

OPINION NO. 85-090

Syllabus:

In parentage proceedings where the complainant-mothers and their children are recipients of public assistance, the State Public Defender must, in accordance with R.C. 120.18, R.C. 120.28, and R.C. 120.33, partially reimburse the counties for the cost of representing indigent paternity defendants who face the state as an adversary.

To: **Randall M. Dana, Ohio Public Defender, Columbus, Ohio**
By: **Anthony J. Celebrezze, Jr., Attorney General, December 27, 1985**

I have before me your request for my opinion as to whether, in light of the Ohio Supreme Court case, State ex rel. Cody v. Toner, 8 Ohio St. 3d 22, 456 N.E.2d 813 (1983), cert. den., 104 S.Ct. 1912 (1984), the Ohio Public Defender must reimburse the various counties pursuant to R.C. Chapter 120 "for attorney fees and expenses incurred in the course of providing representation for indigent paternity defendants in paternity actions brought by the State on behalf of mothers whose children are recipients of public assistance." See R.C. 5107.07; 7 Ohio Admin. Code. 5101:1-3-10(A)(1)(c).

In State ex rel. Cody v. Toner, the Ohio Supreme Court held that: "The denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions." 8 Ohio St. 3d 22, 456 N.E.2d 813 (syllabus).

In order to respond to your question, I must first examine the pertinent provisions of R.C. Chapter 120, which establishes the appointed counsel and public defender systems in Ohio.

R.C. 120.16(A)(1) requires county public defenders to represent certain indigent persons, by providing:

The county public defender shall provide legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty and in postconviction proceedings as defined in this section.

See generally R.C. 120.13-.15. R.C. 120.26(A)(1) requires joint county public defenders to represent indigent defendants under the same circumstances as are set forth in R.C.

120.16(A)(1). See generally R.C. 120.23-.25. In lieu of using a county or joint county public defender system, a board of county commissioners may establish an appointed counsel system to provide representation for indigent persons in the proceedings set forth in R.C. 120.16(A). R.C. 120.33. The defendant may either select his own counsel or request a court to designate counsel to represent him in any such proceeding. R.C. 120.33(A).¹

When representation has been provided to indigent defendants pursuant to R.C. 120.16, R.C. 120.26, or R.C. 120.33, R.C. Chapter 120 provides a method whereby the county or counties involved may be reimbursed by the state for part of the costs involved in providing such representation.

R.C. 120.14(C)(2)(a) requires a county public defender commission to:

[m]ake an annual report to the county commissioners and the Ohio public defender commission on the operation of the county public defender's office, including complete and detailed information on finances and costs that separately states costs and expenses that are reimbursable under section 120.35 of the Revised Code, and any other data and information requested by the state public defender.

R.C. 120.18(A) reads in pertinent part:

The county public defender commission's report to the board of county commissioners shall be audited by the county auditor. The board of county commissioners, after review and approval of the audited report, may then certify it to the state public defender for reimbursement. . . .The state public defender shall also review the report and, in accordance with the standards, guidelines, and maximums established pursuant to divisions (B)(7) and (8) of section 120.04 of the Revised Code, prepare a voucher for fifty per cent of the total cost of each county public defender's office for the period of time covered by the certified report and a voucher for fifty per cent of the costs and expenses that are reimbursable under section 120.35 of the Revised Code, if any, or, if the amount of money appropriated by the general assembly to reimburse counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems is not sufficient to pay fifty per cent of the total cost of all of the offices and systems, for the lesser amount required by section 120.34 of the Revised Code. For the purposes of this section, "total cost" means total expenses minus costs

¹ Pursuant to R.C. 120.16(A)(2), R.C. 120.26(A)(2), and R.C. 120.33(A), a county or joint county public defender or appointed counsel may also provide legal representation to indigent adults and juveniles who are charged with the violation of an ordinance of a municipal corporation for which the penalty or any possible adjudication includes a potential loss of liberty, if the county or local commission has contracted with the municipal corporation to provide legal representation in such circumstances.

and expenses reimbursable under section 120.35 of the Revised Code and any funds received by the county public defender commission pursuant to a contract, except a contract entered into with a municipal corporation pursuant to division (E) of section 120.14 of the Revised Code, gift, or grant. (Emphasis added.)

See R.C. 120.34. R.C. 120.24(C)(2)(a) and R.C. 120.28 provide a system for the reimbursement of expenses incurred by a joint county public defender office which is analogous to the system provided for the reimbursement of a county public defender office pursuant to R.C. 120.14(C)(2)(a) and R.C. 120.18(A). Similar provision is made in R.C. 120.33(A)(4) for the partial reimbursement of the costs and expenses of a county appointed counsel system.

You have asked whether the State Public Defender must partially reimburse counties pursuant to the scheme discussed above for the cost of providing representation to indigent paternity defendants who are entitled to such representation under Cody. R.C. Chapter 120 authorizes representation of an indigent defendant by a county or joint county public defender or by appointed counsel in any proceeding in which such defendant is charged with the commission of an act which violates a state statute and for which a possible adjudication could result in a loss of liberty. R.C. 120.16(A)(1); R.C. 120.26(A)(1); R.C. 120.33. The State Public Defender must partially reimburse a local public defender for the expenses incurred in providing such representation. R.C. 120.18(A); R.C. 120.28; R.C. 120.33. Thus, the question is whether a parentage action brought under R.C. Chapter 3111² comes within the statutory scheme set forth in R.C. Chapter 120. In responding to this question, I must examine the circumstances under which R.C. Chapter 120 was enacted, and the legislative history of R.C. Chapter 120. See R.C. 1.49(B) and (C).

The Legislative Service Commission analysis of Am. Sub. H.B. 164, 111th Gen. A. (1975) (eff. Jan. 13, 1976), which enacted R.C. Chapter 120, states at page one that, "[t]he stated purpose of the bill is to establish a system for providing counsel for indigent persons that meets the requirements of recent U.S. and Ohio Supreme Court decisions and to provide a system for financing public defenders. . . ." See generally Meeks v. Papadopoulos, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159, 162 (1980) (while not determinative of

² Actions initiated pursuant to R.C. Chapter 3111 are civil in nature. R.C. 3111.08(A). It must be recognized, however, that the civil or criminal nature of a particular proceeding is not determinative of the right to counsel pursuant to R.C. Chapter 120. Cf. Mastin v. Fellerhoff, 526 F. Supp. 969, 973 (S.D. Ohio 1981) (concluding that due process requires appointment of counsel whenever a proceeding may result in imprisonment, stating, "a state may not deprive a person of his physical liberty unless that person is represented by counsel, no matter what the nature of the proceeding. . . . To characterize a proceeding as civil rather than criminal is a distinction without a difference if the end result is loss of physical liberty"). Rather, the determinative issue is whether a defendant is charged with the violation of a state statute for which the penalty or any possible adjudication includes the potential loss of liberty.

legislative intent, Legislative Service Commission analyses may be referenced when helpful and objective). The analysis further states at page two: "Present Ohio law is not as broad as the constitutional requirements. . . . [R]ecent court decisions require the presence of counsel at. . . any. . . types of proceedings where the presence of counsel is necessary to assure the adequate presentation of a defense. Present Ohio statutes do not require this." Am. Sub. H.B. 164 was intended to "create a comprehensive system for providing legal representation for indigent persons." Legislative Service Commission analysis at 2. Accordingly, as stated in the analysis at page eight, the public defender "would have to provide legal representation to indigent persons charged with the violation of state statute that is a serious offense," and to "all other persons in any proceeding the outcome of which could result in the loss of liberty."³

It is therefore apparent that the legislature intended to enact a broadly inclusive scheme for the representation of indigent defendants at the county level, with reimbursement from the state. The legislative scheme was intended to remedy the fact that previous Ohio statutory law was not as broad as the constitutional requirements, as enunciated by the United States and Ohio Supreme Courts, and to provide, in accordance with these constitutional requirements, counsel at public expense for indigent defendants whose liberty was threatened in any proceeding. Thus, in those instances where the courts have found a constitutional right to representation at public expense, the legislature intends that such representation be provided through the statutory scheme of public defense established under R.C. Chapter 120 and, that reimbursement by the state for such defense be provided pursuant to R.C. 120.18, R.C. 120.28, and R.C. 120.33.

It is instructive to note that Am. Sub. H.B. 164 enacted R.C. 120.16 to read in pertinent part as follows:

(A)(1) The county public defender shall provide legal representation to indigent persons charged with the violation of a state statute that is a serious offense as defined in the Rules of Criminal Procedure, and in postconviction proceedings as hereinafter defined.

(3) The county public defender shall represent, when designated by the court, juveniles. . . and all other persons. . . in any proceeding the outcome of which could result in the loss of liberty.

1975-76 Ohio Laws, Part I, 1868 (Am. Sub. H.B. 164, eff. Jan. 13, 1976).

R.C. 120.26 and R.C. 120.33, as enacted by Am. Sub. H.B. 164, provided for representation by a joint county public defender and appointed counsel, respectively, for those persons specified in R.C. 120.16(A). See Ohio R. Crim. P. 2. Am. Sub. H.B. 164 clearly provided for representation of indigent defendants in all proceedings the outcome of which could result in the loss of liberty.

³ As discussed below, R.C. 120.16, R.C. 120.26, and R.C. 120.33 have been amended since the enactment of Am. Sub. H.B. 164.

R.C. 120.16(A), R.C. 120.26, and R.C. 120.33 were amended by Am. Sub. S.B. 271, 115th Gen. A. (1984) (eff. Sept. 26, 1984), to read substantially in their current forms.⁴ The Legislative Service Commission analysis of Am. Sub. S.B. 271 states at 3-4:

Under existing law, county and joint county public defenders are required to provide representation to persons who are charged with violating a state statute that is a "serious offense" as defined in the Criminal Rules. . . . They are also required to provide legal representation, when designated by a court, to: (1) juveniles in any proceeding that could result in a loss of liberty. . . and to (2) other persons in any proceeding that could result in a loss of liberty. . . .

. . . the bill would streamline these provisions. Under the bill, county and joint county public defenders would be required to represent indigent persons who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or adjudication could include the potential loss of liberty. (Emphasis added.)

Thus, while R.C. 120.16, R.C. 120.26, and R.C. 120.33 no longer expressly provide representation for all persons "in any proceeding the outcome of which could result in the loss of liberty," it is apparent that the changes effected by Am. Sub. S.B. 271 in this regard were intended merely to "streamline" the previous statutory language, and were not meant to deprive anyone entitled to representation under previous law of that representation. The intent of R.C. Chapter 120 continues to be that of providing a scheme for representation of indigent defendants when representation at public expense is constitutionally required. See R.C. 1.49(A) (when determining legislative intent, the object sought to be attained by the enactment of a statute may be considered). It appears then that, the provisions of R.C. Chapter 120 should be construed in order to fulfill the legislature's intent that the constitutional rights of indigent defendants be protected. See R.C. 1.11 ("[r]emedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice"); State ex rel. Maher v. Baker, 88 Ohio St. 165, 102 N.E. 732 (1913) (syllabus, paragraph one) ("[r]emedial statutes should be liberally construed so as to furnish all the remedy and accomplish all the purposes intended by the statutes"). The Ohio Supreme Court has determined that "[t]he denial of court-appointed counsel for an indigent paternity defendant who faces the state as an adversary, when the complainant-mother and her child are recipients of public assistance, violates the due process guarantees of the Ohio and United States Constitutions." State ex rel. Cody v. Toner (syllabus). With the legislative intent in enacting R.C. Chapter 120 in mind, I turn to your question whether R.C. Chapter 120 provides a mechanism for the provision of counsel to such defendants.

⁴ Sub. H.B. 201, 116th Gen. A. (1985) (eff. July 1, 1985) amended R.C. 120.33. Such amendment, however, has no bearing on this discussion.

A court's judgment or order finding the existence of a father-child relationship pursuant to R.C. Chapter 3111 is determinative for all purposes, R.C. 3111.13(A), and "may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child," R.C. 3111.13(C). See R.C. 3111.13(D)-(F); R.C. 3111.16; R.C. 3113.21.

R.C. 3111.15 reads as follows:

(A) If the existence of the father and child relationship is declared or if paternity or a duty of support has been adjudicated under this chapter or under prior law, the obligation of the father may be enforced in the same or other proceedings by the mother, the child, or the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral, or by any other person, including a private agency, to the extent that any of them may furnish, has furnished, or is furnishing these expenses.

(B) The court may order support payments to be made to the mother, the clerk of the court, or a person or agency designated to administer them for the benefit of the child under the supervision of the court.

(C) Willful failure to obey the judgment or order of the court is a civil contempt of the court. (Emphasis added.)

Thus, pursuant to R.C. 3111.15, if a person, who has been adjudged to be the father of a child and ordered by the court to furnish child support, fails to obey the court's order to support the child, he may be found to be in civil contempt of the court. See R.C. 2705.02(A) (a person found guilty of disobedience of or resistance to a lawful order or judgment of a court may be punished as for a contempt). A person who is found guilty of contempt may be fined not more than five hundred dollars or imprisoned not more than ten days, or both, R.C. 2705.05, or if the contempt "consists of the omission to do an act which the accused yet can perform, he may be imprisoned until he performs it," R.C. 2705.06. Thus, a person may be deprived of his liberty as the result of a contempt proceeding, see generally Mastin v. Fellerhoff, 526 F. Supp. 969 (S.D. Ohio 1981); In Re Young v. Whitworth, 522 F. Supp. 759 (S.D. Ohio 1981); Schock v. Sheppard, 7 Ohio App. 3d 45, 453 N.E.2d 1292 (Lucas County 1982); 1982 Op. Att'y Gen. No. 82-098, and the contempt proceeding itself is a direct result of a parentage action commenced pursuant to R.C. Chapter 3111.

A judicial determination made pursuant to R.C. Chapter 3111 that a person is the father of a child may also lead to criminal sanctions if such person fails to comply with an order of support. R.C. 2919.21(A)(2) prohibits a person from failing to provide adequate support to "[h]is or her legitimate or illegitimate child under eighteen, or mentally or physically handicapped child under twenty-one," and subdivision (A)(4) prohibits a person from failing to provide adequate support to "[a]ny person whom, by law or by court order or decree, the offender is legally obliged to support." Whoever violates R.C. 2919.21 is guilty of a first degree misdemeanor, R.C. 2919.21(D), for which he may be imprisoned for up to six months, R.C. 2929.21(B)(1). See State v. Brown, 5 Ohio App. 3d

220, 451 N.E.2d 1232 (Stark County 1982). See also R.C. 3113.04 (providing for suspension of sentence of person convicted under R.C. 2919.21).

Further, R.C. 3113.06 provides as follows:

No father, or mother when she is charged with the maintenance, of a legitimate or illegitimate child under eighteen years of age, or a mentally or physically handicapped child under age twenty-one, who is legally a ward of a county children services board or a county department of welfare or is the recipient of aid pursuant to Chapter 5107, or 5113, of the Revised Code, shall neglect or refuse to pay such board or department the reasonable cost of maintaining such child when such father or mother is able to do so by reason of property, labor, or earnings.

An offense under this section shall be held committed in the county in which the board or department is located. The board or department shall file charges against any parent who violates this section, unless the board or department files charges under section 2919.21 of the Revised Code, or unless charges of nonsupport are filed by a relative or guardian of the child, or unless action to enforce support is brought under Chapter 3115, of the Revised Code.

Whoever violates R.C. 3113.06 is guilty of a fourth degree felony, R.C. 3113.99, for which a defendant may be imprisoned for not less than eighteen months, two years, thirty months, or three years, whichever is fixed by the court, and for not more than five years, R.C. 2929.11(B)(7). See R.C. 2151.49; R.C. 3113.07; R.C. 3113.08; R.C. 3113.11.

Thus, a defendant upon whom an obligation of support is imposed pursuant to R.C. 3111.13 is subject to prosecution under R.C. 2919.21 or R.C. 3113.06, as well as R.C. 2705.02 and R.C. 3111.15, if he fails to provide such support, and is thus subject to a term of imprisonment.

The United States Supreme Court has noted that, when a putative father may be punished by imprisonment for failure to comply with a support order arising from a paternity proceeding, the putative father has a "liberty interest threatened by the possible sanctions for noncompliance," which is entitled to due process protection. Little v. Streater, 452 U.S. 1, 13 (1981). In State ex rel. Cody v. Toner, the court cited this consideration noted in Little v. Streater, and thereby expressly recognized that a paternity proceeding may threaten the liberty of the putative father. 8 Ohio St. 3d at 23, 456 N.E.2d at 814. The court in Cody weighed the liberty interest and other private interests of a paternity action defendant in accordance with the standards set forth by the United States Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976), in order to determine whether a paternity defendant has a constitutional right to counsel.⁵ Upon considering the

⁵ In Mathews v. Eldridge, 424 U.S. 319, 335 (1976), the United States Supreme Court stated that in order to determine whether due process requirements are met in a governmental proceeding, a court must consider three factors:

pertinent factors, the court in Cody concluded that, "protection of the . . .substantial [liberty and other private] interests of the [putative father]. . .must be considered as being of utmost importance." 8 Ohio St. 3d at 24, 456 N.E.2d at 815.

The sole threat to a putative father's personal liberty as a consequence of a parentage action initiated pursuant to R.C. Chapter 3111 would arise in the event of such individual's noncompliance with a support order against the putative father. See R.C. 2919.21, R.C. 3111.15, and R.C. 3113.06, as discussed above. It is clear, that in Cody, the court determined that this threat to the putative father's liberty was sufficient to invoke the due process protection provided by appointed counsel. It is, therefore, appropriate to consider that this threat to the putative father's liberty renders a proceeding conducted pursuant to R.C. Chapter 3111 a proceeding which may result in a potential loss of liberty. This potential loss of liberty faced by a putative father in a parentage proceeding arises from the fact that a putative father may be charged with the violation of one or more state statutes as a result of the parentage proceeding.

I recognize that a proceeding conducted pursuant to R.C. Chapter 3111 is not itself a proceeding in which a defendant is charged with an act that is a violation of state statute. I believe, however, that, in light of State ex rel. Cody v. Toner, together with the evident intent of the General Assembly in enacting R.C. Chapter 120, R.C. 120.16, R.C. 120.26, and R.C. 120.33 must be given a construction which requires the county, through its public defender or appointed counsel system, to provide representation under the circumstances described herein. R.C. Chapter 120 was enacted to provide representation at public expense to indigent defendants constitutionally entitled to such representation. The Ohio Supreme Court has deemed indigent paternity defendants constitutionally entitled to representation at public expense under those facts present in that case. Thus, R.C. Chapter 120 must be construed so as to provide counsel to those defendants found entitled to representation in Cody.

A construction of R.C. Chapter 120 which excluded parentage proceedings from the reimbursement provisions of R.C. Chapter 120 would lead to an unreasonable situation in which the statutory scheme designed to provide counsel for indigent defendants at public expense, as constitutionally required, would not encompass representation at proceedings in which the Ohio Supreme Court has expressly found such constitutional right to representation. Such a construction would result in the situation where paternity defendants would not be entitled to representation under R.C. Chapter 120, even though other defendants deemed constitutionally entitled to representation

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

would be entitled to counsel under R.C. Chapter 120. Such a construction runs afoul of the rule of statutory construction that it is presumed that the legislature, in enacting a statute, intends a just and reasonable result. See R.C. 1.47(C); 1982 Op. Att'y Gen. No. 82-021. See also R.C. 1.49(E) (in determining legislative intent, a court may consider "[t]he consequences of a particular construction"). Thus, I must construe R.C. Chapter 120 to avoid such unreasonable results.

In State ex rel. Heller v. Miller, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980), the court addressed the issue whether indigent parents are constitutionally entitled to be provided with counsel and a transcript at public expense for appeals as of right in actions instituted by the state to terminate parental rights. The court held indigent parents were so entitled as a matter of due process and equal protection. The court stated as follows:

The Court of Appeals herein held that there is no statutory authorization to appoint counsel on appeal in a civil matter. Constitutional requirements override any statutory void involved. In addition, R.C. Chapter 120 is used at the trial level under R.C. 2151.352⁶ and can be used on appeal as well. (Footnote added.)

61 Ohio St. 2d at 14, 399 N.E.2d at 70-71. Similarly, I believe that R.C. Chapter 120 must be used in this instance to provide counsel to indigent paternity defendants in a proceeding under R.C. Chapter 3111, which is a civil matter, and to provide a means for financing public defenders or appointed counsel for such defendants. The provisions of R.C. Chapter 120 may be used to supply a scheme for providing representation at public expense where such representation is constitutionally required, even though R.C. Chapter 120 may not be applicable to a proceeding by its own terms.

In sum, the legislature intends that whenever a defendant is constitutionally entitled to representation at public expense that it be provided through the system established by R.C. Chapter 120, and that the costs of such representation be shared by the county and the state, as set forth in R.C. Chapter 120. It is my conclusion that R.C. 120.16, R.C. 120.26 and R.C. 120.33 must be construed to provide that indigent paternity defendants are entitled to representation pursuant to those provisions in actions brought by the state on behalf of complainants and their children who are recipients of public assistance. Accordingly, the State Public Defender must partially reimburse the counties for the cost of representing such defendants pursuant to R.C. 120.18, R.C. 120.28, and R.C. 120.33.

In conclusion, it is my opinion, and you are advised, that in parentage proceedings where the complainant-mothers and their children are recipients of public assistance, the State

⁶ R.C. 2151.352 provides that, "[a] child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the [juvenile court] proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code."

Public Defender must, in accordance with R.C. 120.18, R.C. 120.28, and R.C. 120.33, partially reimburse the counties for the cost of representing indigent paternity defendants who face the state as an adversary.