

Kutelia E. **Francis** and Robinson F. Welly,
a Minor Child,
Plaintiffs/Appellants,
v.
Jack Thomas **Welly**,
Defendant/Appellee.
Appeal No. 98-034
FCD Case No. 96-1118
December 18, 1999

Argued and submitted August 27, 1999

Counsel for Appellant: Tom Schweiger, Micronesian Legal Services Corp., Saipan.

Counsel for Appellee: In Propria Persona, Saipan.

BEFORE: DEMAPAN, Chief Justice, CASTRO, Associate Justice, WHITE, Special Judge

DEMAPAN, Chief Justice:

¶1 [1] This is an appeal from a Superior Court Order which concluded Plaintiffs/Appellants Kutelia Eriper Francis (“Plaintiff Francis”) and her minor child, Robinson Francis Welly (“Plaintiff Welly”) (collectively, “Plaintiffs”), were not entitled to appointment of counsel under the Uniform Parentage Act to assist them in collecting child support from Defendant/Appellee Jack Thomas Welly (“Defendant Welly”). We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended¹, 1 CMC § 3102 and 8 CMC § 1534. We reverse and remand with instructions to enter an order appointing counsel for Appellants.

ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 [2] The issue before us is whether the Superior Court has the authority to appoint counsel to assist Plaintiffs in seeking child support under the Uniform Parentage Act. Since this issue turns on statutory

¹ N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

interpretation, it is a question of law to be reviewed de novo. *See Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On March 26, 1997 the trial court issued a Judgment wherein Defendant Welly was adjudged the father of Plaintiff Welly, a minor. *Francis v. Welly*, Civil Action No. 96-1118 (N.M.I. Super. Ct. Mar. 26, 1997) (Judgment). The court granted custody to Plaintiff Francis, the mother, and ordered child support of \$175 per month. *Id.* Plaintiffs' attorney was permitted to and did withdraw in the matter. *Id.*

¶4 On July 31, 1998 Plaintiff Francis filed a Motion for Appointment of Counsel and supporting Declaration, requesting assistance in seeking child support from Defendant Welly because Plaintiffs were unable to afford an attorney. Motion for Appointment of Counsel, Excerpts of Record ("E.R.") at 4-6. At the hearing on the motion, the trial court found Plaintiffs were not entitled to appointment of counsel, and instead suggested that they file a separate action regarding Defendant's failure to pay child support. Transcript, E.R. at 7-10. The trial court entered its Order to this effect on September 15, 1998. *Francis v. Welly*, Civil Action No. 96-1118 (N.M.I. Super. Ct. Sept. 15, 1998) (Order). Plaintiffs timely appealed.

ANALYSIS

I. **The Superior Court Has the Authority to Appoint Counsel to Assist Appellant in Seeking Paternity Support under the Uniform Parentage Act**

¶5 Plaintiffs claim they are entitled to court-appointed counsel by the clear language of 8 CMC § 1719(a).² We agree.

¶6 [3,4] Under the Commonwealth's Uniform Parentage Act ("Act"), beginning at 8 CMC § 1700, a judgment establishing paternity may provide for child support. 8 CMC § 1715. A party may seek to enforce such judgment:

If existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or 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, 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 he has furnished or is furnishing these expenses.

² Defendant Welly has not filed an appellate brief in this matter.

8 CMC § 1717(a) (emphasis added).

¶7 [5]The court may appoint counsel for an indigent party in proceedings under the Act:

(a) At the pre-trial hearing **and in further proceedings**, any party may be represented by counsel. The court **shall** appoint and pay for counsel for a party who is financially unable to obtain counsel.

(b) If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal.

8 CMC § 1719 (emphasis added.)

¶8 [6]Additionally, a court may order one party to pay for the other's fees, including attorney fees:

The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including blood and genetic tests, to be paid by the parties in proportions and at times determined by the court. Pursuant to 7 CMC § 3205, the court may order the proportion of any eligible indigent party to be paid by the Commonwealth; provided, the alleged parent agrees to reimburse the Commonwealth at the close of a proceeding if his paternity is established. At the close of a proceeding in which paternity has been established, the court shall order the adjudicated father to fully reimburse the Commonwealth.

8 CMC § 1716.

¶9 [7,8]Statutory language must be given its plain meaning. *See, e.g., Estate of Faisao v. Tenorio*, 4 N.M.I. 260, 265 (1995); *Office of the Attorney Gen. v. Dealala*, 3 N.M.I. 110, 117 (1992); *Nansay Micronesia Corp. v. Govendo*, 3 N.M.I. 12, 18 (1992). Use of the word "shall" is mandatory and has the effect of creating a duty, absent any legislative intent to the contrary. *Aquino v. Tinian Cockfighting Bd.*, 3 N.M.I. 284, 292 (1992); *see Bank of Hawaii v. Teregeyo*, 3 CR 876, 881 (N.M.I. Super Ct. 1989).

¶10 Here, the Judgment specifically provides for child support, as permitted by the Act's plain language. Plaintiffs sought to enforce said Judgment, as they are entitled to under the Act. Plaintiffs also requested that counsel be appointed to assist them in enforcing the Judgment, arguing they were engaging in "further proceedings" that would authorize appointment of counsel under the Act.

¶11 While there are no Commonwealth cases discussing this issue, other states differ on whether an indigent parent has a due process right to appointment of counsel. *See State of Idaho v. Conley*, 971 P.2d 332, 336 (Idaho Ct. App. 1999); *Salas v. Cortez*, 593 P.2d 226, 234 (Cal. 1979). The *Conley* court noted that, of the eighteen jurisdictions that have adopted the Uniform Parentage Act, only three jurisdictions did not adopt the requirement that an indigent defendant be appointed counsel. Of those three

jurisdictions, two permit appointment at the court’s discretion. *Conley*, 971 P.2d at 335; *see id.* (noting Uniform Parentage Act inapplicable to that case because it had not been adopted in that jurisdiction). Thus, of the states that have adopted the Act, an overwhelming majority either require or grant the court discretion in appointment of counsel for indigent parties in proceedings under the Act.

¶12 *Latourell v. Dempsey*, 518 N.W.2d 564 (Minn. 1994) presented a situation similar to the instant appeal. In *Latourell*, Minnesota’s operative statute provided: “the court shall appoint counsel for a party who is unable to pay timely for counsel in proceedings under [the Minnesota Parentage Act].” *Id.* at 565. Judgment was entered establishing paternity and setting child support, but reserving custody and visitation for further consideration. When the father moved for sole legal and physical custody of the child, the County Attorney’s office refused to represent the father, because it believed its responsibilities ended upon a determination of paternity. *Id.* The court declared that custody and visitation determinations are “proceedings” under the Minnesota Parentage Act. *Id.* at 566. The court reasoned the Parentage Act specifically provides that a judgment in a proceeding under that Act must contain provisions concerning child custody and visitation privileges. Moreover, Minnesota’s Act prescribes how custody and visitation shall be determined, and sets forth the manner in which a father may seek custody. *Id.* at 566-577.

¶13 Finally, the court held:

A formal award of custody and determination of visitation privileges are an integral part of paternity proceedings instituted under The Parentage Act to obtain support for the minor child. Because a judgment or order in a paternity proceeding must establish custody and visitation rights, and because determination of custody and visitation falls under [the Act], *Latourell* is entitled to counsel

Id. at 566. This was true even though the standards for determining custody and visitation are set forth outside the Minnesota Parentage Act. *Id.*

¶14 [9,10,11] Here, as in *Latourell*, a party seeking to enforce a judgment establishing paternity and setting child support engages in “further proceedings” under the Act, and is therefore entitled to appointment of counsel. The Act authorizes a court to set child support at the same time it establishes paternity. While setting child support is not mandatory, it is an “integral part of paternity proceedings instituted under” the Act. *See id.* at 566. Additionally, the Act’s use of the word “shall” in describing the court’s authority to appoint counsel indicates such appointment is mandatory with respect to indigent parties.

¶15 We therefore hold an indigent party seeking to enforce a judgment establishing paternity and setting child support is entitled to court-appointed counsel.³ This right to counsel furthers the Commonwealth's compelling interest in protecting children, by providing a means by which children may enforce their right to child support.

CONCLUSION

¶16 For the foregoing reasons, we **REVERSE** the trial court's Order denying Plaintiffs' Motion for Appointment of Counsel, and **REMAND** with instructions to enter an order appointing counsel for the minor and his guardian.

³ Once a court appoints counsel, it may seek reimbursement from the father pursuant to 8 CMC § 1716.