Non-Parents' Right to Counsel in Abuse, Neglect and Dependency Cases

Sara DePasquale wrote a blog on the Role of a Foster Parent in the A/N/D Court Action, which prompted me to explore the role of non-parents, and specifically their right to representation.

Prior to the filing of an abuse, neglect and dependency (A/N/D) petition, the child may be in the care of grandparents, other relatives or friends. They are providing support and maintenance and making daily decisions about the health and welfare of the child. This may be more permanent substitute care compared to the temporary care provided by a foster parent.

Once the petition is filed each parent named in the petition is appointed provisional counsel pursuant to G.S. 7B-602. But what about non-parents? The relative or friend who has custody of or is caring for the child may meet the statutory definition of "caretaker" or "custodian". See G.S. 7B-101. Also, the child may have a court appointed guardian [G.S.7B-600; G.S. 35A-1202(7) & (10)] at the time the petition is filed. Does the caretaker, custodian or guardian have a right to court appointed counsel if they are indigent?

Is a non-parent who is a party entitled to counsel?

The short answer is no under the statute because G.S. 7B-602 is limited to parents. However, as a matter of due process, an indigent non-parent party might be entitled to representation.

If certain criteria are met, a guardian, custodian, or caretaker can be made a party to the abuse, neglect and dependency proceeding. G.S. 7B-401.1(c)-(e) set forth the criteria:

A **guardian** shall be a party if one of two conditions is met.

- The person is a court-appointed or general guardian at the time the petition is filed; or
- The person is appointed as the child's guardian pursuant to G.S. 7B-600 and the court has found that the guardianship is the permanent plan for the juvenile.

A **custodian** shall be a party if one of two conditions is met.

- The person is the juvenile's custodian as defined in G.S. 7B-101(8), when the petition is filed; or
- The person is awarded custody of the juvenile in the juvenile proceeding but only if the court has found that the custody arrangement is the permanent plan for the juvenile.

A **caretaker** shall be a party if one of three conditions is met.

- The petition contains allegations relating to the caretaker;
- The caretaker has assumed the obligation and status of a parent; or
- The court in its discretion makes a caretaker a party.

One could argue that when a guardian, custodian or caretaker is made a party to the proceeding, that step should automatically trigger the right to court appointed counsel because the person has met the statutory requirements and has stepped into the place of the parents. Party status does not trigger a right to representation, however. Unlike many states, North Carolina does not provide a statutory right to counsel for indigent non-parents. *Compare* Ala. Code 12-15-305, Me. Rev. Stat. tit. 22, 4005, Ga. Code Ann.15-11-103, Ky. Rev. Stat. Ann. 620.100 and Mo. Ann. Stat. 211.211.4.

Does due process require appointment of counsel for indigent non-parents?

An IDS Policy adopted in July 2008 addresses the appointment of counsel for non-parent respondents in abuse, neglect, and dependency proceedings. It states that if the judge decides that due process requires appointment of counsel for an indigent non-parent respondent, IDS will pay for the representation. The IDS policy references two cases that the court would likely review to determine an indigent non-parent's right to appointed counsel: *Mathews v. Eldridge*, 424 U.S. 319 (1976) and *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

As indicated by those decisions, courts apply a balancing test when analyzing a person's due process rights. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), after the respondent's disability benefits were terminated, he brought an action challenging the constitutionality of the procedures for terminating disability benefits and asked for the reinstatement of his benefits pending a hearing. The District Court held that the termination procedures violated procedural due process and concluded that prior to termination of benefits the respondent was entitled to an evidentiary hearing. The Court of Appeals affirmed. The U.S. Supreme Court reversed and held that an evidentiary hearing is not required prior to termination of disability benefits, and that the administrative procedures for the termination fully comport with due process. In reaching its conclusion, the U.S. Supreme Court considered the flexibility of due process and applied a **three-pronged balancing test** assessing:

(1) The private interest that will be affected by the official action;

(2) The risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and

(3) The government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail.

Thereafter, in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the U.S. Supreme Court applied this three-pronged test to the appointment of counsel for a parent in a termination of

parental rights proceeding. The U.S. Supreme Court held that failure to appoint counsel for an indigent parent in a proceeding for termination of parental status did not deprive the parent of due process in light of the circumstances. The court found that the petition contained no allegations upon which criminal charges could be based, no expert witnesses testified, the case presented no troublesome points of law, and the presence of counsel could not have made a determinative difference for the parent.

In terms of the first prong, the private interest varies with the non-parent's status. A **guardian** has the strongest interest. By statute the guardian has the care, custody and control of the juvenile, which is the same language the courts have used when describing the rights of parents. Furthermore, a guardian can represent the juvenile in legal actions, and consent to medical care, marriage, enlistment in the military and enrollment in school. G.S.7B-600. Under G.S. 48-3-601(2)c., a guardian must consent to a child's adoption.

Second in line is the **custodian**. A custodian is awarded legal custody of the juvenile by a court but the definition of custodian in the Juvenile Code does not include the same rights of care, custody, and control to the child as the statute that addresses guardianship. The custodian's rights are authorized (or limited) by different statutes. For example, G.S. 48-2-401(c)(4) entitles a custodian to notice that an adoption petition for the child has been filed, but G.S. 48-3-601 does not require a custodian's consent to adoption. A custodian's rights may also be specifically addressed by the court order.

The interests of a **caretaker** are least likely to trigger a due process right to representation. Although a caretaker may be responsible for the health and welfare of a child, the caretaker has not been awarded any legal rights over the child by a court. A parent may remove the child from the caretaker at any time, without any court action. *See* In re A.C.F., 176 N.C. App. 520, 525 (2006). Some circumstances, however, might trigger a right to representation for a caretaker. *See In re Shelby R.*, 804 A.2d 435 (N.H. 2002) (plurality opinion finds as a matter of due process under state constitution that stepparent had right to appointed counsel in abuse and neglect proceeding; opinion relies on stepparent's interest in preserving marital and family relationship).

The *Mathews* and *Lassiter* cases do not resolve how the court should analyze the three-prong test in deciding if indigent non-parents have a right to representation in A/N/D cases. The North Carolina appellate courts apparently have not addressed the issue.

Do you have any experience or thoughts on this issue?