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Civil right to counsel urged

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Through litigation and legislation, a growing number of private and public interest lawyers across the country are pushing to secure those with low incomes the right to counsel in civil matters, including foreclosures, evictions and child custody cases.

Legal aid groups are under-funded and overworked, they argue, and pro bono services aren't enough to fill the gap for the millions who go unrepresented.

"We can't do it alone," said Kathryn Grant Madigan, immediate past president of the New York State Bar Association, who for the past year has been hitting the radio airwaves with public service announcements calling for a civil right to counsel.

"No one should lose their child because they did not have effective counsel," said Madigan, partner at Levene Gouldin & Thompson in Binghamton, N.Y. "This is a significant social movement, and it has spread indeed all over the country. We've been beating this drum for so long and hard, and we've gotten to the place now where everyone is starting to pay attention."

On the litigation front, attorneys are asking the Ohio Supreme Court to rule that an elderly, low-income couple facing loss of their home through foreclosure has a state constitutional right to counsel at state expense. *Hill v. Myers*, No. 08-1141.

The Alaska Supreme Court is considering whether the state has to provide an attorney for a mother involved in a custody dispute because the woman is poor and the father has a lawyer. A lower court granted the attorney, but the case was appealed. *Gordanier v. Jonsson*, No. 3AN-06-8887.

In Washington state, the Supreme Court ruled in December that there is no right to legal representation in divorce cases. The case involved a woman who couldn't afford a lawyer at her divorce trial and lost primary custody of her children. Her husband had an attorney. *King v. King*, 174 P.3d 659 (Wash. 2007).

Legislative action

On the legislative front, Louisiana's governor signed a law in July that provides legal counsel to parents facing termination of parental rights in intrafamily adoption disputes.

In New York City, a proposed bill is pending that would give low-income seniors the right to an attorney in eviction cases and foreclosures.

Right-to-civil-counsel statutes have also been proposed in recent years in California, Georgia, Maryland, Texas, Washington and Wisconsin. Several bar associations, including those in Hawaii, Massachusetts, Minnesota and New York, are also establishing task forces to establish a civil right to counsel, answering a call from the American Bar Association.

In 2006, the ABA adopted a resolution urging governments to provide lawyers in civil cases where "basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody." Mary Ryan, a partner at Boston's Nutter McClennen & Fish, was one of many who heeded that call. "All of us want to find a way

to ensure that poor people get access to justice," Ryan said. "That can mean the difference between living comfortably and living on the streets or losing kids."

Ryan is co-chairwoman of the Boston Bar Association's newly formed Task Force on Civil Right to Counsel, which is seeking private funding and grants for nine pilot projects that would provide free lawyers to litigants in housing, juvenile, family and immigration law cases. The goal is to demonstrate the value of the projects before seeking public funding.

"I think most people believe they have a right to a lawyer if they're getting evicted," Ryan said. "They watch TV and see that, if a poor person is charged with a crime, a lawyer will be provided."

True for criminal matters, not for civil ones.

That was decided by the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), in which the high court said that individuals charged with crimes had a right to counsel. In 1981, the high court was asked to recognize a right to counsel in civil cases in *Lassiter v. Department of Social Services*, 452 U.S. 18, in which a mother who faced permanent loss of her parental rights argued that she was entitled to counsel. The justices held that, although courts could appoint a lawyer on a "case by case" basis, there is no categorical right to counsel in civil cases.

Going for a precedent

Lawyers, meanwhile, have turned to their state supreme courts and state constitutions for help in getting counsel appointed in civil cases.

That's what Robert Newman of Cincinnati's Newman & Meeks is doing in his efforts to get a lawyer for the elderly couple that could lose their home to foreclosure. He said that, in the past decade, the Ohio Supreme Court has approved providing counsel in civil cases involving a paternity action, a custody case and a juvenile proceeding. He hopes the court will view his foreclosure case as just as serious and offer the couple an attorney.

"Almost everybody who faces a foreclosure feels that they have no chance. They are up against a big foreclosure law firm, a big collections law firm, and it looks like they're on a rail out of town," said Newman, who is handling the case pro bono. "I wanted to figure out some way of not only helping them, but setting a precedent for other people who are facing foreclosures."

For Marvin "Monty" Gray of Seattle's Davis Wright Tremaine, it's family law litigants who could really use legal help. He argued that point last year in his effort to convince the Washington Supreme Court that a poor mother was entitled to a lawyer in a divorce and custody proceeding. Gray wrote the amicus brief on behalf of the state bar association, which argued that the woman deserved a lawyer because her fundamental parenting rights were at risk, and her husband had an attorney. Gray believes such matters are far too complicated to navigate alone.

"The procedure is so difficult that it's completely unrealistic to expect people to do that unaided," Gray said. "I do think that family law is distinguishable from many other areas of civil law. People's lives, their marriages, their homes — things like that — are at stake." The court disagreed, ruling that the woman was not entitled to a lawyer.

"The question in the case was not whether it was good public policy to do it, but whether the constitution compelled it to be done. And the constitution does not compel it," said Maureen Hart, the deputy solicitor for the state attorney general's office who argued against granting the mother a government attorney. "Really, that was the only issue in the case. Was she constitutionally entitled to have a taxpayer funded defense."

Hart argued no, and the court agreed. As for the civil-right-to-counsel movement, she said, "it didn't find legal traction in this state with our highest court."

And rightfully so, said attorney Ted Frank, a resident fellow at the American Enterprise Institute, a conservative think tank in Washington, who is a vocal opponent of a civil right to counsel. He believes that giving people free attorneys in civil matters will trigger more meritless claims and waste taxpayer money.

"It's not clear to me that we should be asking taxpayers to pay for this," Frank said. "If they have a blank check from the U.S. government to take all comers, then [attorneys] lose the incentive to screen for good cases." Consequently, Frank believes, an automatic right to counsel will bring all sorts of frivolous litigants out of the

Louisiana: Governor Bobby Jindal signed into law a bill that provides state-paid attorneys to poor parents facing termination of parental rights in intrafamily adoption cases.

New York City: A bill is pending that would guarantee counsel for low-income seniors who could lose their homes due to eviction or foreclosure.

California: The Equal Justice Commission of the state bar has proposed legislation that provides for a narrower right to counsel for civil cases involving high-priority basic needs, such as shelter, sustenance, safety, health and child custody.

Source: NLJ research

woodwork. "If a lawyer is free, you're going to use the lawyer for anything," Frank said. "And these are not going to be the good lawsuits. These are going to be the bad lawsuits." He added that the "legal profession should have a little more modesty. We have a role in society, but we cannot solve all of society's problems."

For Maryland public defender Timothy A. Bradford, a former private attorney who once argued against providing a woman a lawyer in a 2003 Maryland custody case, guaranteeing counsel to poor civil litigants is a noble cause. He's just not sure it's feasible or doable. "It would be great if everyone had an attorney, but it's also difficult to implement, especially in a small region," he said. "In theory and in practice, it's two different things."