

STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

ADMINISTRATIVE ORDER 2013 – 03

APPOINTMENT OF COUNSEL FOR INDIGENT PARENTS

In August 2011, Administrative Order Number 42 was issued prohibiting the appointment of counsel, in light of the legislative repeal of the authority for the appointment of counsel for indigent parents in abuse and neglect cases under RSA chapter 169-C. However, in the case, In Re C.M. & a., 163 NH 768 (2012), the New Hampshire Supreme Court held that, while due process does not require the per se appointment of counsel in every abuse and neglect case, the facts of a particular case may require such an appointment.

As a result of the Supreme Court opinion, the Circuit Court issued a protocol to provide guidance on the factors to be considered by the trial court in making the determination of when the appointment of counsel is permissible pursuant to In Re C.M. & a. The protocol is attached to this administrative order.

This administrative order supersedes Administrative Order Number 42. As of the effective date of this order, if counsel was appointed in the Circuit Court on an abuse and neglect appeal pursuant to RSA 169-C, then counsel shall be deemed required in Superior Court for the appeal. The affected party need not file a motion in Superior Court for the appointment of counsel.

Date: March 26, 2013

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Tina L. Nadeau, Chief Justice  
New Hampshire Superior Court

## Protocol 4 – Appointment of Counsel for Indigent Accused Parents in RSA 169-C Cases

Effective July 1, 2011, the legislature amended RSA 169-C: 10, II(a), eliminating the statutory right to counsel for an indigent parent alleged to have abused or neglected his or her child. See Laws of 2011, 224:77. However, in the case, In Re C.M. & a., 163 NH 768 (2012), the New Hampshire Supreme Court held that, while due process does not require the per se appointment of counsel in every abuse and neglect case, the facts of a particular case may require such an appointment.

This protocol is designed to provide guidance on the factors to be considered by the trial court in making the determination of when the appointment of counsel is permissible pursuant to In Re C.M. & a.

### A. Standard

The Supreme Court found that, "...the procedural protections embodied in [RSA 169-C] prevent the risk that an uncounseled parent will be erroneously deprived of the care or custody of his or her child." In Re C.M. & a. at 777. The Court also acknowledged, however, that, "...the facts and circumstances of a particular case may require the appointment of counsel to adequately protect a parent's right to due process." (Id.)

Therefore, the standard in making this determination is as follows:

**"Do the facts and circumstances of the case before the trial court outweigh the presumption that the procedural safeguards found in RSA 169-C adequately protect the accused parents from the erroneous deprivation of the care and custody of their child?"**

This determination must, as indicated by the Court, be made by the trial court on a case-by-case basis.

### B. Timing, Method and Review of Inquiry Related to Appointment of Counsel

It would appear from C.M. that the first procedural point at which the trial court must address the issue of the adequacy of the protections afforded by RSA 169-C is at the preliminary hearing where, pursuant to RSA 169-C: 15 IV, the Court must determine, "...whether each parent summoned, having custody or control of the child, understands the possible consequences to parental rights should the court find that the child is abused or neglected." In Re C.M. at 775.

The trial court's colloquy with the parents should be directed at determining the parent's ability to understand the nature and consequences of the proceedings, their cognitive and intellectual capacity and their ability to adequately represent themselves. Consistent with that colloquy, the court should consider the complexity of the legal issues presented by the case and the potential need for expert testimony.

Additionally, any existing medical, psychological, educational or other relevant existing records reflecting on these factors may also be considered. The court is encouraged to engage DCYF and the CASA GAL/GAL on these issues as part of the colloquy and to inquire about any relevant information DCYF and the CASA GAL/GAL might have relative to the parent's ability to represent themselves. Once the court has made those necessary findings, the court should make inquiry regarding the indigence of the parents. The hearing on these issues must be on the record.

Because the factors may change during the course of the proceedings and the nature and scope of pre- and post-adjudicatory hearings is different, it is recommended that the trial court review its initial finding on the issue of appointment of counsel made at the Preliminary Hearing, at each subsequent hearing in the case. For example, DCYF may subsequently determine that it will be seeking termination of the parents' rights to the child or the court may become aware of additional information which calls into question the initial determination that the parent(s) have the ability to understand the proceedings and their potential consequences to their parental rights is no longer appropriate or the court determines an accused parent understands the nature and scope of a post-adjudicatory hearing and has the ability to represent himself/herself at that hearing.

#### C. Narrative Written Order of Appointment

The trial judge, after conducting the colloquy on appointment of counsel, shall create a narrative order explaining in detail the reasons for the court's decision to appoint or not appoint counsel. The order should contain specific factual findings which justify the appointment of counsel for the parent(s), based on the factors discussed in C.M.

#### D. Mandatory Appointment of Counsel

A close reading of C.M. would seem to indicate that the appointment of counsel is mandatory in two very limited circumstances if either of the following factors is found to be present:

1. The court finds that the accused parents, whether because of cognitive impairment or severe mental illness, cannot understand the possible consequences to their parental rights should the court find that the child is abused or neglected; or,
2. The court finds that there is a significant likelihood that permanent termination of parental rights may occur. (See Court's citation to In Interest of D.B., 385 So. 2d 83, 91 (Fla. 1980) in C.M. at p. 777). Such a finding should not be made absent a removal of the child(ren) from the home.

#### E. Discretionary Appointment of Counsel

If the trial court finds that the accused parent(s) are able to understand the consequences to their parental rights in the event that the court finds the child is abused or neglected and that there is either no threat or only a potential threat of permanent termination of parental rights the court can, in very limited circumstances, consider appointment of counsel on a case by case basis.

**Note Well: Prior to the discretionary appointment of counsel, the trial court must make specific written findings that the circumstances of the accused parents in the case before the court outweigh the presumption created by the Supreme Court that the procedural safeguards provided in RSA 169-C adequately protect parents' right to due process.**

The following factors may be considered by the court in making this determination:

- Seriousness and complexity of the specific allegations of abuse or neglect as well as the complexity of issues surrounding any potential defense, for example, the need for medical or psychological evidence either in the proof or defense of the case;
- Ability of the parent(s) to adequately represent themselves, including their intellectual capacity, sophistication in terms of their ability to understand the process, call witnesses, challenge the state's case, articulate their position etc.;
- The significant likelihood that the proceedings may result in permanent deprivation of parental rights combined with a removal of the child (ren) from the home, even temporarily; and/or
- The existence of cognitive impairment, severe mental illness or other incapacity which prevents the accused parent(s) from fully understanding the proceedings and their consequences.

#### F. Indigence

In any case where the court has determined that the appointment of counsel would be appropriate (mandatory or discretionary), the court must also determine if the accused parent is indigent and unable to afford counsel prior to appointing counsel to represent the parent. The question of indigence is an inquiry that is separate from the analysis concerning the constitutional entitlement to counsel.

#### G. Unbundled Legal Services

In any case where the court determines the parent(s) is entitled to counsel pursuant to the holding in In Re C.M. & a. and this protocol, the court must consider whether the use of unbundled legal services would be appropriate for limited representation of the accused parent(s).

Those services can and should be ordered for discreet portions of the process. For example, if a parent requires the assistance of counsel at the Preliminary Hearing and, after full consultation with counsel, decides to enter into a consent agreement, counsel's services may appropriately end with the adoption of that agreement by the court. Or, where counsel represents the parent for purposes of the adjudication, counsel's services may appropriately end with the court's finding. Of course, the appropriate use of unbundled services will be fact-dependent in every case.

#### H. Fee Caps

In the event that the court appoints counsel for an accused parent(s), Supreme Court Rule 48 provides a fee cap of \$1700.00. Counsel should be reminded of the fee cap at the time of appointment. Motions to exceed should not be favored and should be considered only in the most extreme cases.