity and any subsequent change in that determination.<sup>6</sup>
  - ii. When the child's lawyer reasonably believes that the child has diminished capacity, is at risk of substantial physical, financial or other harm unless action is

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<sup>3</sup> See Commentary 3 (from ABA Standards)

<sup>4</sup> See Commentary 4 (from ABA Standards)

<sup>5</sup> See Appendix: Query 1

<sup>6</sup> See Commentary 5 (from ABA Standards)

taken, and cannot adequately act in the child's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the child and, in appropriate cases, seeking the appointment of a best interest advocate or investigator to make an independent recommendation to the court with respect to the best interests of the child.

- iii. When taking protective action, the lawyer is impliedly authorized under Montana Rule 1.6(a) to reveal information about the child, but only to the extent reasonably necessary to protect the child's interests. Information relating to the representation of a child with diminished capacity is protected by Rule 1.6 and Rule 1.14 of the ABA Montana Rules of Professional Conduct.<sup>7</sup>

### **CASE PREPARATION**

- a. Counsel shall solicit the support of social workers that understand the public defender's advocacy role to investigate the various health and social services that may be available to the children and families in the community.
- b. Counsel's role of advocate and advisor must be based on knowledge of the range of services available to the child.
- c. Counsel shall advise the child(ren) of all available options, as well as the practical and legal consequences of those options.<sup>8</sup>
- d. Counsel shall advocate the child's express wishes and shall not substitute his or her judgment about what is in the best interests of the child. The primary role of counsel is to represent the perspective of the child alone and not that of the child's best interests, of the child's parents or guardian, or of the Department of Public Health and Human Services. Appointment of a guardian-ad-litem to investigate the best interests of the child is a matter within the exclusive province of the court.
- e. Counsel shall ensure that children do not waive appointment of counsel. Counsel should be assigned at the earliest possible opportunity and shall actively represent the child at all stages of the proceeding. When counsel becomes aware of the assignment, counsel shall meet with the child as soon as possible to permit effective preparation.<sup>9</sup>

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<sup>7</sup> See Appendix Query 2 and Commentary 6 (from ABA Standards)

<sup>8</sup> See Appendix Query 3

<sup>9</sup> See Appendix Query 4

- f. When meeting with the child for the first time, counsel shall identify himself or herself by name and affiliation, if appropriate. If the first meeting takes place in a detention, mental health, or other healthcare facility, counsel shall make it clear to the minor that he or she is not a member of the facility staff. Counsel shall inform the child that the conversation is confidential and that the matters they discuss should not be revealed to facility staff or others in order to preserve that attorney-child confidentiality. Counsel shall also inform the child that he or she has a right to remain silent.<sup>10</sup>
- g. During the conference, counsel shall:
- i. Explain the issues and possible dispositions;
  - ii. Explain the court process, timelines, and the role of all the parties involved, such as judge, prosecutor, guardian ad-litem, child and parent;
  - iii. Inform the child not to make statements to anyone concerning the case without prior consultation with counsel;
  - iv. Obtain signed releases for medical and mental health records, education records, and other necessary records. Counsel should advise the child of the potential use of this information and the privileges that attach to this information;
  - v. Obtain information from the child concerning the facts and whether there were any statements made, witnesses, and other relevant information.
- h. Counsel shall maintain the attorney-child privilege with the understanding that the attorney represents the child alone and not the child's parents or guardians. The potential for a conflict of interest between one or both parents should be clearly recognized and acknowledged. Counsel should inform the parent that he or she is counsel for the child and that in the event of a disagreement between a parent or guardian and the child, counsel is required to serve exclusively the wishes of the child.<sup>11</sup>
- i. If counsel is unable to communicate with the child because of language or disability, counsel shall use the experts necessary to ensure the ability to communicate with the child.<sup>12</sup>
- j. **DURATION OF APPOINTMENT.** Unless otherwise provided by a court order, an appointment of a child's lawyer in an abuse and neglect proceeding continues in effect until the lawyer is discharged by court order or the case is dismissed. The

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<sup>10</sup> See Appendix: Query 6

<sup>11</sup> See Appendix: Query 7

<sup>12</sup> See Commentary 7 (from ABA Standards), Appendix Query 8, and Appendix Query 9

appointment includes all stages thereof, from removal from the home or initial appointment through all available appellate proceedings. With the permission of the court, the lawyer may arrange for supplemental or separate counsel to handle proceedings at an appellate stage.<sup>13</sup>

### **HANDLING THE CASE**

- a. Counsel should seek the most expedient and timely resolution of the proceeding possible while providing effective advocacy for the child. Counsel should only seek the continuance of any phase of the proceedings if it is necessary to effectively advocate for the child.
- b. Counsel shall be familiar with the applicable court rules and local customs in practice regarding the admissibility of evidence commonly offered in such proceedings, such as reports from agency employees, as well as substantive law in these proceedings.
- c. In preparation for any proceedings such as show cause, adjudicatory or termination, counsel should:
  - i. Review the petition and all other evidence;
  - ii. Counsel shall obtain the entire file from DPHHS;
  - iii. Be fully informed of the rules of evidence, court rules, and the law with relation to all stages of the hearing process;
  - iv. Be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the hearing;
  - v. Be aware of the substantive and procedural law regarding the preservation of legal error for appellate review;
  - vi. Counsel shall be familiar with applicable principals of confidentiality;
  - vii. Prepare the child for the proceeding, explain the issues involved, and the alternatives open to the judge;
  - viii. If the child has already been removed from the home, determine the basis for the removal;

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<sup>13</sup> See Commentary 8 (from ABA Standards) and Appendix Query 10

- ix. Determine the actions taken by the State to investigate other possible actions to protect the child without removal, such as locating a non-custodial parent or relative, identifying services to address the needs of the parent and child, including intensive home-based services, and other services, such as disability support services;
  - x. Familiarize himself or herself with relevant law; and,
  - xi. Interview all witnesses, favorable and adverse.
- d. During any proceedings, counsel shall, where it benefits the child:
- i. Examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence;
  - ii. Offer evidence favorable to the child's case, if available; and,
  - iii. Determine whether an expert is needed to assist in preparation of the parent's case.
- e. During the show cause hearing, counsel shall examine witnesses as to:
- i. Whether the agency has made all reasonable efforts to explore services that will allow the child to remain safely at home and avoid protective placement of the child;
  - ii. Whether there are other responsible relatives or adults available who may be able to care of the child or provide additional supervision;
  - iii. The accuracy of the facts contained in the petition or affidavit in support of intervention; and,
  - iv. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.
- f. Where counsel believes that the child's desires are not in the child's best interest, counsel may attempt to persuade the child to change his or her position. If the child remains unpersuaded, however, counsel should assure the child that counsel will advocate for the child's expressed interest.

- i. Counsel should make sure that the child is carefully prepared to participate in the procedures required and used in the particular court.
- g. At the adjudicatory hearing, counsel shall, where it benefits the child, examine and cross-examine adverse lay and expert witnesses, and challenge other non-testimonial evidence regarding:
  - i. The accuracy of the facts presented by the State to prove abuse or neglect of the child;
  - ii. Factual basis of opinions presented by the State to prove abuse or neglect of the child;
  - iii. Whether the agency failed to provide services that would have allowed the child to stay safely in the home;
  - iv. If the court grants the State's request and orders the child to be removed from the home, counsel shall investigate supervision and visitation restriction conditions and determine if a challenge is appropriate.
- h. Prior to making admissions or stipulations regarding placement or visitation counsel must:
  - i. Discuss the consequences of such a decision with the child;
  - ii. Explain to the child that the ultimate decision to make the admission or voluntarily place the child has to be made by the parent;
  - iii. Investigate and, where appropriate, candidly explain to the child the prospective strengths and weaknesses of the case, including the availability of the State's witnesses, concessions and benefits which are subject to negotiation, and the possible consequences of any adjudication.
- i. Counsel's recommendation on the advisability of an admission should be based on a review of the complete circumstances of the case and the child's situation.
- j. In preparation for a disposition hearing, counsel should:
  - i. Determine what actions the parent has taken since the adjudicatory proceedings to address the concerns of the State as to the safety of the child;
  - ii. Investigate what the agency has done to explore services that will allow the child to remain safely at home or return to the home; and,

- iii. Determine what sort of disruption that the removal of the child has caused the child and the family.
- k. In the disposition hearing, counsel shall, where it benefits the child, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:
  - i. Whether, if the agency objects to placing the child with the parent, the agency sufficiently explored and provided services that would have allowed the child to reside safely in the parent's home;
  - ii. Whether the agency appropriately considered the non-custodial parent or other family members as caretakers; and,
  - iii. The factual basis of the agency's recommendations for placement outside of the home.
- l. If the court grants the State's request and orders the child to be removed from the home, counsel shall challenge unnecessary supervision and restrictions on visitation.
- m. In preparation for a permanency hearing, and, if parental rights have not been terminated, counsel should:
  - i. Keep in contact with the child and determine what actions the parent has taken to address the concerns of the State as to the safety of the child;
  - ii. Investigate what the agency has done to explore services that will allow the child to live safely with the parent; and,
  - iii. Determine what sort of disruption the removal of the child has caused the child and the family.
- n. In preparation for a parental rights termination proceeding, counsel should:
  - i. Determine what actions the parent has taken to address the concerns of the State as to the safety of the child;
  - ii. Investigate what the agency has done to explore services that will allow the child to remain safely in the home; and,

- iii. Determine what sort of disruption that the removal of the child has caused the child and the family.
- o. In a parental rights termination proceeding, counsel shall, where it benefits the child, examine and cross-examine adverse lay and expert witnesses and challenge other non-testimonial evidence regarding:
  - i. Whether the statutory grounds for termination have been met;
  - ii. Whether termination is in the best interest of the child;
  - iii. Whether the agency made reasonable efforts to prevent the need for termination and to safely reunify the family, such as identifying services available to protect the child without removal, in-home baby sitters, intensive home-based services, and other services that address the needs of the child, including disability support services;
  - iv. Whether the treatment plan, if one was required, was appropriate.
- p. If counsel withdraws from representation of a child following adjudication and disposition, counsel shall make all reasonable efforts to ensure that the child is well represented in matters that stem from the hearing.<sup>14</sup>

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<sup>14</sup> See Appendix: Query 11