



Civil Right to Counsel Update

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Oral Argument: Right to Counsel in AK Supreme Court

On May 21st the Alaska Supreme Court heard oral argument in *Office of Public Advocacy v. Alaska Court System and Jonsson*. As reported in the [October](#) and [December](#) 2008 issues of Civil Right to Counsel Update, the case involves an appeal of a ruling that counsel must be appointed for an indigent parent in a custody matter, under both the equal protection and due process clauses of the Alaska constitution. Ms. Jonsson's equal protection claim, which the Alaska Court System endorsed, was that the statute violated equal protection by denying parents a right to an appointed attorney when the opposing parent was represented by private, rather than publicly-funded, counsel.

Ms. Jonsson's pro bono counsel argued that the due process claim was not properly before the court but that the court might have to reach it anyway, as part of the equal protection argument. The statute treats parents like Ms. Jonsson, involved in custody cases against private attorneys, differently from those battling the state.

Most of the court's questions focused on three areas: whether a right to counsel could be inferred from the statute if a publicly funded party-guardian ad litem is in the case, whether the due process issue was properly before the court, and whether Ms. Jonsson was seeking a bright-line rather than fact-dependent ruling (and if so where the bright line should be drawn). On this last point, Ms. Jonsson argued for a "bright line rule" finding a right to counsel in every new custody case involving an unrepresented indigent parent and a private attorney, once the possibility of fee shifting has been exhausted. The court expressed concern that briefing did not sufficiently present the argument in opposition to a constitutional right to counsel. The court could avoid the constitutional issues by affirming the trial court's ruling that the statute confers a right to counsel when a party-guardian ad litem is involved and one or both parents are indigent. One week after oral argument the court asked for supplemental memoranda from parties

and amici on possible mootness and on whether the due process issue is properly before the court.

To hear the oral argument, click [here](#).

NCCRC Amicus Brief in MI Supreme Court



In an [amicus brief](#) submitted to the Michigan Supreme Court in May, NCCRC and other advocates critiqued the U.S. Supreme Court's flawed reasoning in [Lassiter v. Dep't of Social Services](#), 452 U.S. 18 (1981), argued that Michigan should follow its own path to find a state constitutional right to counsel, and highlighted the need for an automatic reversal standard when a trial court improperly denies a right to counsel. The case, *In re McBride*, No. 136988 (Mich. 2009), involved the denial of counsel to an incarcerated father in hearings that terminated his parental rights.

The Michigan Court of Appeals, while agreeing that an attorney should have been appointed for the father under state statutory law, held that the error was "harmless" and so not reversible, and the father sought review from the Michigan Supreme Court. The applicability of a "harmless error" standard when counsel has been totally denied in a *civil* case is a mostly unanswered question nationwide (in criminal cases, reversal in such circumstances is automatic).

John Pollock, ABA Section of Litigation Civil Right to Counsel Fellow, drafted the amicus brief on behalf of NCCRC, the Legal Services Association of Michigan, and the Michigan State Planning Body, and John received substantial input from other NCCRC participants. Unfortunately, in June the Michigan Supreme Court denied the father's request for review. However, unpublished Court of Appeals decisions have no precedential value in Michigan, and so the harmless error standard for denial of a civil right to counsel is not Michigan law. Moreover, a strongly worded [dissent](#) from the denial of review agreed that the father's due process rights were violated. The brief's sections on *Lassiter's* flaws will be valuable to right to counsel litigation in other states. Contact John Pollock, jpollock@publicjustice.org for more information.

MA Launches Civil Right to Counsel Pilot Projects

Two Massachusetts pilot projects will explore the impact of full representation in eviction cases. The pilots grow out of the work of the Boston Bar Associate Task Force on Expanding the Civil Right to Counsel, as described in its report: [Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts](#). (See [Civil Right to Counsel Update](#), Oct. 2008). The pilot project tests the

theory that an expanded civil right to counsel should target the cases in which counsel is most likely to affect the outcome. Representation will focus on scenarios identified through a survey of housing experts in the state: 1) where the eviction was tied to a mental disability; 2) where it involves criminal conduct, and 3) where a viable defense exists and listed factors reveal a power imbalance likely to deprive a tenant of an affordable apartment.

One pilot project is situated in a specialized housing court and another in a generalized district court, since evictions occur in both types of courts. The funding supports representation through two legal aid offices. Evaluative tools, including a randomized experiment, will attempt to measure the efficacy of the program, testing the theory that representation in fact preserves shelter. The projects also hope to estimate the number of these types of eviction cases statewide, in case the program becomes the basis for a statewide proposal. For more information, contact Russell Engler, New England Law | Boston, at rengler@nesl.edu, or Jayne Tyrrell, MA IOLTA Committee, at jtyrrell@maiolta.org.

CA Pilot Project Bill Clears State Assembly



California's proposed legislation to establish pilot projects guaranteeing counsel for low-income people in cases affecting basic human needs remains on track, although implementation in the short term has fallen victim to the state's severe budget crisis. The bill, [AB 590](#), is sponsored by Assemblyman Mike Feuer, a former legal aid lawyer. With a dedicated revenue stream from a \$10 increase in fees for certain court services, it cleared the Assembly on June 5.

Subsequently, to help the court system absorb nearly \$400 million in budget cuts, Feuer, chair of the Assembly Judiciary Committee, agreed to direct the new funds to the courts' budget for two years, after which the funds will revert to the pilot project. California civil right to counsel advocates remain cautiously optimistic that the pilot project will get underway then.

Right to Counsel Workshop: WA Access to Justice Conference

"How Does the Civil Right to Counsel Movement Promote Health and Economic Justice?" was the topic of a workshop offered at Washington State's 2009 Access to Justice Conference at the end of May. The interactive workshop examined traditional and non-traditional strategies for working with tenants and homeowners who face housing loss in diverse situations. Starting with the premise that housing is a basic human right, panelists explored how the right

to counsel must be part of a comprehensive system to promote the health and wellbeing of communities.

The civil right to counsel and access to justice movements, while allied and closely related, are nonetheless distinct: the important goal of expanding access to justice differs from the achievement of a legally recognized right to counsel in civil proceedings where basic human needs are at stake. Washington civil right to counsel advocates have gained voice and visibility for their cause through access to justice-sponsored events, which offer an excellent opportunity for demonstrating the common strategic ground between counsel as a matter of right and access as the framework under which the right arises.

Report from Internat'l Legal Aid Group Conference

Wellington, New Zealand was the site in April of the [International Legal Aid Group's bi-annual conference](#). The location attracted more Asian and Southern Hemisphere countries than usual, and national reports from several countries were available. Systems in Hong Kong and Brazil are described briefly here; see the conference website for further information.

Hong Kong guarantees counsel in both civil and criminal cases, with an open-ended budget. Over half of HK's 6.9 million people are financially eligible for regular legal aid, and over 70 percent for special self-funded legal aid available in significant personal injury cases (with a portion of recoveries returned to the fund). The means test may be waived for civil cases involving breaches of the HK Bill of Rights or the International Covenant on Civil and Political Rights. A merits test applies in civil cases but not criminal cases, yet 75 percent of the cases are civil and 80 percent of the budget is spent on those cases. The staff includes about 70 salaried solicitors and barristers, but some 2,800 compensated private counsel who participate on a legal aid panel provide most representation.

Brazil guarantees counsel in both civil and criminal cases through its federal constitution, but because individual states implement the right it is not fully effective throughout the country. The State of Rio has the most developed system and uses a unified salaried staff system; all its lawyers are called "public defenders." Civil public defenders represent both plaintiffs and defendants and outnumber the criminal public defenders about 2 to 1. These lawyers are augmented by law students who have a mandatory 400 hour pro bono requirement of service to the legal aid program and function essentially as unpaid paralegals.

Report Notes Growth of Civil Right to Counsel

A landmark report released in April describes the sorry state of

indigent defense services in many parts of the country and notes that civil right to counsel cases account for a significant proportion of the cases handled by indigent defense providers. Entitled [Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel](#), the report is the product of a blue ribbon commission convened by the Constitution Project and National Legal Aid and Defender Association and co-chaired by former Vice President Walter Mondale. The report's findings make clear that the indigent defense system's failings affect the quality of civil right to counsel representation. Those failings include insufficient funding, excessive caseloads, undue influence by the courts and other funders, and a lack of access to experts and other essential resources, according to the report.

If the report brings any good news for civil right to counsel advocates, it is that the indigent defense reform movement has made strides in recent years, and that some of its techniques are worth copying. For example, in some states indigent defense reform advocates have successfully combined litigation with legislative advocacy to persuade state legislatures to overhaul the indigent defense system completely, and to allocate millions of dollars to fund it. Statewide study commissions and newspaper articles about individuals suffering from inadequate representation have also proven effective in persuading legislatures to act.

New Resolution from Phila. Bar

On April 30, the Philadelphia Bar Association approved a [resolution](#) mapping out the Association's future civil right to counsel work. According to the resolution, "the recent substantial economic downturn in the Philadelphia region and across the United States have underscored the sense of urgency in developing a system of Civil Gideon" in matters concerning basic human needs. The resolution states that the Association's Chancellor has appointed a Task Force on Civil Gideon to develop "concrete and practicable proposals" to advance the civil right to counsel in cases "including termination of parental rights or complete loss of custodial rights and proceedings involving housing and otherwise placing basic sustenance at risk." The Task Force will submit its proposals to the Association's Board of Governors.