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9.15 LEGAL REPRESENTATION

PURPOSE

Most judicial activities, including child protective proceedings, are complex and require special legal skills not usually possessed by parents or social workers. All parties in a complex legal proceeding are usually better served by having legal counsel. To provide the most protection of all parties' rights, there must be clarity of roles, rights and responsibilities.

LEGAL BASE


1. Guardian ad litem:

a. Title 22 MRSA 4005 (l), requires that the court:

- (1) Appoint a guardian ad litem in every child protection proceeding except a request for a preliminary protection order under 4034 or petition for a medical treatment under 4071, but including hearings on those orders.
- (2) Appoint him as soon as possible after the proceeding is initiated.
- (3) Pay his reasonable costs and expenses.
- (4) Guardians ad litem must meet the qualifications established by the Supreme Judicial Court.

b. The guardian ad litem shall be given access to all reports and records relevant to the case. In general the guardian ad litem shall act in pursuit of the best interest of the child. S/He will investigate to ascertain the facts, including:

- (1) Reviewing relevant mental health, medical, school or other records/materials regarding the child, parents, or other persons having or seeking care or custody of the child;
- (2) Interviewing the child with or without other persons present;
- (3) Interviewing parents and other persons involved with the

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child;

(4) Subpoenaing, examining and cross-examining witnesses;

(5) Making a report and recommendations to the court with a copy to each party.

(6) The GAL shall have face-to-face contact with the child in the child's home or foster parent home within seven (7) days of appointment by the court and at least once every three (3) months thereafter.

c. Title 4 MRSA §1501 et seq., authorizes the Court Appointed Special Advocate Program (CASA) to provide volunteer lay persons to serve as guardians ad litem in child protection proceedings.

d. The GAL is responsible for acting in pursuit of the best interest of the child and reporting to the court his or her objective and informed findings. Staff should include the GAL in as much of the process of the case as possible, inviting the GAL to Family Team Meetings (FTM) and other relevant group decision making processes. Clear and factual information about the child is to be provided to the GAL in a timely manner.


e. The GAL role is expected to extend to advocacy for the best interest of the child and may include recommendations on placement, visits, services and educational needs. Staff should be considering these recommendations in case planning.

f. Staff should support regular contact with the child, informing the child of the initial visit.

g. Prior to changes in placement, the caseworker should consult with the GAL wherever possible. The GAL must be informed of any changes in the child's placement within two (2) working days. Both the caseworker and GAL should discuss the extent to which the child will be involved in the court process (present at court, meeting judge.)

g. GAL has the authority to ask questions of witnesses in the hearing and offer recommendations at the hearing.

2. Counsel for parents:

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a. Title 22 MRSA §4005 (2), entitles parents to legal counsel in child protection proceedings, except a request for a preliminary protection order under §4034, or a petition for a medical treatment under §4071, but including hearings on those order.

b. Parents may request the court to appoint counsel for them.

c. The court, if it finds them indigent, shall appoint and pay the reasonable costs and expenses of the parents' legal counsel.

3. Counsel for the Department:

The Department of Health and Human Services is represented by the Office of the Attorney General or other counsel duly authorized by the Office of the Attorney General.

PRACTICE STANDARDS

1. Parents:

a. At the time a decision is reached to bring a petition, staff working with the parents will advise them of their right to legal representation , and will encourage them to seek legal advice.

If an attorney is known to have been advising or representing parents about child protection matters, that attorney will be informed of the department's decision to bring a petition.


b. Staff may have to help parents get to court to request counsel.

c. The court will determine whether parents are legally indigent and, if so, will appoint counsel. The court may ask the department caseworker for whatever financial information the caseworker may have to assist the court in its determination.

d. Parents may, before the judge, knowingly waive right to legal representation.

If parents decide to waive this right, arrangements will be made with the court to include this information on a formal document, e.g., on the petition, in the findings, in an order, or on a signed waiver.

e. If staff suspect that a parent may be incompetent, this must be

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brought to the attention of the court. The judge will determine whether to appoint a guardian ad litem for the parent.

f. Legal counsel for parents may, on occasion, advise parents not to talk with the Department, especially if criminal charges are pending. Staff will honor the attorney's request not to contact the attorney's clients, but will explain the importance of involving parents in case planning and explain the inherent problems, such as delays in services. The Assistant Attorney General should be contacted in these circumstances, and the court should be made aware that a request has been made not to contact the parent.

2. Child:

a. Staff will check with the court to ensure that a guardian ad litem is appointed for the child in all cases, as specified in the statute; whether parents are consenting to the department's request in the petition or motion or not. The purpose of the guardian ad litem is to act in pursuit of the child's best interest.

b. The guardian ad litem may be an attorney, or persons trained through CASA to understand the legal rights and responsibilities in child protective proceedings and be able to assess the child's needs, gather facts, evaluate alternatives, question the parties, and otherwise actively participate on the child's behalf before and during the hearing.

c. Staff should review the Handbook for Guardian ad Litem provided by the Maine District Court, to be fully informed of the role of the GAL and his or her interaction with DHHS and the courts.


d. In some areas, the court will appoint a person working under the supervision of the Court Appointed Special Advocate Program to be guardian ad litem.

e. Notice of hearing must always be given to GAL.

3. Department of Human Services:

a. The Attorney General's Office will assign an Assistant Attorney General to represent the Department.

b. Legal representation includes:

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(1) Providing legal advice on the evidence of the case and on the strengths and weaknesses of possible legal options that the Department has available to it.

(2) Preparation (in conjunction with the caseworker) and presentation of the case, according to established court procedures.

c. Confidentiality and disclosure of information to parent(s) or their attorney(s) and the guardian ad litem is a complex issue. One person's right to disclosure may be in conflict with another person's right to confidentiality.

(1) The Legal summary format (see item 4 below) may be used by the Assistant Attorney General as part of disclosure to parent(s)' attorney(s) and/or made available to the guardian ad litem or other parties; it must contain facts rather than conjectures.

(2) Information from case records will be reviewed by the caseworker or other designated staff person to determine what is relevant, and what will be disclosed or kept confidential in accordance with Title 22 §4008.


(3) Copies of medical or psychological evaluations done in preparation for a Child and Family Services hearing, whether court ordered or not, are usually provided to parent(s)' attorney(s).

(4) Copies of other reports, evaluations, or case records will be disseminated in accordance with 22MRSA §4008.

(5) When there is doubt about what is to be disclosed, and the manner in which it is to be done, contact the Assistant Attorney General or the program consultant. (6) Information being disclosed will be marked confidential.

(7) What was disclosed to whom will be noted in the case record.

d. District staff responsibilities include:

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(1) Making the decision whether a child protection petition should be brought before the court. This decision whether child is believed to be in jeopardy and a child protection order sought is from the court should be completed in a group discussion model with AAG consultation.

(2) Notifying Assistant Attorney General immediately when a petition is filed.

(3) Gathering and presenting evidence to support the petition, including properly authenticated documentary evidence. Assistant Attorney General will assist when subpoenas, motions, and/or court orders are required.

(4) Providing the Assistant Attorney General with evidence, including names, addresses, phone numbers of witnesses, and the specific facts to which each witness can testify.

(5) Discussing, organizing, and preparing the case with the Assistant Attorney General.


(6) Notifying the Assistant Attorney General in writing of the Department's requested disposition at least ten (10) days prior to the hearing, except for emergency hearings.

This can be in the legal summary or other format agreed to by the Assistant Attorney General.

e. Case management

(1) If the caseworker and supervisor disagree with their Assistant Attorney General's recommendations regarding legal sufficiency of evidence, case management or negotiations (e.g., whether to proceed or dismiss; whether to have a full hearing; evidence to be presented; proposed contents of a court order), they will contact the Child Welfare Program Administrator (CWPA) who may request consultation with central office staff.

f. Agreements with other parties during litigation are not reached by the Assistant Attorney General without consultation with the caseworker.

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(1) See Child Protection Orders, in Section XI especially regarding negotiation.

(2) Stipulations agreed to by parties cannot be appealed. See Appeals in Section XI.

g. Concerns about particular court orders and/or specific issues with a judge will be referred to the Assistant Attorney General and CWPA.

Social service staff will never, directly or indirectly, contact a judge about a disagreement regarding a particular case or the judge's stance in an aggregate of cases.

PROCEDURES

1. Assistance from the Assistant Attorney General should be requested as soon as caseworker determines that it will be required. At a minimum:

a. Hearing on Preliminary Protection Order

Immediately notify Assistant Attorney General and provide a copy of the petition, affidavit, order and any documentation of evidence available.

b. Final hearing


(1) No hearing on Preliminary Protection Order was required

Preferably three (3), but at least two (2) weeks prior to the final hearing date, notify Assistant Attorney General and provide a copy of the petition, casework narrative, and legal summary, and available documentation of evidence.

(2) Preliminary hearing was held

At least ten (10) days before final hearing date, provide casework dictation and attorney summary, and any additional documentation of evidence obtained.

2. All except emergency cases will require a formal summary for the Assistant Attorney General as soon as possible but no later than two (2) weeks before the hearing, to assist the Assistant Attorney General in case preparation.

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3. Testimony will usually be limited to the direct knowledge of the witness and to statements by others heard by witnesses and which are not excluded by the hearsay rule.

The worker will take care to remain objective and will:

- a. Consult with the AAG to ensure that all of the information needing to be presented can be done so through admissible evidence.
- b. Stress the jeopardy to the child, based on knowledge of child development.
- c. Weight testimony carefully so as to avoid words which may appear to be inflammatory or disparaging.
- d. Remain clear, concise, and professional.