

# Clearinghouse REVIEW

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# A RIGHT TO A LAWYER? MOMENTUM GROWS



Sargent Shriver National Center on Poverty Law



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*“To Promote Jurisprudential Understanding of the Law”*

## **The Civil Right to Counsel in Washington State**

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**T**he Washington State Supreme Court established an Access to Justice Board in 1994—an act that over a decade later we can view as the organic genesis of calls for a civil right to counsel in the state. The court established the board to perform several then-missing functions including coordinating an integrated statewide civil legal services delivery system, promoting high-quality services, and developing adequate resources for the system.<sup>1</sup> Also among the board’s court-ordered tasks was to “[p]romote jurisprudential understanding of the law relating to the fundamental right of individuals to secure meaningful access to the civil justice system.”<sup>2</sup>

Within a year of its creation, the Access to Justice Board had accordingly established a jurisprudence committee with Leonard Schroeter, a leading constitutional lawyer, as its chairman. Each year the committee coordinated a workshop at the Access to Justice Conference, a statewide event conducted by the board in coordination with the state bar and supreme court. The resulting set of papers and discussions laid the theoretical and organizational groundwork for subsequent calls to recognize a civil right to counsel.<sup>3</sup>

Over time, committee members became increasingly convinced that the state constitution protected litigants’ right to have meaningful access to the courts—a concept that entailed a right to assistance of counsel in some civil cases. This understanding prompted a decision to expand the committee’s focus to include promotion of the concept. With this shift, the committee saw that it could pursue its efforts best outside an organization that was ultimately an arm of the supreme court. Seattle University’s Access to Justice Institute, a unit of the university’s law school, hosted the group newly independent from the Access to Justice Board. Though only loosely affiliated, the group’s members shared a commitment to obtaining recognition of a right to counsel in civil cases through, among other means, litigation.

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<sup>1</sup>For more background, see [www.wsba.org/atj/board/default.htm](http://www.wsba.org/atj/board/default.htm).

<sup>2</sup>*Id.*

<sup>3</sup>See, e.g., papers collected at [www.wsba.org/atj/committees/jurisprudence/default1.htm](http://www.wsba.org/atj/committees/jurisprudence/default1.htm).

**City v. Thomas**

Daniel Thomas was an elderly man when a rural Washington city got judicial authorization to demolish the home he had built fifty years earlier.<sup>4</sup> Mr. Thomas survived solely on a social security disability benefit which he had been receiving since a work-related electrocution decades earlier left him with a “mood disorder with mania.”

While a psychologist found him capable of understanding “individual aspects of the legal proceedings against him,” he was “unlikely to grasp the complexity of the proceedings or define how the parts fit into the whole.” As the psychologist testified, “Dan is very easily distracted and, while he remains in constant motion, he had difficulty even completing the simplest tasks around his house. I do not believe that Dan is able to adequately assess his own abilities and he demonstrated limited insight and judgment during the interview and testing. Dan is easily overwhelmed with complex cognitive tasks due to his distractibility and impulsivity. Dan’s primary limitations are in his ability to sequence, organize, and follow through with plans.”

Despite these limitations, the City proceeded against Mr. Thomas in open court without any accommodation. Six years before the legal action, the City annexed Mr. Thomas’s property, which for the preceding forty-eight years remained undisturbed in unincorporated land. Beginning enforcement proceedings against him, the City claimed that his alterations on his property before annexation violated applicable building codes. With Mr. Thomas, the City executed, as a precursor to the litigation, a suspect “stand-still agreement” that included a compliance schedule for the repair or demolition, or both, of the home.

The City soon sued Mr. Thomas and his wife for violating the agreement. The City sought judicial permission to demolish the home and to collect \$30,039 in associated fines. The City also stopped water and power services to the couple’s home.

The trial court granted the City’s request. No transcript of the proceedings exists. The court files contained no declarations or other documents from Mr. Thomas. Witnesses observed that his presentation consisted of asking the court for his water and power to be restored.

Mr. Thomas asked the trial court to appoint counsel for him several times because he knew he could not effectively present his case. His daughter also sought legal assistance for him. Although he was financially eligible, legal services’ attorneys were unavailable to help because they were overcommitted to cases elsewhere.

Mr. Thomas’s daughter had contacted some twenty agencies before her letter reached the desk of Deborah Perluss, who was by then a longtime participant in the Washington group. The case presented all the characteristics of a situation in which appointment of counsel would have been appropriate. The state itself had targeted Mr. Thomas. He had an important property interest at stake and one that was entitled to enhanced constitutional protections. He was unable to advocate for himself, yet he likely would have won the case if he had had a lawyer. He had sought appointment of counsel from the court and legal aid. Bottom line: the trial court had allowed the City to render a very old mentally compromised man homeless through a legal claim that was marginal at best.

Mr. Thomas’s request for help reached Ms. Perluss after the trial court had decided the summary judgment motion. The posture was fortuitous from the standpoint of litigating a right-to-counsel claim. Northwest Justice Project, a legal services provider, made a limited appearance in the case through Ms. Perluss and a colleague, Allyson O’Malley-Jones. Ms. O’Malley-Jones was the Northwest Justice Project’s centralized intake system’s staff attorney who had received the initial calls from Mr. Thomas’s family. The lawyers asked the trial court to vacate the demolition and collection order and appoint counsel for Mr. Thomas. The timing allowed them to

<sup>4</sup>Daniel Thomas is a pseudonym.

supplement the record with evidence to support the right-to-counsel claim; the evidence included the psychologist's testimony noted above, declarations concerning Mr. Thomas's efforts to obtain legal assistance, and information about the lack of available resources to provide legal help. The posture of the case also squarely presented the right-to-counsel question as the only applicable claim going forward.

The trial court concluded that there was no legal or factual basis to appoint legal counsel at public expense. An appeal immediately followed. Recognizing the need for additional help, the law firm of Heller, Ehrman, White & McAuliffe agreed to provide pro bono assistance on the appeal. The briefing in the case marked the first effort to incorporate into a brief the range of arguments and evidence developed in the preceding years' discussions. State constitutional law, statutes, the common law, and international law were among the many strands woven together.

The appellate court never reached the right-to-counsel issues that the case raised. Mr. Thomas died soon after the appeal was filed. The reviewing appellate court eventually determined that the case was moot.

### The Circle of Support

Spurred by the Thomas litigation, supporters continued publicly to advance the civil-right-to-counsel concept. Outreach efforts continued in the form of conference presentations and published articles. These efforts in turn, along with ongoing closed-door discussions, refined the jurisprudential rationales for the right and helped elaborate options for obtaining recognition. There also developed at the time a growing synergy between Washington and emergent efforts elsewhere in the country.

Annually Washington's Access to Justice Conference had a workshop dedicated to examining the jurisprudence of access to justice. The workshops had come to devote discussions largely to the hows, whys, and whats associated with the general idea of a civil right to counsel. The growing connectedness of the Washington and national efforts is reflected in the makeup of the workshop panels. The 2002 conference session was typical. Speakers included David Udell of the New York University's Brennan Center for Justice, Russell Engler of the New England School of Law, Ms. Perluss of the Northwest Justice Project, and Judge Anne Ellington of the Washington State Court of Appeals.

Similar discussions continued in law journals. In 2003 Justice Earl Johnson of the California Court of Appeal, a long-time voice for the civil-right-to-counsel concept, published in the *Seattle Journal for Social Justice*, based out of Seattle University, a lengthy article examining developments in right-to-counsel law internationally and their ramifications for understanding U.S. law.<sup>5</sup> The journal published, as a follow-up, three more pieces reflecting on right-to-counsel jurisprudence in Washington.

Ms. Perluss's article elaborated on the theory developed in the Thomas case. It argued that the civil right to counsel should be understood as an extension of a state constitutional right to meaningful access to the courts. Access, not interest, she suggested, should be the primary rubric under which to argue, understand, and implement the appointment of civil counsel.<sup>6</sup> Lisa Brodoff, Susan McClellan, and Elizabeth Anderson offered a complementary theory, suggesting that, until recognition of a broad civil right to counsel, the Americans with Disabilities Act provides an effective avenue to request counsel for those unable to advocate for themselves due to a protected disability.<sup>7</sup> In the third

<sup>5</sup>Earl Johnson Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 201 (2003).

<sup>6</sup>Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE, 571 (2004).

<sup>7</sup>Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon* 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 609 (2004).

piece, Sudha Shetty, director of Seattle University's Access to Justice Institute, examined, and suggested ways of overcoming, the barriers facing immigrants who cannot effectively access the court system without representation.<sup>8</sup>

A significant breakthrough in these efforts came at the 2003 National Legal Aid and Defender Association meetings in Seattle. Again, a workshop dealt with the right-to-counsel topic. Speakers at the extended workshop included Justice Johnson, Ms. Perluss, and Ms. Brodoff and Raven Lidman, two Seattle University professors who were by then active participants in the Washington State discussions. Also participating on the panel were Mary Schneider of the Legal Services of Northwest Minnesota; Debra Gardner and Wilhelm Joseph, who had been advancing the right-to-counsel concept in Maryland; and Alan Houseman of the Center for Legal and Social Policy.<sup>9</sup>

The standing-room-only session produced two clear messages: there was significant interest in promoting the civil-right-to-counsel concept in many states; and there was a need for a national body to coordinate, support, and encourage these state-based efforts. Soon thereafter, the National Coalition for a Civil Right to Counsel was born with Washington's advocates among the cofounders.

Reflecting on developments on the national scene, supporters in Washington felt a similar need to foster more organized and expanded participation. To those involved, the loose affiliation of individuals that had grown out of the Access to Justice Board's jurisprudence committee seemed increasingly unlikely to be able to sustain the kind of long-term planning and coordination necessary to advance the issue. And so they formed the Committee for Indigent Representation and Civil Legal Equality (Circle). As word traveled both through

bar circles and formally at state conferences, Circle's membership grew. Circle now consists of over thirty individuals and representatives from the private bar, legal aid providers, public defender's offices, and the state's three law schools.

In formal but precise language, the Circle's mission statement captures its purpose and so bears extended quotation. It reads: "Circle is comprised of individuals who are committed to the principle of equal justice for all as fundamental to the system of justice in the state of Washington. Circle embraces the principle that the right to representation by competent counsel in judicial proceedings is fundamental and cannot be denied for want of adequate funds. On the basis of this principle, Circle is committed to establishing a legally enforceable right of indigent persons to competent attorney representation in non-criminal judicial proceedings in Washington." And "Circle intends to affirmatively assert in appropriate cases in Washington courts that on the basis of the above principles indigent litigants are entitled to legal representation by a competent attorney at public expense."

### "I Suggest that You Get A Lawyer"

Under the parenting plan emerging from dissolution of her marriage in February 2003, June Arden had primary custody and decision-making authority over her three children while Jeffery Halls, the children's father, had residential time two weekends a month.<sup>10</sup> That April, Mr. Halls, through counsel, filed against Ms. Arden a contempt motion alleging that she had violated the parenting plan by denying him a weekend visitation and by failing to give notice of relocation. To avoid becoming homeless, Ms. Arden with her children had made a temporary emergency visit to Minnesota to stay with family. The contempt motion sought imprisonment as a sanction.

<sup>8</sup>Sudha Shetty, *Equal Justice Under The Law: Myth Or Reality For Immigrants And Refugees*, 2 SEATTLE JOURNAL FOR SOCIAL JUSTICE 565 (2004).

<sup>9</sup>Debra Gardner, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases: Frase v. Barnhart and Beyond*, in this issue.

<sup>10</sup>See generally *In re Custody of Halls*, 109 P.3d 15 (Wash. App. 2005).

At the hearing, the trial court ordered Ms. Arden indefinitely confined to the county jail. She had not been represented. The order also placed the children with Mr. Halls. The presiding judge commented to her, “I suggest that you get a lawyer.”

The court released Ms. Arden from jail three days later and ordered her to appear to show cause why Mr. Halls “should not have primary residential care of the children”—an order plainly violating applicable state laws. While the trial court recognized that state and federal law required that counsel be appointed to represent Ms. Arden, it proceeded with the subsequent hearing despite none being present. The judge again found Ms. Arden in contempt and ordered her imprisoned if she failed to deliver the children to the father. The trial court also on its own initiative granted Mr. Halls “sole custody” of the children—a concept not to be found in Washington’s custody laws.

At yet another review hearing, a public defender was finally appointed for Ms. Halls. The presiding judge asked the father’s counsel, “Want me to put her in jail or are you satisfied?” When the father’s counsel responded that it would not be necessary, the public defender appointed for the hearing was allowed to withdraw as Ms. Arden’s counsel. Immediately the father’s lawyer asked for, and was granted, entry of a parenting plan that “reflects what’s going on now.” Ms. Arden appealed the ruling. Two days later, Mr. Halls’s attorney petitioned the trial court for entry of yet another parenting plan, one that he asserted “doesn’t leave any room for error.” Again, too, he asked for a contempt finding. The trial court complied and issued a ten-year “temporary” order restraining the mother from entering the children’s schools and removing them from Jefferson County. The presiding judge justified the ruling without the statutorily required findings of fact or conclusions of law. He relied on the idiosyncratic proposition that “[a]ll it takes is two contempts and the Court can change the Parenting Plan without further findings.”

Although the underlying substantive law significantly differed from that involved in

the Thomas litigation, Ms. Arden’s case similarly contained many of the indicia of a case in which counsel should be appointed. Losing custody of children is among the most harrowing threats a person can face, and the constitution already accords the parental-child relationship enhanced protection. Ms. Arden opposed a represented and aggressive adversary, and, though not clear in the initial record, subsequent evidentiary development revealed an extensive history of domestic violence. Ms. Arden was unable to advocate effectively for herself, and, although she had sought help, legal assistance was unavailable due to a shortage of attorneys.

The Halls case required a legal approach different from that used in the Thomas litigation. Northwest Justice Project assumed direct representation of Ms. Arden on appeal and assigned two experienced family law attorneys. Their briefing raised the right-to-counsel claim but centrally addressed the family law and contempt issues. Circle made its first formal appearance in litigation as *amicus curiae*, and pro bono counsel from a local law firm represented it. The Northwest Women’s Law Center also appeared as *amicus curiae*. Both *amicus* briefs addressed the right to counsel.

Both the family-law issues and the contempt findings complicated the case. Each offered virtually indisputable alternative grounds to reverse the trial court, a tack the reviewing court ultimately took. Also, by the time the appeal reached the court above, the children were back living with Ms. Arden. Charged with sexual assault of one of the children, Mr. Halls did not take any part in the proceedings before the intermediate appellate court. While the court declined to reach the right-to-counsel question on the custody modification proceeding, it reaffirmed a right to appointed counsel when contempt was on the table and the right attached “throughout the proceedings.” Citing both its rulings and return of the children to Ms. Arden, the court wrote: “[W]ithout knowing whether the parties still have a dispute and the parameters of the dispute, we are unwilling to issue an advisory opinion.”

### Not the Conclusion

The Halls case was a catalyst for a more sustained effort. The time-consuming briefing, fact development, and coordination were demanding on the participants who all had other full-time jobs elsewhere. Securing dedicated support for the project had been a long felt need. In order to sustain the effort, the need for a staffed presence became apparent.

Out of months of discussions and some significant debate, Circle members crafted a plan to refocus its efforts and provide the necessary support to pursue them vigorously. The resulting plan called for refining the legal and evidentiary rationales for the right and producing a coordinate protocol to identify the kinds of cases in which appointment of counsel would be appropriate.

Circle determined that, as the last critical step of the renewed plan, it needed dedicated support in the form of a project coordinator. The coordinator was to be responsible for all aspects of the project from evidentiary development to legal research to public outreach to agenda setting and minutes production. Grant funding having been secured,

Circle hired a young attorney with a background in public defense and social science research (I am that attorney).

This plan is now functioning. A broad coalition of dedicated supporters oversees and implements outreach, education, relevant potential litigation, and related activities in Washington. Circle members continue to play leadership roles in supporting emerging county-wide efforts, notable among them the American Bar Association's Taskforce on Access to Civil Justice.

These efforts and those of colleagues in other states have generated significant and sustained momentum, as this entire issue evidences. There is as yet no point that could fairly be called a conclusion. As you watch reporting on developments in legal services, you will see the next pieces of this story.

#### **Author's Acknowledgments**

*This article would not have been written without the committed efforts of a significant number of people who authored the described events and helped ensure they were retold in a meaningful way. I am grateful to them all.*