

**N.D.A.G. Letter to Cleveland (Jan. 9, 1991)**

January 9, 1991

Ms. Constance L. Cleveland  
Assistant State's Attorney  
Burleigh County Courthouse  
Bismarck, ND 58501

Dear Ms. Cleveland:

Thank you for your August 30, 1990, letter requesting an Attorney General's opinion concerning the requirement for counsel for juveniles under N.D.C.C. § 27-20-26.

The question you raise concerns the interpretation of N.D.C.C. § 27-20-26 and its application to the interview of a child concerning an ongoing investigation which implicates the child. Thus, the questioning you are concerned with is considered a stage of the proceeding which entitles the child to counsel. State v. Ellvanger, 453 N.W.2d 810, 813 (N.D. 1990); In Interest of J.D.Z., 531 N.W.2d 272, 275 (N.D. 1988). N.D.C.C. § 27-20-26(1) provides:

Except as otherwise provided under this chapter, a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter and, if as a needy person he is unable to employ counsel, to have the court provide counsel for him. . . . Counsel must be provided for a child not represented by his parent, guardian, or custodian.

Id.

The Division of Juvenile Services is the administrative agency which has custody of delinquent and unruly children committed to its care by the court. N.D.C.C. § 27-21-02. Thus, the Division of Juvenile Services is the legal custodian of children committed to its care, custody, and control. Legal custodians are allowed to represent a child at an interview conducted by an officer regarding an on-going investigation which implicates the child. N.D.C.C. § 27-20-26. As a child's custodian, the Division of Juvenile Services may represent a child at an interview conducted by an officer regarding an on-going investigation which implicates the child.

The child's right to counsel is not eliminated solely because the child's parent, guardian, or custodian represents him at an interview. N.D.C.C. § 27-20-26 contemplates a three-part test to determine whether counsel is not required.

First, the child's parent, guardian, or custodian must be present.

Secondly, the child's parent, guardian, or custodian must provide adequate representation of the child. The North Dakota Supreme Court has held that the mere presence of the parent does not constitute representation by the child's parent sufficient to allow for waiver of the child's right to counsel under N.D.C.C. § 27-20-26. In Interest of J.D.Z., 431 N.W.2d 272, 275-276 (N.D. 1988); State v. Grenz, 243 N.W.2d 375, 379-80 (N.D. 1976).

The third requirement is that the right to counsel must be waived. The child may waive his right to counsel if the waiver is "knowingly, intelligently, and voluntarily made." In Interest of D.S., 263 N.W.2d 114, 120 (N.D. 1978). Whether a waiver is made in a knowing, intelligent, and voluntary manner is a question of fact. However, a child cannot waive his right to counsel when he is not represented by his parent, guardian, or custodian. State v. Ellvanger, 453 N.W.2d 810, 813. Additionally, the child and the parent, guardian, or custodian must "be informed of the child's right to counsel and to have counsel provided by the court if his parent or parents cannot, without undue financial hardship, provide full payment for legal counsel and other expenses of representation." In Interest of D.S., 263 N.W.2d 114, 120 (N.D. 1978).

It is therefore my opinion that under N.D.C.C. § 27-20-26, counsel need not be present when a child is represented by his parent, guardian, or custodian, if that representation is adequate, and if there has been a knowing, intelligent, and voluntary waiver of the right to counsel. Whether those circumstances exist in a particular situation is a question of fact which would depend upon each individual situation.

Sincerely,

Nicholas J. Spaeth

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