

Case raises civil Gideon issue

By Jane Pribek

Wisconsin Law Journal

March 22, 2006

Over 40 years ago, the U.S. Supreme Court recognized the right to counsel for defendants in criminal cases in the landmark case of Gideon v. Wainwright.

"We just raised the amount we're spending on tourism promotion, from \$13 to \$15 million per year. Is tourism really more important than fairness in the courts?"

**John Ebbott,
Legal Action of Wisconsin Inc.**

To attorney John F. Ebbott, of Legal Action of Wisconsin Inc. in Milwaukee, it's almost unbelievable that before then, indigent criminal defendants were left to fend for themselves in the justice system with their liberty at stake. He predicts that, 40 years from now, people will look back at the justice system before civil litigants were extended the same fundamental right, and they, similarly, will find it inconceivable.

Ebbott, Legal Action's executive director, is representing Diana Ronnfeltd-Mendoza in her appeal of a child custody matter, in which she is asking the Wisconsin Supreme Court to establish a right to court-appointed counsel in civil cases, otherwise known as the "civil Gideon."

Unique Argument for Wisconsin

This is Ebbott's second case to present the issue. In Kelly v. Warpinski, also a child custody case, the state's highest court denied his client's request for court-appointed counsel last April, without explaining the ruling.

In the case at bar, Ronnfeltd-Mendoza is appealing the decision of Richland County Circuit Court Judge Edward E. Leineweber, who denied her request for a court-appointed attorney, as well as her request for a placement modification of her teenage daughter.

At a July 15 hearing last year where Ronnfeltd-Mendoza filed her request for counsel, the court declined to address the request on that date. Rather, the judge proceeded to conduct a hearing on a motion to enforce the current order brought by the father, Jerome Parrish, but the proceedings focused in great part upon whether Ronnfeltd-Mendoza had failed to prosecute her modification motion and whether she had complied with previous court orders. No "best interests" determination was ever made, Ebbott says.

Although their daughter was present to testify, she never did, and was ordered to remain primarily placed with her father. It wasn't until a Dec. 6 hearing later that year that the court denied her motion for court-appointed counsel, as well as her placement motion. Ronnfeltd-Mendoza was physically unable to attend that hearing, Ebbott notes.

After the July hearing, Ebbott filed an interlocutory appeal and a writ of prohibition on the issue of her request for court-appointed counsel with the District IV Wisconsin

Court of Appeals. The intermediate appellate court denied both, and on review by the Wisconsin Supreme Court, the justices denied them as well. This time, however, in the denials, it was noted that Chief Justice Shirley S. Abrahamson and Justice David T. Prosser Jr. dissented.

Judge's Actions were Justified

William H. Rudolph, the guardian ad litem in the case, explains that the July hearing was not scheduled as an evidentiary motion.

"Court system expenses are already high for counties, and getting higher every year. Absent a state appropriation, I don't know how the counties could ever afford this."

**Sarah Diedrich-Kasdorf,
Wisconsin Counties Association**

Rudolph, of the William H. Rudolph Law Office in Hillsboro, adds that Ronnfeldt-Mendoza had a history of disregarding court orders. Judge Leineweber, who is not one to get bogged down in procedure over the merits of cases, had given her numerous chances and was completely justified in enforcing the rules as an exercise of his inherent power to control his courtroom, he says.

Attorney Katherine E. Campbell, of LaRowe, Gerlach & Roy S.C. in Reedsburg, represents Parrish and is in complete agreement with Rudolph, adding that Ronnfeldt-Mendoza is prone to taking unilateral action and then going back to the judge for his OK.

Having legal representation before Judge Leineweber would have made all the difference in Ronnfeldt-Mendoza's case, Ebbott states in his brief asking the high court for bypass, filed on March 8.

He argues that Article I, Sec. 21(2) of the Wisconsin Constitution, which grants the right to appear before a court either pro se or by counsel, should be read in conjunction with Article I, Sec. 1 and with the U.S. Supreme Court's ruling in Griffin v. Illinois, 351 U.S. 12 (1956), which established the "principle of equal justice," so that states cannot provide a remedy to the rich that is unavailable to the poor. Stated another way, if a wealthy party to a civil lawsuit has the constitutional option to appear with counsel, an indigent party should be guaranteed that right as well.

Equal Protection Argument

Efforts to establish a civil Gideon in other states are focusing largely on Gideon itself and procedural due process, rather than relying on Griffin and equal protection guarantees. But those other states probably don't have a "suitors' rights" provision in their constitutions; Wisconsin is one of only five states that does, he explains.

A noteworthy distinction between Kelly and Ronnfeldt-Mendoza is that in the earlier case, Judges Mark A. Warpinski and Dominic S. Amato, of the Brown and Milwaukee County Circuit Courts, respectively, objected to Kelly's original action primarily on procedural grounds. Further, they are "not persons whose interests are adverse to the interests of Kelly... and they do not have an interest in contesting their [Petitioners'] claim of a constitutional right to court-appointed counsel in civil cases." So reads the brief filed by the State of Wisconsin in Kelly, which also provides that the Wisconsin Attorney General did not wish to contest Kelly's claim. In addition, Judge Amato did eventually appoint counsel in that case.

In Ronnfeldt-Mendoza's case, however, Judge Leineweber denied the request, putting the issue squarely before the appellate courts.

Moreover, a denial of the bypass petition wouldn't mean the case is finished, as it did in Kelly, because Kelly was an original action. Ronnfeldt-Mendoza still has the option, if a denial should occur, of seeking review from District IV of the Wisconsin Court of Appeals.

Rudolph says that he will not be participating in the appeal as it pertains to Ronnfeldt-Mendoza's request for court-appointed counsel, viewing it as an issue that solely involves the parents.

"I don't care if she has 10 attorneys. My concern is, and always has been, the best interest of this child. I have done an investigation. Just look up the mother on CCAP if you want to get an idea of what she's all about."

Promoting Civil Gideon

Ebbott is a member of the National Coalition for a Civil Right to Counsel, an informal alliance of legal services providers, academics, private bar and state bar representatives from some 35 states. Listservs and conference calls keep the members informed about what's going across the country.

The group got its start in Maryland, where legal services providers there fought – unsuccessfully — for the establishment of a civil Gideon right in 2003 in *Frase v. Barnhart*. Frase was also a child custody case, in which the state's highest court sided with the mother and then ruled the issue of her right to court-appointed counsel moot. It was a 4-3 decision and the closest any state has come to establishing this right.

The coalition's latest strategy is to secure the civil Gideon right in a number of states, and then ask federal appellate courts to revisit the issue.

The last time the U.S. Supreme Court looked at it was 25 years ago, in *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981). The court ruled, 5-4, that the federal Constitution does not guarantee a right to counsel in civil cases. The federal versus state constitutions distinction is significant, says Ebbott.

Fiscal Concerns

Campbell disagrees with Ebbott's legal analysis, and questions the fiscal feasibility of a civil Gideon right.

She's not alone. Sarah Diedrich-Kasdorf, a senior legislative associate for the Wisconsin Counties Association, says that her organization has opposed the civil Gideon push in the past, and will continue to do so, for one reason — money.

To the best of her knowledge, no one has estimated the cost of providing court-appointed counsel to indigent civil litigants. Whatever that sum may be, it is likely that a large portion of it would be borne by the counties, she says.

"We already have problems on the criminal side. The indigency standards are so low for the Public Defender, that the counties already end up paying a greater portion of the costs for counsel for indigent criminal defendants. Court system expenses are already high for counties, and getting higher every year. Absent a state appropriation, I don't know how the counties could ever afford this," she says.

Money, or a lack thereof, is always raised as an objection, says Ebbott. The state can always say it can't afford it. "But we just raised the amount we're spending on tourism promotion, from \$13 to \$15 million per year. Is tourism really more important than fairness in the courts? Is there really no money for this? They always seem to find it for special interests."

He agrees that times are hard for state and county governments. "But there never really is any good time to press for this. If not now, when? The coffers are never overflowing, and in my mind, we can't sit back and wait another 10 years for the perfect moment. There is no perfect moment."

Progressive Tradition

Wisconsin is a state that takes pride in its progressivism, and it would be exciting, to say the least, for the state to lead the nation in this regard, Ebbott says. Evidencing Wisconsin's tradition of progressivism is that the Wisconsin Supreme Court wrote that the right to appointed counsel is a logical corollary from the constitutional right to be heard by counsel, in *Carpenter v. County of Dane*, 9 Wis. 249 (1859), over 100 years before *Gideon*.

For courts to find a civil *Gideon* right is not completely without precedent, he says. Recently, in *Kenny A. v. Sonny Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), the court declared a right to counsel under the Georgia Constitution in "deprivation" actions. And, closer to home, in *Garcia v. Garcia* and *Garcia v. Circuit Court of Milwaukee County*, 2005 AP 1696-LV, 2005 AP 1699-W, Judge Joan Kessler of the District I Court of Appeals wrote in her dissent that she would grant a petition for leave to appeal on the issue of whether Article I, sec. 21(2) creates a right to the appointment of counsel at public expense in a family law case.

Another frequent objection to the civil *Gideon* is that it would encourage frivolous lawsuits. Just the opposite would take place, Ebbott counters in his brief: "Pro se litigants have no professional ethical obligation to not to pursue frivolous claims or defenses. Attorneys do. As the Public Defender does in criminal cases, attorneys will serve as a screening function and will thus reduce the number of cases of dubious merit."

Most judges, he hypothesizes, would likely welcome the change, given the record numbers of unrepresented litigants of recent years, who tend to put the brakes on the wheels of justice.

It's also encouraging to Ebbott that when *Kelly* was pending, the State Bar of Wisconsin's Individual Rights and Responsibilities Section asked the association's Board of Governors to file an amicus brief favoring the right to counsel for the poor in civil matters. (The governors referred the request to the bar's Executive Committee, which ultimately did not act on it once the high court declined to take the case.)

As to whether the public will view this as lawyers seeking full employment for lawyers, Ebbott concedes that these claims will undoubtedly be made, most likely among those who abhor taxation for just about everything. Further, looking at the hourly rates paid to guardians ad litem in family law cases, or private bar attorneys who take public defender cases, the attorneys who would take civil Gideon cases would by no means be getting rich off them.

Gideon, as well as *Brown v. Board of Education*, were highly controversial decisions at the time, but with time, they have come to be viewed as two of the most important legal precedents in our nation's history.

He states, "We've never had a public consensus in favor of basic rights at the time when they were being pushed for. But most people do resign themselves to it once the rights are declared, and years later, they say, 'Yes, this is significant and where would we be without it?'"

[| Home](#) | [Editorial Archive](#) | [Subscriptions](#) |
[| WLJconnect Registration](#) | [Advertising](#) | [Contact](#) |

Copyright © 2006 The Daily Reporter Publishing Co.