IN THE SUPREME COURT FOR THE STATE OF ALASKA

OFFICE OF PUBLIC ADVOCACY, Appellant, v. ALASKA COURT SYSTEM, RANDALL GUY GORDANIER, JR., and SIV BETTI JONSSON Appellees.	Supreme Court No. S-12999 Superior Court No. 3AN-06-8887 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE MARK RINDNER, JUDGE

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE SIV JONSSON

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Appellee, Siv Jonsson. Although the ABA takes no position on the Alaska constitutional and statutory issues presented in this case, the ABA supports the appointment of counsel in civil cases in which basic human needs are at stake and, specifically, supports the appointment of counsel for indigent defendants in child custody cases.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its more than 400,000 members come from all 50 states and other jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors and law students.[1]

The ABA has long taken a particular interest in promoting equal access to justice for persons with limited financial resources. The ABA's first standing committee, created in 1920 with Charles Evans Hughes, who would later become Chief Justice of the United States Supreme Court, as its first chair, was "The Standing Committee on Legal

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to a member of the Judicial Division Council prior to filing.

Aid and Indigent Defendants."[2] The ABA's Goal IV, which is to "Advance the Rule of Law," includes Objective 3: "Work for just laws, including human rights, and a fair legal process," and Objective 4: "Assure meaningful access to justice for all persons."[3]

In its creation of standards and policies for the legal profession, the ABA has addressed the core question raised by this and related cases: When is a right to appointed counsel necessary to ensure meaningful access to our justice system? In 2006, then ABA President Michael Greco appointed a Presidential Task Force on Access to Justice, chaired by Maine Supreme Judicial Court Associate Justice Howard Dana, to study and make recommendations regarding a right to counsel in civil cases. The Task Force was joined by several ABA Sections and entities, including the Standing Committee on Legal Aid and Indigent Defendants, when it presented its report ("ABA Report") and its recommended Resolution ("ABA Resolution") to the 550 member ABA House of Delegates on August 7, 2006.[4]

The ABA Resolution, which was unanimously adopted, provides:

> **RESOLVED,** That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of

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[2] ABA Standing Committees are entities charged with investigating and studying continuing or recurring matters related to the purposes or business of the ABA. ABA Constitution, Article 31.3. The Standing Committee on Legal Aid and Indigent Defendants has charge of matters related to, *inter alia,* the administration of justice as it affects the poor and remedial measures intended to help the poor protect their legal rights. *Id.* at Article 31.7.

[3] ABA Mission and Goals, *available at* http://www.abanet.org/about/goals.html.

[4] The ABA Report, including the ABA Resolution, is attached as Appendix A to this brief.

> right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

ABA Report, at 1. The categories of proceedings identified in the ABA Resolution are those "considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access as a matter of right." ABA Report, at 13. The Resolution's reference to "child custody" is intended to include all proceedings "where the custody of a child is determined or the termination of parental rights is threatened." *Id.*

The ABA Report described the essential role of counsel in providing litigants with meaningful access to justice in our adversarial system:

> The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer.

ABA Report, at 9-10.

As noted in the ABA Report, United States Supreme Court Justice Wiley Rutledge observed in addressing a 1941 ABA meeting that: "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion." ABA Report, at 15 (internal quotation marks omitted). As reflected in the

ABA Resolution, it is the ABA's consensus belief that in adversarial proceedings where basic human needs are at stake, such as the child custody case presently before this Court, appointment of counsel should be provided as a matter of right at public expense for parties unable to afford counsel.[5] The ABA, therefore, respectfully submits this brief, as it may assist the Court in consideration of this issue.

ARGUMENT

I. THE APPOINTMENT OF COUNSEL FOR INDIGENT LITIGANTS IN ADVERSARIAL CHILD CUSTODY PROCEEDINGS PROTECTS FUNDAMENTAL RIGHTS, PROMOTES FAIRNESS, AND ENSURES THAT COMPLETE AND APPROPRIATE INFORMATION IS BROUGHT TO BEAR ON THE ASSESSMENT OF THE BEST INTERESTS OF THE CHILD

Nearly 30 years ago, the ABA determined that the appointment of counsel for indigent parents facing termination of parental rights was necessary "to minimize [the risk of error] and ensure a fair hearing." Brief for American Bar Association as *Amici Curiae* Supporting Respondent, *Lassiter v. Dep't of Soc. Servs. of Durham County*, 452 U.S. 18 (1981) (No.79-6423), 1980 U.S. S. Ct. Briefs LEXIS 2389, at *7 [hereinafter ABA *Lassiter* Brief]. Based on the experiences of the ABA and its members, the ABA

[5] The ABA's position is consistent with the views of the Alaska State Bar. On September 11, 2008, the Board of Governors of the Alaska Bar Association voted to enact a proposed resolution that urged the State of Alaska "to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, health or child custody." The state bar associations of California, Massachusetts, and Pennsylvania have also adopted similar resolutions. Like the ABA, these state bar associations call for the appointment of counsel to protect basic human needs and include child custody cases within the category of civil cases that require such an appointment.

maintained at that time that *pro se* litigants were at a distinct disadvantage in seeking to preserve their fundamental rights as parents, and that "[s]killed counsel is needed to execute basic advocacy functions." *Id.* at *15.

These observations are no less true today. Studies demonstrate that the assistance of an attorney makes a significant difference in the outcome of child custody proceedings, and this is especially so when the opposing parent is represented by counsel. A litigant who proceeds *pro se* in seeking to maintain or secure custody of a child must contend not only with heightened emotions but also complicated legal rules that make it exceedingly difficult for a non-lawyer to present an effective case. Moreover, it has long been recognized that what is at stake for parents in custody proceedings is nothing less than the fundamental liberty interest in the care and management of one's children. Thus, when a court undertakes to structure custody and visitation arrangements, fundamental fairness is served when both parents have skilled counsel and, as a result, a meaningful opportunity to present pertinent evidence related to the best interests of the child regardless of the parents' individual financial means.

A. Participation Of Counsel Makes A Difference In Cases Involving The Care and Custody Of Children

1. If a parent is not represented by counsel, the risk of error in child custody proceedings is greatly increased

As this Court has recognized, "child custody determinations are among the most difficult in the law." *Flores v. Flores,* 598 P.2d 893, 896 (Alaska 1979); *accord Jenkins v. Handel*, 10 P.3d 586, 590 n.12 (Alaska 2000). The difficulties stem not only from the procedural complexities inherent in any adversarial litigation proceeding, but

also the intense, emotionally charged backdrop against which child custody decisions are ordinarily made, as well as the amorphous nature of the legal standards that govern in family law disputes. *See Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (noting that the best interest of the child standard "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores"); *see also In re Emilye A. v. Ebrahim A.*, 9 Cal.App.4th 1695, 1709 (1992) (stating that "[f]ew lay people are equipped to respond to the legal complexity of [custody] proceedings," especially when dealing with the "emotionally devastating potential loss of . . . their relationship with their children"). Moreover, indigent parents are often "people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation"—circumstances that "may combine to overwhelm an uncounseled parent." *Lassiter*, 452 U.S. at 30.

Even apart from the emotional impact of child custody proceedings, few parents are capable of performing the essential advocacy functions that a custody hearing requires without the assistance of counsel. As the ABA recognized long ago, *pro se* parents often fail adequately to "delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal." ABA *Lassiter* Brief, *supra*, at *16; *accord Danforth v. State Dep't of Health*, 303 A.2d 794, 799 (Me. 1973) ("The average parent would be at a loss when faced with problems of procedure, evidence or cross-examination [in child neglect proceedings]."). Unless such tasks are performed

competently, there is an increased risk that the decision-maker will reach an erroneous result.

The case of *King v. King*, 174 P.3d 659 (Wash. 2007), illustrates the difficulties *pro se* parents face in child custody disputes. Brenda King was "a housewife with a ninth-grade education and no money [who] was forced to act as her own attorney during a five-day divorce trial." Jonathan Martin, *Court Rules That Spouses Aren't Entitled To Public Divorce Lawyers*, Seattle Times, Dec. 7, 2007. Mrs. King's then-husband was represented by an attorney. In representing herself during the course of the bitter dispute over custody of the couple's three children, Mrs. King "gave speeches when she was supposed to ask questions," "didn't subpoena any witnesses," and "didn't know how to present evidence against her then-husband, including Child Protective Services reports about him." *Id.*; *see also King*, 174 P.3d at 673-76 (Madsen, J., dissenting) (Mrs. King "affirmatively did her own case harm" because she "was unable to prevent the admission of evidence that a lawyer would have been able to keep out," "could not separate her emotions from her conduct as her own legal representative," and "had exhausted the court's patience" by the end of the trial).

Having failed to bring to the attention of the court information that skilled counsel would routinely have presented, Mrs. King, a stay-at-home mother who had taken care of her children full-time for 10 years, lost the custody fight and was permitted to see her children only every other weekend. Like so many others, the *King* case demonstrates clearly "how much [is] at stake at trial" for parents in custody disputes "[a]nd how complicated it is for someone without a law degree to present that story in any

meaningful way in a courtroom." David Bowermaster, *Should the Poor Be Appointed Attorneys In Civil Cases?*, Seattle Times, May 31, 2007 (internal quotation marks and citation omitted).

The matter of *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003), also highlights the significant need for appointed attorneys who can assist indigent parents seeking to preserve rights to custody of their children. When Deborah Frase, mother of three, was incarcerated on a misdemeanor drug possession charge, her mother placed her youngest son in the care of the Barnharts, a family from the mother's church. Ms. Frase reclaimed her three-year-old son six weeks after he went to live with the Barnharts, but the Barnharts then sued for custody of the boy. Unable to get free legal assistance, Ms. Frase was forced to represent herself in seeking to retain custody of her child.

Although Ms. Frase spent hours attempting to prepare her case, she did not depose the Barnharts or otherwise seek discovery regarding their claims, failed to identify salient points of law, could not question witnesses effectively, missed critical objections, and had little understanding of the rules of evidence or procedure. *See* Brief of Appellant, *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (No. 6), at 29-31 (explaining that because Ms. Frase had only a "rudimentary grasp of Maryland's family law" gleaned from her research in the courthouse library, she "was unable to challenge or limit [the Barnhart's] testimony" about disputed facts and "th[e] case was tried before the master and argued to the circuit court without a word of advocacy about the defining constitutional and family law issues"). The magistrate judge who heard the case ultimately found Ms. Frase to be a fit parent entitled to custody of her own child, but also attached several impermissible

conditions to the custody award, including the requirement that the Barnharts' son be permitted to have regular visitation with Ms. Frase's child.[6] *See also In the Matter of K.L.J.*, 813 P.2d 276, 281-82 (Alaska 1991) (reversing a decision terminating the parental rights of a father in an adoption proceeding initiated by his child's mother and new husband, where the father was denied the right to counsel, failed to make significant legal objections, did not know about or inform the court of substantial errors of law, and "prejudiced himself in presenting his own testimony").

2. Empirical studies demonstrate that attorneys affect outcomes in child custody cases

In the context of negotiations between parents regarding physical and legal custody (an acknowledged national trend in divorce cases over the past two decades), empirical studies have demonstrated that participation by attorneys has a significant impact on custody determinations and placement outcomes. When distinguished scholars, including Harvard Law School Professor Robert H. Mnookin, studied whether "the presence of lawyers influence[s] the sorts of custody parents are requesting or receiving" in the context of divorce negotiations, they found, not surprisingly, that lawyers make a difference. Robert Mnookin, Eleanor Maccoby, Catherine Albiston & Charlene Depner, *What Custodial Arrangements are Parents Negotiating?*, Divorce Reform at the Crossroads (Stephen Sugarman and Herma Kay eds., 1990). Their study

[6] Ms. Frase was able to obtain counsel on appeal, and the Maryland Court of Appeals vacated the custody determination on the grounds that the conditions infringed upon Ms. Frase's fundamental right as a parent "to make child rearing decisions." *Frase*, 840 A.2d at 128 (quoting *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000)).

showed that joint legal custody was the arrangement selected in 92% of the cases in which both parents had counsel, compared to a mere 50% of the cases in which neither parent had a lawyer. Furthermore, "[w]hen only one parent was represented, the frequency [of joint legal custody outcomes] fell between the two extremes." *Id.* at 62.

The results were "more complex" for physical custody, *id.* at 63, because mothers received physical custody of the children in the vast majority of all cases regardless of representation; but, even so, statistics showed that mothers received physical custody in only 49 percent of the cases in which only the father was represented by counsel, compared to 63 percent of cases in which both parents were represented and 86 percent of the cases in which only the mother had counsel, *id.* at 64. In fact, there appeared to be a clear correlation between representation and the likelihood of a particular custody outcome: "[m]other physical custody was more common when only the woman had a lawyer, father custody when only the man had a lawyer, and joint custody when both were legally represented." *Id.*[7]

It is clear that having skilled counsel capable of performing basic advocacy functions impacts custody determinations, whether those determinations are made by

[7] Empirical studies have consistently shown that legal representation makes a major difference in whether a party wins in cases decided by the courts. *See, e.g.,* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L. Rev. 533 (1992); Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

formal hearing or less formal negotiations. Representation is important, therefore, for a full and fair resolution of child custody issues.[8]

The appointment of counsel is especially important when the other parent in a custody dispute is represented. If only one parent is represented by counsel, the information that the ultimate decision maker receives in order to make an assessment of each parent's custodial capabilities may be significantly skewed, placing the unrepresented parent at a distinct disadvantage in the hearing or negotiation process. As one Maryland Court of Appeals judge observed in *Frase,* where the Barnharts were represented by counsel but Ms. Frase was not:

> With the constraints of the adversarial court system, and the prohibitions it (and our cases) place upon judges not to assist either side, the poor, unrepresented parent faced with experienced counsel on the other side is at a great, system-built-in disadvantage. . . .[I]t is especially frightening to me to think that affluent third parties, by reason of the quality of the legal representation their affluence brings them, may be able to simply overwhelm poor parents who cannot afford counsel in a civil adversarial system that is not permitted to fully ensure equality in the presentation of cases.

Frase, 840 A.2d at 134, 136 (Cathell, J., concurring); *see also In re Adoption of R.I.*, 312 A.2d 601, 602 (Pa. 1973) (noting that in termination of parental rights cases "there is

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[8] As sixteen retired Washington State Court Judges asserted in an amicus brief filed in the Washington State Supreme Court:

> [I]ndigent persons without counsel receive less favorable outcomes dramatically more often that those with counsel. . . . This disparity in outcomes is so great that the conclusion is inescapable that indigent *pro se* litigants are regularly losing cases that they should win.

Brief for Retired Washington Judges as Amici Curiae Supporting Appellant, *King v. King*, 174 P.3d 659 (2007) (No. 79978-4), at 6.

a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel") (internal quotation marks omitted); Note, *Lassiter v. Dep't of Social Servs.: A New Interest Balancing Test For Indigent Civil Litigants*, 32 Catholic U. L. Rev. 261, 261 n.3 (1982) (observing that "indigent litigants are less familiar with the judicial process and, consequently, more intimidated"; are "usually incapable of understanding the complexities of a modern civil trial"; and "may have limited education that is no match for a seasoned attorney's legal expertise").

The fact that courts often appoint a third party to represent a child's welfare in the context of a divorce or custody dispute (*e.g.*, a social worker or *guardian ad litem*) does not ensure accurate custody determinations or eliminate the need for the assignment of an attorney who is dedicated to the protection of parental rights. A parent's interests can be different from that of his child, and what is best for the child is a complicated question that is sometimes revealed only through full vetting of the relevant facts in the course of the adversarial process. Indeed, without counsel, a parent's right to the care, custody, and management of her own children is quite vulnerable, and may be overlooked or dismissed in favor of "what some government petty tyrant decides is meant by the term 'welfare' or 'best interests' of the children." *Turner v. Pannick*, 540 P.2d 1051, 1056 (Alaska 1975) (Dimond, J., concurring).

No less than any other party engaged in significant litigation or negotiation, parents need *advocates* in cases that involve the custody and welfare of their children. Appointing attorneys to serve in that capacity is the well-established means of ensuring

that parental rights are protected, and of avoiding errors in the adversarial process that our society trusts to produce fair outcomes.

B. Courts Have Long Maintained That Child Custody Cases Implicate Fundamental Rights And A Number of States, Including Alaska, Have Recognized A Categorical Right To Counsel In Certain Parental Rights Cases

More than 60 years ago, the Supreme Court of the United States stated that the individual right to have children is one of the "basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Parental rights are considered "essential" liberties, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and have been characterized as "far more precious . . . than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953); *accord Troxel*, 530 U.S. at 65-66 (a parent's interest in "the care, custody, and control of [her] children" is "perhaps the oldest of the fundamental liberty interests recognized by this Court"). The United States Supreme Court acknowledged in *Lassiter* that "[a] parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." 452 U.S. at 27 (internal quotation marks and citation omitted).

Like the federal courts and other state courts across the nation, this Court has acknowledged "the importance of the family unit," *In the Matter of C.L.T.*, 597 P.2d 518, 524 (Alaska 1979), and the fundamental interest that a parent has in maintaining custody of her child. *Flores*, 598 P.2d at 895 ("the right to direct the upbringing of [children]" is "one of the most basic of all civil liberties"); *see also In the Matter of L.A.M. v. Alaska*,

547 P.2d 827, 832 n.13 (Alaska 1976) (defining "parental rights" to include "[p]hysical possession of the child" which includes "day-to-day care and companionship"); *Turner*, 540 P.2d at 1055-56 (Dimond, J., concurring) (declaring that the "right of parents to nurture and direct the destiny of their children" is "fundamental"). This Court has stated that the loss of custody is often recognized as "punishment more severe than many criminal sanctions," *In re Adoption of A.F.M.*, 15 P.3d 258, 266 (Alaska 2001) (quoting *In the Matter of K.L.J.*, 813 P.2d at 283), and has made clear that "parents should not be deprived of the fundamental rights and duties inherent in the parent-child relationship except for grave and weighty reasons"). *S.J. v. L.T.*, 727 P.2d 789, 796 (Alaska 1986) (internal brackets, quotation marks and citation omitted).

Recognizing that "the right to direct the upbringing of one's child" is a fundamental right, this Court in *Flores* concluded that appointment of counsel is a right under the Alaska Constitution in child custody cases where an indigent party's opponent is represented by counsel provided by a public agency. 598 P.2d at 896; *see also Reynolds v. Kimmons*, 569 P.2d 799, 801 (Alaska 1977) (in proceeding for non-support, "(t)he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard [through] counsel") (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (first alteration in original)). This Court has also recognized that appointing lawyers for indigent parents furthers the state's own interest in fair adjudication of parents' fundamental rights regarding the care, custody and control of their children. *See In the Matter of K.L.J.*, 813 P.2d at 280 (in adoption proceeding, "[t]he state's interest in its citizens receiving a just determination on such a fundamental issue cannot be open to

question"). Counsel promote, rather than hinder, a state's interest in the welfare of its children because the appointment of counsel "will make the fact-finding process more accurate." *Id.*

In *Lassiter*, decided two years after this Court's decision in *Flores*, the United States Supreme Court applied factors enunciated in *Matthews v. Eldridge*, 424 U.S. 319 (1976), to a federal due process challenge to denial of appointment of counsel in a case in which a mother's parental rights had been terminated. The Court recognized that a parent's interest in the continued care and custody of a child was "extremely important," that the state's pecuniary interest was "relatively weak," and that the "risk of an erroneous deprivation of the parent's rights" may, in some cases, be "insupportably high." *Lassiter*, 452 U.S. at 31. Nevertheless, the *Lassiter* Court determined that these factors must, on a case by case basis, be "weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty." *Id.*

This Court rejected *Lassiter's* presumption against a right to counsel in civil cases, however, in the context of adoption proceedings where indigent parents must defend against the termination of their parental rights. *In the Matter of K.L.J.,* 813 P.2d at 285. This Court also rejected *Lassiter's* case-by-case approach in such cases, in favor of a "bright line right to counsel." *Id.* at 282 n.6. Courts in other states, before and after *Lassiter*, have reached similar conclusions. *See, e.g., Lavertue v. Niman,* 493 A.2d 213, 218 (Conn. 1985) (right to appointed counsel in state supported paternity action); *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794, 795 (Me. 1973) (right to

appointment of counsel for indigent parent against whom custody petition was instituted in neglect proceeding); *State v. Cadman*, 476 A.2d 1148, 1152 (Me. 1984) (citing *Danforth, supra,* as case in which "rights guaranteed by Maine's Declaration of Rights were more protective than those granted by the federal Bill of Rights"); *Carroll v. Moore*, 423 N.W.2d 757, 766 (Neb. 1988) (due process right of indigent defendant in state-initiated paternity proceeding to "appointed counsel at public expense"); *New Jersey Div. of Youth and Family Servs. v. R.G.*, 937 A.2d 1013, 1019 (N.J. Super. Ct. App. Div. 2008) (constitutional right under New Jersey Constitution to appointment of counsel for indigent person in abuse and neglect proceeding which may result in either temporary loss of custody or permanent termination of parental rights); *In re Adoption of R.I.*, 312 A.2d at 602 (constitutional right to appointed counsel in petition for involuntary termination of parental rights of natural parents by couple seeking to adopt child); *In the Matter of Lindsey C.*, 196 W.Va. 395, 407 (1995) (right of indigent parent to appointment of guardian ad litem in termination proceedings where indigent parent was involuntarily hospitalized by reason of mental illness but not adjudicated incompetent); *see also In the Matter of Adoption of Doe*, 543 So.2d 741, 749 (Fla. 1989) (Barkett, J., concurring) (liberty interest in parent-child relationship held in such esteem under state constitution that "the only civil proceeding in which a person is entitled to free public counsel in Florida is a proceeding to terminate parental rights").

In *In the Matter of K.L.J.*, moreover, this Court noted that "our view comports more with the dissent [of Justice Blackmun in *Lassiter*]," 813 P.2d at 282 n.6, and specifically agreed with Justice Blackmun's "caution about reviewability of case-by-case

decision making" *Id.* (citing *Lassiter,* 452 U.S. at 50 (Blackmun, J. dissenting)). As Justice Blackmun stated in *Lassiter*, appellate review of a case-by-case approach to the appointment of counsel

> assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an [un]fair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial . . . .

Id. at 50-51 (Blackmun, J., dissenting). *See also In the Matter of K.L.J.,* 813 P.2d at 282 n.6 (*quoting* Note, *A New Interest Balancing Test*, 32 Catholic U. L. Rev. at 283 ("[I]t will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of cross-examination, or the testimony of various witnesses.")).

Consistent with the rationale of these cases, the ABA Resolution endorses a categorical approach, urging that governments provide legal counsel "as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake," including child custody proceedings. ABA Report, at 1.

C. Recognition Of A Right To Counsel For Indigent Litigants In Child Custody Proceedings Not Only Promotes Fairness In Individual Adjudications But Also Advances The Broader Societal Interest In The Perception Of Fair And Equal Access To Justice Regardless Of Financial Means

Former ABA President Louis Powell, who later became an Associate Justice of the United States Supreme Court, once remarked that "[e]qual justice under law is . . . perhaps the most inspiring ideal of our society."[9] Lawyers and lay people alike understand and accept the basic idea that, in the United States, the judicial process should be blind to the social and economic circumstances of the participants, and that all deserve equal access to the courts and a fair hearing of their grievances and disputes, regardless of whether they can be characterized as "rich" or "poor."[10] The unfortunate present reality, however, is that economic status can make a difference with respect to the administration of justice in some cases. *See* David Udell & Rebekah Dillar, *Access to Justice: Opening the Courthouse Door* 2 (Brennan Center for Justice, 2007) ("[m]eaningful access to the courts . . . is increasingly out of reach for many Americans"). Nowhere is this disparity plainer than when unrepresented indigent individuals without legal training undertake to proceed *pro se* in the legal arena against parties with sufficient wealth to have retained the assistance of private counsel. *Id.*; *accord Frase*, 840 A.2d at 134-35 (Cathell, J., concurring).

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[9] ABA Report, at 2.

[10] In a recent national poll, 79 percent of the respondents answered "yes" when asked if a poor person has a right to free counsel if sued in civil court, despite the fact that no such general right has been recognized in the United States. Jonathan Baird, *Deck Stacked Against Poor In Court*, Concord Monitor, June 27, 2008.

In this regard, respected attorney and social commentator Reginald Heber Smith observed nearly ninety years ago that "[t]he administration of American justice is not impartial" and that "the rich and the poor do not stand on an equal[] [footing] before the law." Reginald Heber Smith, *Justice and the Poor* 8 (The Merrymount Press, 1919). That is, whereas an individual with financial means has the ability to hire a skilled attorney to bring, or to defend against, lawsuits that affect his business, family, and personal interests, it is exceedingly difficult for those who do not have the resources to retain competent counsel to protect themselves in like fashion. Not only do such individuals face enormous obstacles in attempting merely to understand complex legal proceedings without assistance, but, when personal and significant issues—such as preservation of parental rights—are at stake, "the extreme emotional stress may also have a debilitating effect on an unrepresented indigent litigant." Note, *A New Interest Balancing Test*, 32 Cath. U. L. Rev. at 261-62 n.3.

Initiatives to encourage attorneys and law firms to provide *pro bono* legal representation have helped to increase the odds that low-income individuals and families will be able to secure legal representation in times of need. *See, e.g.*, Public Interest Law Initiative website.[11] But there can be no doubt that an overwhelming and unmet need for lawyers who provide free legal services still exists.[12] The case at bar illustrates this fact:

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[11] *Available at* http://www.probonoinitiative.org/aboutus.htm (last visited Oct. 17, 2008).

[12] As an example, it is estimated that "New York's Legal Services turns away four people for every one the organization is able to represent, with 225 lawyers handling

(Footnote continues on next page.)

like many low-income litigants, Ms. Jonsson sought representation through the state's legal services agencies but was turned away.

Indeed, approximately *80 percent* of poor people in the United States are unable to get legal assistance to address serious and significant legal problems. *See* Public Justice Center website;[13] *accord* Alan W. Houseman, Center for Law and Social Policy, *The Future of Civil Legal Aid in the United States* 11 (2005) (stating that nine state studies validated ABA findings that "less than 20 percent of the legal needs of low income Americans were being met" and eight of the nine studies found the unmet legal need to be greater than 80 percent).[14] As a result of being consistently unable to secure counsel, "poor people largely cannot enforce what rights they have," and the "laws that protect such basic needs as family integrity, shelter, medical care, food, and employment have

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(Footnote continued from previous page.)

25,000 cases a year." Emily Jane Goodman, *Facing Eviction—Without The Right To Counsel*, Gotham Gazette, June 2008 (quoting the executive director of Legal Services of New York City). Nationwide, "[a]ccording to most estimates, about four-fifths of the civil legal needs of low-income individuals, and two- to three-fifths of the needs of middle-income individuals remain unmet." Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 371 (2004). In the words of former President Jimmy Carter, "[n]inety percent of our lawyers serve ten percent of our people. We are [at the same time] overlawyered and underrepresented." *Id.*

[13] *Available at* http://www.publicjustice.org/our-work/index.cfm?pageid=88 (last visited Oct. 17, 2008).

[14] *Available at* http://www.clasp.org/publications/future_legal_aid.pdf (last visited Oct. 17, 2008).

become effectively meaningless for many people." Paul Marvy & Debra Gardner, *A Civil Right to Counsel For the Poor*, 32 Human Rights 8, 8 (2005).[15]

Recognizing the "vast and continuing unmet need for the services of lawyers among those unable to afford counsel," ABA Report, at 4, the ABA passed its Resolution, urging that governments provide legal counsel at public expense in those categories of cases "where basic human needs are at stake," including child custody proceedings.

II. HUMAN RIGHTS LAW IN OTHER INDUSTRIAL DEMOCRACIES PROVIDES A RIGHT TO COUNSEL IN ADVERSARIAL CHILD CUSTODY PROCEEDINGS

The United States Supreme Court has considered the laws of other nations as persuasive authority when interpreting basic guarantees of human rights. As the Supreme Court explained in *Roper v. Simmons*, which overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), and prohibited the death penalty for minors, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom." 543 U.S. 551, 578

[15] As the Supreme Court of the United States noted in *Griffin v. Illinois*, the eternal hope of "equal justice for poor and rich, weak and powerful alike" was embodied in the Magna Charta, which proclaimed in 1215 that "[t]o no one will we sell, to no one will we refuse, or delay, right or justice." 351 U.S. 12, 16 (1956). But "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

(2005).[16] State courts have also cited foreign law favorably in deciding domestic law issues.[17]

The human rights law of other industrial democracies requires counsel in certain civil cases, including when child custody is at stake. For example, under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), all members of the Council of Europe ("COE") are required to provide civil litigants with a "fair hearing." Article 6(1) of the European Convention provides that

> [i]n the determination of his *civil rights and obligations* or of any criminal charges against him, everyone is entitled to a *fair* and public *hearing* within

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[16] *See also Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (citing foreign authority when overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and decriminalizing private, consensual, homosexual sexual activity); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (citing foreign authority when overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989), and prohibiting the execution of mentally ill defendants).

[17] *See, e.g., People v. Jones*, 949 P.2d 890 (Cal. 1998) (citing English case law in demonstrating importance of corpus delecti rule); *Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003) (en banc) (citing international authority to demonstrate that "the views of the international community have consistently grown in opposition to the death penalty for juveniles"); *Snetsinger v. Montana Univ. Sys.*, 104 P.3d 445, 458 (Mont. 2004) (Nelson, J. concurring) (citing international human rights law in support of holding that state university's policy against dependent health insurance coverage for same-sex partners violated state constitution); *Sterling v. Cupp,* 625 P.2d 123 (Or. 1981) (examining pertinent international standards to interpret provision of Oregon constitution prohibiting treatment of prisoners with "unnecessary rigor"). Sitting chief justices of state high courts have also written approvingly of using law from foreign jurisdictions in interpreting state constitutions. *See, e.g.,* Margaret H. Marshall, *Wise Parents Do Not Hesitate to Learn from Their Children: Interpreting State Constitutions in the Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633 (2004) (Chief Justice, Massachusetts Supreme Judicial Court); Shirley S. Abrahamson & Michael Fischer, *All the World's a Courtroom: Judging in the New Millenium*, 26 Hofstra L. Rev. 273 (1997) (Chief Justice, Wisconsin Supreme Court).

> a reasonable time by an independent and impartial tribunal established by law.

European Convention for the Protection of Human Rights and Fundamental Freedoms, 212 U.N.T.S. 222, 228, at Art. 6, ¶ 1 (Nov. 4, 1950) (emphasis added). In 1979, the same year that this Court decided *Flores v. Flores, supra*, the European Court of Human Rights ("ECtHR") determined that the European Convention's guarantee of a "fair hearing" requires effective access to the court, and may, in the case of a poor litigant, require the government to provide counsel. *Airey v. Ireland*, (1979) 2 E.H.R.R. 305 (Eur. Ct. H.R.).

The petitioner in *Airey v. Ireland* sought legal separation from her husband, with attendant issues regarding child custody, support and protection from domestic violence. She lacked funds to hire a lawyer to represent her in the appropriate Irish court, and her request for appointed counsel was denied by the Irish government. She filed a petition with the European Commission for Human Rights, which was ultimately heard by the ECtHR, claiming that her access to court had been denied by the failure to provide counsel. The ECtHR rejected the Irish government's argument that she had been provided access because "she [was] free to go before [the] court without the assistance of a lawyer." *Id.* at 314. The court reasoned that

> [t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

Id. at 314-315 (internal footnotes omitted)

Based on the nature of the separation proceeding, which might involve expert witnesses and complex legal issues, and noting that "marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court," the court found it "improbable that a person in Mrs. Airey's position . . . can effectively present his or her own case." *Id.* at 315. The court also found it "certain" that Mrs. Airey "would be at a disadvantage if her husband were represented by a lawyer and she were not." *Id.*[18] The ECtHR therefore concluded that, because she had not been provided with counsel, Mrs. Airey had been denied effective access to court in violation of the European Convention's guarantee of a fair hearing. *Id.* at 318. That guarantee, as interpreted in *Airey*, thus requires appointed counsel in comparable circumstances in each of the COE's 49 member countries.

The concept of a right to counsel in civil proceedings was, however, far from new when the ECtHR decided *Airey*. Indeed, the decision of the ECtHR in *Airey* can be seen as

> reflecting the views of many of its member countries. In 1979, two-thirds of the member countries at that time already had requirements, some dating back centuries, to provide the poor with free civil lawyers: Austria—1781; Belgium—1994; Denmark—1969; England—1495; France—1851; Germany—1877; Iceland—1976; Italy—1865; Norway—1915 (perhaps as

[18] The ECtHR has more recently recognized a right to counsel based solely on the opposing party's representation by counsel in order to avoid what is described as 'inequality of arms.' In a 2005 case from the United Kingdom, the ECtHR concluded that failure to provide counsel to defendants in a defamation case in which plaintiff was represented by experienced counsel was a denial of the defendants' Article 6.1 "fair hearing" rights. *Steel v. United Kingdom*, (2005) 41 E.H.R.R. 22 (Eur. Ct. H.R.).

early as the 1600's); Portugal—1899; Spain—1835; Sweden—1919; Switzerland—1937; The Netherlands—1957.

Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 Temp. Pol. & Civ. Rts. L. Rev. 769, 776 (2006) (citing Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loy. L.A. L. Rev. 341, 342-49 (1985)).

In most of these countries the civil right to counsel has been provided by statute or by explicit constitutional provisions. *Id.* In some instances, however, it has been established by court decisions. The Supreme Court of Switzerland in 1937 required the governments of the Swiss Cantons to provide free lawyers to indigent persons in all civil cases requiring "knowledge of the law" based on the Swiss constitution's guarantee that "all Swiss are equal before the law." *See* Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 1, 5 (1967). While Germany has long had a comprehensive statutory right to counsel, "the German Constitutional court has also made it clear that the nation's guarantee of a 'fair hearing' in civil cases may require the appointment of free counsel for poor people where the legal aid statute does not." Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and other Industrial Democracies*, 24 Fordham Int'l L. J. S83, S90 (2000) (citing Decision of June 17, 1953 (No. 26), Entscheidungen des Bundesgerfassungsgerichts [BverwGE] 2, 336 (1953)). In most COE countries, the right to counsel covers a wide range of civil matters, including family law cases. Lidman, *supra*, at 779; *see also id.* at 790-800 (chart).

Recognition of a right to counsel in civil cases generally, and child custody cases in particular, has not been limited to COE countries. Twenty years after the ECtHR decision in *Airey v. Ireland*, the Supreme Court of Canada faced a similar issue in *New Brunswick v. G. (J.)*. 177 D.L.R. (4th) 124 (Can. 1999), *available at* 1999 WL 1556609. The petitioner in that case was the mother of three children who were in the custody of the Minister of Health and Community Services under a court order. When the Minister applied to extend the custody order by six months, the petitioner made a motion claiming a right to state-funded legal counsel to represent her in opposing the application. While most Canadian provinces would have provided legal aid as a matter of statutory law, New Brunswick had denied her application for legal aid because only permanent guardianships were covered under the applicable guidelines. As in this case, "all other parties were represented by counsel." *Id.* at ¶ 79. The Canadian Supreme Court heard the mother's appeal after the children had been returned to her care and despite mootness because it raised an issue of national importance – whether a parent has a constitutional right to state-funded counsel in child custody hearings – and because similar cases would likely be rendered moot by the time they reached the Supreme Court.

Having considered "the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the [mother]," the Supreme Court of Canada in *New Brunswick v. G. (J.)* held that the mother's "right to a fair hearing required that she be represented by counsel." *Id.* at ¶ 75. The court noted that child custody proceedings require a parent to plan and present her case "in the context of what is to many a foreign environment, and under significant emotional strain" and that "an unrepresented parent

will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case." *Id.* at ¶¶ 79-80.

The court in *New Brunswick v. G. (J.)* emphasized the importance of providing counsel to parents in child custody proceedings as a means of enabling the court to make a decision that is in the child's best interest.

> For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. . . . In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests.

Id. at ¶ 73. The court concluded, therefore, that "the appellant [mother] needed to be represented by counsel for there to have been a fair determination of the child's best interests" and that failure to provide her counsel was not "in accordance with principles of fundamental justice." *Id.* at ¶¶ 81, 91.

As recognized in *Airey* and *New Brunswick v. G. (J.)*, and by legal authority in many industrial democracies, a parent's representation by counsel serves not only the interests of the parent but also the state's interest in making a determination that is in the best interest of the child. This conclusion is reflected in the ABA Resolution: meaningful access to the court requires representation of counsel when a parent's fundamental right

to direct the upbringing of her child is at stake in an adversarial proceeding. This is especially true when the opposing party is represented by counsel.

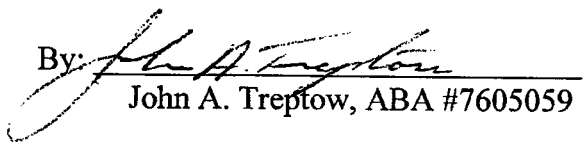
CONCLUSION

For the foregoing reasons, the American Bar Association, as *amicus curiae*, respectfully requests that this Court affirm the decision below that Appellee, Siv Jonsson, was entitled to appointed counsel in this case.

Dated: November 19, 2008

Respectfully submitted,

DORSEY & WHITNEY LLP

By: 
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APPENDIX A

112A

Unanimously Approved by ABA House of Delegates August 7, 2006

AMERICAN BAR ASSOCIATION

TASK FORCE ON ACCESS TO CIVIL JUSTICE
SECTION OF BUSINESS LAW
COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS
COMMISSION ON LAW AND AGING
SECTION OF LITIGATION
STEERING COMMITTEE ON THE UNMET LEGAL NEEDS OF CHILDREN
SPECIAL COMMITTEE ON DEATH PENALTY REPRESENTATION
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
COMMISSION ON IMMIGRATION
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
KING COUNTY BAR ASSOCIATION (WASHINGTON)
MAINE STATE BAR ASSOCIATION
NEW YORK COUNTY LAWYERS' ASSOCIATION
THE PHILADELPHIA BAR ASSOCIATION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
WASHINGTON STATE BAR ASSOCIATION
BOSTON BAR ASSOCIATION
COLORADO BAR ASSOCIATION
NEW YORK STATE BAR ASSOCIATION
CONNECTICUT BAR ASSOCIATION
MINNESOTA STATE BAR ASSOCIATION
LOS ANGELES COUNTY BAR ASSOCIATION
THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
SECTION OF LABOR AND EMPLOYMENT LAW
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.

REPORT

This Resolution is the Logical Next Step in the ABA's Long History of Support for Achieving Equal Justice in the United States

The ABA has long held as a core value the principle that society must provide equal access to justice, to give meaning to the words inscribed above the entrance to the United States Supreme Court – "Equal Justice Under Law." As one of the Association's most distinguished former Presidents, Justice Lewis Powell, once observed:

> "Equal justice under law is not just a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

The ABA also has long recognized that the nation's legal profession has a special obligation to advance the national commitment to provide equal justice. The Association's efforts to promote civil legal aid and access to appointed counsel for indigent litigants are quintessential expressions of these principles.

In 1920, the Association created its first standing committee, "The Standing Committee on Legal Aid and Indigent Defendants," with Charles Evans Hughes as its first chair. With this action, the ABA pledged itself to foster the expansion of legal aid throughout the country. Then, in 1965, under the leadership of Lewis Powell, the ABA House of Delegates endorsed federal funding of legal services for the poor because it was clear that charitable funding would never begin to meet the need. In the early 1970s, the ABA played a prominent role in the creation of the federal Legal Services Corporation to assume responsibility for the legal services program created by the federal Office of Economic Opportunity. Beginning in the 1980s and continuing to the present, the ABA has been a powerful and persuasive voice in the fight to maintain federal funding for civil legal services.

These actions are consistent with and further several of the ABA's key goals including:

GOAL II To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition.

When the ABA adopted this Goal, the following objectives for achieving it were listed:

1. Increase funding for legal services to the poor in civil and criminal cases.
2. Communicate the availability of affordable legal services and information to moderate-income persons.
3. Provide effective representation for the full range of legal needs of low and middle income persons.
4. Encourage the development of systems and procedures that make the justice system easier for all persons to understand and use.

The ABA Has Adopted Policy Positions Favoring a Right to Counsel

The ABA has on several occasions articulated its support for appointing counsel when necessary to ensure meaningful access to the justice system. In its amicus brief in *Lassiter v. Dept of Social*

Services of Durham County, 425 U.S. 18 (1981), the ABA urged the U.S. Supreme Court to rule that counsel must be appointed for indigent parents in civil proceedings that could terminate their parental rights, "[I]n order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense. *Id.* at 3-4. The ABA noted that "skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. . . . Pro se litigants cannot adequately perform any of these tasks."

In 1979 the House of Delegates adopted Standards Relating to Counsel for Private Parties, as part of the Juvenile Justice Standards. The Standards state "the participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings." These standards were quoted in the *Lassiter* amicus brief. Also, in 1987, the House of Delegates adopted policy calling for appointment of counsel in guardianship/conservatorship cases.[1]

The ABA stated these positions some years ago, but its continuing commitment to the principles behind the positions was recently restated when it championed the right to meaningful access to the courts by the disabled in its amicus brief in *Tennessee v. Lane,* 541 U.S. 509 (2004). The case concerned a litigant who could not physically access the courthouse in order to defend himself. In terms that could also apply to appointment of counsel, the brief states, "the right of equal and effective access to the courts is a core aspect of constitutional guarantees and is essential to ensuring the proper administration of justice." ABA Amicus Brief in *Tennessee v. Lane* at 16.

Echoing the Association's stance in *Lassiter*, the brief continued "the right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights . . . [W]hen important interests are at stake in judicial proceedings, the Due Process Clause requires more than a theoretical right of access to the courts; it requires *meaningful* access. . . To ensure meaningful access, particularly when an individual faces the prospect of coercive State deprivation through the judicial process of life, liberty, or property, due process often requires the State to give a litigant affirmative assistance so that he may participate in the proceedings if he effectively would be unable to participate otherwise." *Id.* at 17-18 (internal citations omitted).

Despite 130 Years of Legal Aid in the United States, Existing Resources Have Proven Inadequate to Fulfill the Promise of Equal Justice for All.

The right to representation for indigents in civil proceedings goes back to the earliest days of the common law when indigent litigants had a right to appointment of counsel so they could have access to the civil courts. Most European and Commonwealth countries have had a right to counsel in civil cases for decades or even centuries, entitling all poor people to legal assistance

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[1] *See* House of Delegates Resolution adopted in August, 1987 offered by the Special Committee on Legal Problems of the Elderly: "BE IT RESOLVED, That the American Bar Association supports efforts to improve judicial practices concerning guardianship, and adopts the following Recommended Judicial Practices and urges their implementation for the elderly at the state level: ... I. Procedure: Ensuring Due Process Protections ... C. Representation of the Alleged Incompetent ... 1. Counsel as advocate for the respondent should be appointed in every case..."

when needed. The United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve. As of today, the level of resource does not approach the level of need[2] and only a fortunate few of those unable to afford counsel enjoy effective access to justice when facing serious legal problems

For the first 90 years of legal aid in this country, the only financial support for civil legal aid came from private charity. It started in 1876 with a single legal aid society serving German-American immigrants in New York City. Bar associations and social service organizations later established legal aid programs in a few cities elsewhere in the country. Starting in 1920, prompted by the publication of Reginald Heber Smith's landmark expose of injustice in America, JUSTICE AND THE POOR, and under the leadership of Charles Evans Hughes, the ABA, as noted above, sought to nurture development of such programs and managed to foster legal aid societies in most major cities and many smaller communities around the nation. But those societies were grossly underfunded and understaffed.

It was not until 1965 that government funding first became available for civil legal aid as part of the War on Poverty. In 1974, the federal Legal Services Corporation was established as the central funding entity for legal aid programs nationwide. During the early years the federal government expanded legal aid funding considerably. But the expansion of federal appropriations soon stalled, when LSC proved vulnerable to political attack. Thus, local legal aid agencies began to more aggressively seek diversified funding from other sources including Interest on Lawyers Trust Accounts (IOLTA), state and local governments and private sources.[3] Despite these innovative and often heroic efforts, however, taking account of inflation and the growth in numbers of poor people civil legal aid funding is no higher today in real terms than it was a quarter century ago.[4]

Given this persistent shortage of legal aid resources, it is not surprising to find a vast and continuing unmet need for the services of lawyers among those unable to afford counsel. While the nationwide Legal Services Corporation-funded system for providing legal services assists as many as one million poor people with critical legal problems each year, a recent survey shows that the legal aid programs within that system have to turn away another million people who come to their offices[5]. Millions more are discouraged and don't bother seeking legal aid because

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[2] *See Documenting the Justice Gap in America, A Report of the Legal Services Corporation* (2005) documenting the percentage of eligible persons that LSC funded-programs are unable to serve due to lack of sufficient resources.

[3] Some of these funding sources also have come under attack. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Wieland v. Lawyers Trust Fund of Illinois*, Docket # 5-03-0419, App. Ct. of Ill, 5th Jud Dist. (2003).

[4] Expenditures of public resources to address the legal needs of the poor in the United States compare poorly with funding in many other industrialized nations. At the lower end, Germany and Finland invest over three times as much of their gross domestic product as the United States in serving the civil legal needs of lower income populations. At the upper end, England spends 12 times as much of its GDP as the U.S. does to provide civil legal aid to its citizens. In between, New Zealand spends five times more than the U.S and the Netherlands over seven times as much. Even Hong Kong, now a part of the People's Republic of China, invests more than six times as much as the U.S.

[5] *See* n. 1, *Documenting t he Justice Gap* at p. 5. It also should be noted that many of the cases in which local programs reported they provided services were ones where limited resources meant they only were able to supply

they know help is not available. Despite all the efforts of legal aid programs and pro bono lawyers, an ABA nationwide legal needs study in 1993 showed that legal help was not obtained for over 70% of the serious legal problems encountered by poor people.

More than ten years have passed since that ABA research, and matters have only gotten worse. Poverty has not significantly abated and indeed has increased since the 2000 census. Similarly, the civil legal needs of the poor remain substantially unfulfilled. For example, a September 2003 report by the District of Columbia Bar Foundation estimates that less than 10% of the need for civil legal assistance is being met in that jurisdiction. A similar study in Washington State, also released in September 2003, found that 87% of the state's low-income households encounter a civil legal problem each year, and that only 12% of these households are able to obtain assistance from a lawyer. In Massachusetts - a state with significant legal services resources - the occurrence of civil legal problems among the poor increased significantly in the period 1993-2002. By 2002 at least 53% of the poor households in the state had at least one unmet civil legal need and only 13% of those households were able to resolve all the problems they experienced.[6]

Both Constitutional Principles and Public Policy Support A Legally Enforceable Right to Counsel to Achieve Effective Access to Justice in Many Civil Cases

In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) the U.S. Supreme Court held:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries....From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

It appears just as difficult to argue a civil litigant can stand "equal before the law . . . without a lawyer to assist him." Indeed just a year after *Gideon*, the Supreme Court made a similar observation about civil litigants. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries...." *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Yet, in 1981, the Supreme Court, in a civil matter, said that there is no absolute right to court appointed counsel for an indigent litigant in a case brought by the state to terminate parental rights. *Lassiter v. Department of Social Services*, 425

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self-help assistance, but believed full representation would have led to a better outcome for the clients. (*Id.* at p. 6, fn 8.)

[6] Seven additional states have recently examined the kinds of legal problems experienced by low-income residents of the state and what they do about them: Oregon (2000), Vermont (2001), New Jersey (2002), Connecticut (2003), Tennessee (2004), Illinois (2005) and Montana (2005). These studies, too, demonstrate that only a very small percentage of the legal problems experienced by low-income people (typically one in five or less) is addressed with the assistance of a private or legal aid lawyer.

U.S. 18 (1981). While the Court recognized that the complexity of a termination of parental rights proceeding might "overwhelm an uncounseled parent," the Court found--by a 5-4 vote--that the appointment of counsel was not required in every case. *Id.* at 30. Instead, trial courts were instructed to balance three factors to determine whether due process requires that a parent be given a lawyer: "the private interest at stake, the government's interest and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27. The court went on to apply the standard in such a way that it virtually excluded the appointment of counsel except in the most extraordinary circumstances, in particular by overlaying on the three-part due process test an additional presumption against appointed counsel where there is no risk of loss of physical liberty.

It is to be hoped that the U.S. Supreme Court will eventually reconsider the cumbersome *Lassiter* balancing test and the unreasonable presumption that renders that test irrelevant for almost all civil litigants. There would be precedent for such a reversal, as seen in the evolution of the criminal right to counsel from *Betts v Brady,* 316 U.S. 455 (1942) to *Gideon* in 1963. In *Betts,* the Court said the appointment of counsel was required in criminal cases only where, after a case-by-case analysis, the trial court determined that counsel is necessary to ensure that trial is not "offensive to the common and fundamental ideas of fairness and right." *Id.* at 473. But by 1963, the Court realized that the *Betts* approach was unworkable, and overturned it in *Gideon.*

Powerful common law, constitutional, and policy arguments support a governmental obligation to ensure low income people are provided the means, including lawyers, to have effective access to the civil courts. These arguments have equal and sometimes greater application at the state level than they do at the federal level.

Common Law Antecedents Support a Right to Counsel in Civil Matters

The common law has a long history of granting indigent litigants a right to counsel in civil cases. As early as the 13th and 14th centuries English courts were appointing attorneys for such litigants, a right that Parliament codified in 1495.[7] Several American colonies imported this statute and its right to counsel as part of the common law they adopted from the mother country and, it has been argued, this nascent right continues to the current day.[8] But at a minimum the venerable age and persistence of this right[9] in the common law tradition suggests the fundamental importance

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[7] The critical language from the Statute of Henry VII, which also relieved indigent civil litigants from the obligation to pay fees and costs, reads as follows: "[T]he Justices...shall assign to the same poor person or persons counsel,...which shall give their counsel, nothing taking for the same;...and likewise the Justices shall appoint attorney and attorneys for the same poor person or persons...." II Hen VII, c. 12 (1495), An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, reprinted in 2 Statutes of the Realm 578 (1993). .

[8] See, e.g., Brief for Appellant, *Frase v. Barnhart*, 379 Md. 1000 (2003) at pp. 33-42, arguing the Statute of Henry VII is part of the English common law the colony and later the state of Maryland adopted as its own and this right to counsel remains part of Maryland law in the current day. Nor is this common law argument limited to the original 13 states. Many if not most other states expressly incorporated the English common law as it existed at the moment of their statehood as the common law of those states. See Johnson, *Beyond Payne: The Case for A Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOYOLA OF LOS ANGELES L. REV. 249, 251-259 (1978) for an explanation why the Statute of Henry VII the California Supreme Court used as the basis for finding a common law right to waiver of fees and costs also appears to justify the provision of free counsel to those same indigent litigants.

[9] The Statute of Henry VII was not replaced until 1883, when it was succeeded by a law designed to make the right more effective. In 1914 the English Parliament passed another reform of legal aid. Then in 1950 it enacted a

that tradition, which is the basis of American law, accords guaranteeing poor people equality before the law and furnishing them the lawyers required to make that guarantee a reality.

Other European and commonwealth countries also have come to recognize a statutory right to counsel in civil cases. France created such a statutory right in 1852, Italy did so when Garibaldi unified the country in 1865, and Germany followed suit when it became a nation in 1877. Most of the remaining European countries enacted right to counsel provisions in the late 19th and early 20th century. Several Canadian provinces, New Zealand and some Australian states have provided attorneys to the poor as a matter of statutory right for decades, although the scope of the right has changed in response to legislative funding and priorities.[10]

As of this time, no American jurisdiction has enacted a statutory right to counsel at public expense nearly as broad as these other countries. But many states have passed laws conferring a right to counsel in certain narrow areas of the law. The most common are those guaranteeing counsel to parents – and sometimes children -- in dependency (often called neglect) proceedings, and to prospective wards in guardianship and similar proceedings in which interference with personal liberties are at stake. A handful of states also have extended a statutory right to counsel in other situations. It is encouraging that state legislatures have recognized the truth that poor people cannot have a fair hearing in these particular adversarial proceedings. Yet many other proceedings that threaten loss of basic human needs are equally adversarial and often more complex. In those cases, just like dependency proceedings, no civil litigant can be "equal before the law…without a lawyer."

Courts perhaps more than legislatures are familiar with the truth of this principle embodied in the common law right to counsel and implemented, to a limited degree in many state statutes in the U.S., and to a broader extent, in the laws of many other countries. On a regular basis, the judiciary witnesses the helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents. Judges deeply committed to reaching just decisions too often must worry whether they delivered injustice instead of justice in such cases because what they heard in court was a one-sided version of the law and facts. Nearly a decade ago, one trial judge, U.S. District Court Judge Robert Sweet, gave voice to this concern in a speech to the Association of the Bar of New York, and also tendered a solution. "What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon,* that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system."[11]

State and Federal Constitutional Principles Support a Civil Right to Counsel

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sophisticated civil legal aid program that remains the most comprehensive and generously funded legal aid system in the world.

[10] These developments in other countries are surveyed in Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 Loyola of Los Angeles Law Review 341 (1985). Several of the foreign statutes are translated in Cappelletti, Gordley and Johnson, TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (Milan/Dobbs Ferry: Giuffre/Oceana, 1975, 1981).

[11] Sweet, *Civil "Gideon" and Justice in the Trial Court (The Rabbi's Beard)*, 42 THE RECORD 915, 924 (Dec. 1997).

In the years between *Gideon* and *Lassiter*, a few state supreme courts took some promising steps toward a constitutional right to counsel in civil cases. The Maine and Oregon Supreme Courts declared the constitutional right to due process required that their state governments provide free counsel to parents in dependency/neglect cases.[12] The Alaska Supreme Court ruled that counsel must be appointed at public expense to an indigent party in a child custody proceeding if the other party was provided free representation.[13] The California Supreme Court found a due process right to counsel for defendants in paternity cases[14] and an equal protection right for prisoners involved in civil litigation.[15] The New York Court of Appeal fell only one vote short of declaring a constitutional right to free counsel for poor people in divorce cases.[16]

During that era, between *Gideon* and *Lassiter*, academic articles also frequently appeared discussing the many legal theories which would support a constitutional right to counsel in civil cases.[17] In common with the state supreme court decisions mentioned above, these articles usually articulated arguments based on the due process clauses found in the federal and state constitutions and their implicit guarantees of a fair hearing in civil proceedings. But they carried the argument beyond the narrow categories of cases covered by the then existing state court decisions to embrace a far broader range of civil litigation. They emphasized the serious consequences losing litigants face in many other civil cases poor people commonly experience – and the empirical and other evidence suggesting the lack of counsel virtually guarantees these people in fact would lose those cases.

Some of these articles likewise found strong support for a right to counsel in the equal protection clauses common to the federal and most state constitutions. Some pointed to the fundamental interest all citizens have in enjoying "like access to the courts" for the protection of their rights – as the essential handmaiden of the right to vote without which laws enacted to give them substantive rights cannot be enforced. As a fundamental interest, it warrants the "close scrutiny" to which the courts are to subject any policies denying that access. It also was observed that some states have made "poverty" a "suspect class." This again would mandate close scrutiny of a state's denial of counsel to poor people in judicial proceedings structured in a way that requires a lawyer if one is to have effective access to those courts.

Over the years after *Gideon,* lawyers continued to pursue litigation seeking to establish the right to counsel in civil cases, with considerable success, initially on traditional notions of due

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[12] *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *State v. Jamison*, 444 P.2d 15 (Ore. 1968).

[13] *Flores v. Flores,* 598 P. 2d 893 (Ak, 1979).

[14] *Salas v. Cortez*, 24 Cal.3d 22, 593 P.2d 226 *cert. den.* 444 U.S. 900 (1979).

[15] *Payne v. Superior Court*, 17 Cal.3d 908 (1976).

[16] *In re Smiley*, 369 N.Y.S.2d 87, 90 (N.Y. 1975).

[17] See, e.g., Note, *The Right to Counsel in Civil Litigation*, 66 Colum.L.Rev. 1322 (1966); O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); Note, *The Indigent's Right ot Counsel in Civil Cases*, 43 Fordham L. Rev. 989 (1975), Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U.Mich.J.L. Ref. 554 (1976), Comment, *Current Prospects for an Indigent's Right to Appointed Counsel and Free Transcript in Civil Litigation*, 7 Pac. L.J. 149 (1976), Johnson, *Beyond Payne: The Case for a Legally Enforceable Right to Representation for Indigent California Litigants*, 11 Loyola of Los Angeles L..Rev. 249 (1978).

process. In Michigan and other states, a detailed blueprint was developed to take a series of cases through the appellate courts to establish the right to counsel in various circumstances. After several victories, the initiative was set aside in part because of the *Lassiter* decision.

After *Lassiter* and its narrow construction of due process, most of the possible constitutional theories remain untested in either the federal or state courts. But they have been reinforced by constitutional decisions abroad. As early as 1937, a quarter century before *Gideon* and over four decades before *Lassiter*, the Swiss Supreme Court found the analog of our constitution's equal protection clause, the "equality before the law" provision of that nation's Constitution, mandated appointment of free counsel for indigent civil litigants.[18] Then in 1979 the European Court of Human Rights issued a historic decision, *Airey v. Ireland*[19], based on an analog of due process--a provision in the European Convention on Human Rights and Fundamental Freedoms which guarantees civil litigants a "fair hearing."[20] In a decision that now applies to 41 nations and over 400 million people, the court held indigents cannot have a "fair hearing" unless represented by lawyers[21] and required member states to provide counsel at public expense to indigents in cases heard in the regular civil courts.[22] As a direct result of this decision, the Irish legislature created that nation's first legal aid program which is now funded at three times the level of America's. The *Airey* decision and its progeny also have influenced the scope of legal aid legislation in several other European countries.[23]

Policy Considerations Support Recognition of a Civil Right to Counsel

Underlying all the constitutional theories are several undeniable truths. The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts, following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position

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[18] *Judgment of Oct. 8, 1937*, Arrets du Tribunal Federal (ATF) 63, I, 209 (1937), discussed in O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 Ohio St. L.J. 5 (1967).

[19] *Airey v Ireland*, 2 Eur. Ct. H.R. (ser.A) 305 (1979).

[20] "In the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time." Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, para.1, 213 U.N.T.S. 222.

[21] As the court explained: "The Convention was intended to guarantee rights that were *practical and effective*, particularly in respect of the right of access to the courts, in view of its prominent place in a democratic society....The possibility of appearing in person before the [trial court] did not provide an *effective* right of access... [I]t is not realistic,...to suppose that,...the applicant could effectively conduct her own case, despite the assistance which,...the judge affords to parties acting in person...." (*Id.* at p. 315, emphasis supplied.).

[22] A constitutional "fair hearing" guarantee likewise formed the basis for the Canadian Supreme Court's recent declaration of a right to counsel at public expense for indigent litigants, in this instance parents involved in dependency/neglect cases. *New Brunswick v J.G.* 177 D.L.R. (4th) 124 (1999).

[23] See, e.g., *Steel and Morris v. The United Kingdom*, Eur.Ct.H.R. (Judgment of Feb. 15, 2005) which found England's legal aid statute denying counsel to indigent defendants in defamation cases violated the right to counsel required to satisfy the European Convention's guarantee of a "fair hearing.".

may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.[24]

There are other problems, too, when parties lack counsel in civil proceedings. In seeking to insure that justice is done in cases involving pro se litigants, courts must struggle with issues of preserving judicial neutrality (where one side is represented and the other is not), balancing competing demands for court time, and achieving an outcome that is understood by pro se participants and does not lead to further proceedings before finality is reached. Meantime large numbers of pro se litigants lose their families, their housing, their livelihood, and like fundamental interests, losses many of them would not have sustained if represented by counsel. Furthermore, the perception the courts do not treat poor people fairly has consequences for the system itself. As California Chief Justice Ronald George recently observed, "[E]very day the administration of justice is threatened...by the erosion of public confidence caused by lack of access."[25]

Whether cast as a constitutional imperative or a policy finding compelling a legislative remedy, when litigants cannot effectively navigate the legal system, they are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result. Absent a systemic response, access to the courts will continue to be denied to many solely because they are unable to afford counsel. Considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a right of meaningful access to the courts.

Current Efforts to Establish a Civil Right to Counsel

For over two decades, the *Lassiter* decision appeared to paralyze serious consideration of a right to counsel in civil cases. But in the last few years advocates around the country have taken up the challenge with renewed vigor and strategic thinking.[26] Some are exploring state law common law

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[24] *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in the Legal Process*, 20 Hofstra L.Rev. 533 (1992); Seron et al, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of A Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001).

[25] Chief Justice Ronald George, State of Judiciary Speech to California Legislature, 2001.

[26] This renewed interest also is reflected in the academic literature. Marvy, Paul and Gardner, Debra, *A Civil Right To Counsel For the Poor*, 32 Human Rights 8 (Summer 2005); Boyer, Bruce, Justice, *Access to the Courts, and the Right to Free Counsel For Indigent Parents: The Continuing Scourge of Lassiter v. Department of Social Services of Durham*, 36 Loy. U. Chi. L.J. 363 (2005); Nethercut, John, *'This Issue Will Not Go Away...': Continuing to Seek the Right to Counsel in Civil Cases*, 38 Clearinghouse Review 481 (2004); Smith, Jonathan, *Civil Gideon*, 18 MIE Journal 4:3 (2004); Perluss, Deborah, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 Seattle J. for Soc. Just. 571 (2004); Klienman, Rachel, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507 (2004); Johnson, Earl, *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 J. for Soc. Just. 201 (2003); Johnson, Earl, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 Fordham Int'l L.J. 83 (2000); Sweet, Robert, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503 (1998); Sweet, Robert, *Civil Gideon and Justice in the Trial Court (the Rabbi's Beard)*, 52 The Record of the Ass'n of the Bar of the City of N.Y. 915 (1997); Young, Rosalie, *The Right to Appointed Counsel In Termination Of Parental Rights: The States' Response to Lassiter*, 14 Touro L. Rev. 247 (1997); Scherer, Andrew, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harv. C.R.-C.L. L. Rev. 557 (1988); Werner, F. *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (1987). Estrelle, Mark, *Gideon's Trumpet Revisited: Providing Rights of Indigent Defendants in Paternity Actions*, 29 J. Fam. L. 1, 9 (1985);

rights and constitutional guarantees of open courts and access to the courts as well as due process and equal protection, through appellate advocacy and litigation. Others are pursuing a range of legislative approaches. In each of what is already a significant number of states, a local broad-based team of advocates has determined the route they believe is most likely to achieve success.

Many of those advocates have come together as the National Coalition for a Civil Right to Counsel (NCCRC). The coalition provides information-sharing, training, networking, coordination, research assistance, and other support to advocates pursuing, or considering pursuing, a civil right to counsel. It includes well over a hundred advocates from legal services programs, private law firms, state bar associations, law schools, national strategic centers and state access to justice commissions, representing over 30 states. At present, there are active civil right to counsel projects underway in at least eight jurisdictions and discussions are taking place in a number of others.

Courts are also now being asked to revisit the issue. For example, a nonprofit poverty and civil rights program and two major private firms in Maryland are actively pursuing recognition of the civil right to counsel through an appellate strategy raising claims under the state's constitution as well as the common law this state imported from the mother country. In 2003, in the case of *Frase v. Barnhart*, 379 Md. 1000 (2003), they brought the question whether a poor person has the right to appointed counsel in a civil case before Maryland's highest appellate court. As part of a coordinated effort, the state bar association and legal services programs filed amicus briefs in support of the appellant's right to counsel. The court avoided ruling on the issue by a 4-to-3 vote, finding in favor of the unrepresented litigant without reaching the issue. But an impassioned 3-judge concurrence would have declared a civil right to counsel for the indigent mother who faced a contested custody dispute without the assistance of counsel.

In Washington, advocates from the private bar, legal services, the state's three law schools, and others have joined together to pursue judicial recognition of the civil right to counsel under the state's constitution. To date, the group has litigated two cases. One involved a local city seeking to remove a 77-year old disabled man from the home he built nearly 50 years earlier for alleged building code violations. The other case involved an abusive husband asserting false allegations through his attorney in order to obtain sole custody of his children. Both cases were ultimately resolved in the appellate courts in ways that did not result in rulings on the right to counsel issue.

In Wisconsin advocates have filed appeals on behalf of indigent mothers seeking to retain custody of their children from their abusive estranged husbands, contending the Wisconsin state constitution guarantees them the right to counsel to defend their custodial rights. In Georgia, the federal District Court, relying in part on the Georgia state constitution's due process clause, recently held that foster children have a right to counsel in all deprivation cases (elsewhere known as dependency cases, abuse and neglect proceedings, etc.).[27] And, in a recently filed test case the Canadian Bar Association is seeking to establish a national right under their Constitution to obtain civil legal aid in certain types of cases and challenging British Columbia's current legal aid plan as inconsistent with required standards for legal aid delivery for low-income Canadians.

Besharov, Douglas, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 Fam. L. W. 205, 219, 221 (1981).

[27] *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (D. Ga. 2005).

In other states, new focus on legislative recognition of a right to counsel has emerged. In California an effort is underway to draft a "model" statute, with alternative provisions regarding certain key issues, which creates and defines the scope of a statutory entitlement to equal justice including a right to counsel in appropriate circumstances. Recently, the State Bar of Texas sought legislation providing a civil right to counsel for low income tenants in certain eviction appeals cases. In New York this past June, the City Council appropriated $86,000 for a study of the need for counsel in eviction proceedings and the costs and benefits of providing counsel to tenants facing eviction. In addition, the New York State Equal Justice Commission has made advocacy for a civil right to counsel a prominent part of its agenda.

The effort to establish a right to court appointed counsel is a part of the struggle to make justice a matter of substance over form. More than 50 million people have incomes so low that they are eligible for legal services from Legal Services Corporation-funded programs[28] and millions more survive on incomes so low they cannot afford lawyers when in serious legal jeopardy. Many also have physical or mental disabilities or experience other barriers to navigating the legal system without a lawyer. Yet over the past quarter century the federal government has reduced its commitment to legal services by over 50%.

There is a crisis in equal justice, as documented above, and advocates are pursuing litigation and legislative strategies that might force a change in prevailing practices. The resolution voices the ABA's support for these primarily state-law-based approaches. While it remains important to look for the right in federal due process and equal protection law as the ultimate objective, the resolution seeks to foster the evolution of a civil right to counsel on a state-by-state basis, rooted in the unique provisions of each state's constitution and laws. This approach is likely to achieve significant results and provide doctrinal support for a future reconsideration of the right to civil counsel under the federal constitution.

The Proposed Resolution Offers a Careful, Incremental Approach to Making Effective Access to Justice a Matter of Right, Starting with Representation by Counsel in those Categories of Matters in which Basic Human Needs Are at Stake.

The right proposed in this resolution is long overdue and deeply embedded in the nation's promise of justice for all. But it also represents an incremental approach, limited to those cases where the most basic of human needs are at stake. The categories contained in this resolution are considered to involve interests so fundamental and critical as to require governments to supply lawyers to low income persons who otherwise cannot obtain counsel.

The resolution does not suggest that jurisdictions should limit their provision of counsel and other law-related services to these high-priority categories. Rather it indicates that in these categories they should *guarantee* no low income person is ever denied a fair hearing because of their economic status. In other categories of legal matters, it is expected that each jurisdiction will continue to supply legal services on the same basis as they have in the past. This includes jurisdictions where courts have the constitutional, statutory, or inherent power to appoint counsel in other categories of cases or for individuals who suffer impairments or unique barriers which

[28] "CPS Annual Demographic Survey, March Supplement," http://pubdb3.census.gov/macro/032005/pov/new01_125_01.htm

make it impossible for them to obtain a fair hearing in any cases unless they are represented by lawyers.

The right defined in this resolution focuses on representation in adversarial proceedings; it does not propose a generalized right to legal advice or to legal assistance unrelated to litigation in such forums. "Adversarial proceedings" as defined in the resolution are intended to include both judicial and some quasi-judicial tribunals, because many of the disputes involving the basic human needs described below are, in one jurisdiction or another, allocated to administrative agencies or tribunals. Indeed the label is often arbitrary. Cases a forum labeled a court would hear in one jurisdiction will be heard by a tribunal labeled an administrative agency or hearing officer or something else in other jurisdictions. The emphasis of the right articulated here is on the adversarial nature of the process, not what the tribunal is called. Some courts as well as some tribunals bearing another name function in an inquisitorial manner and without legal counsel. (In many states, for instance, parties in the small claims court are not allowed to be represented by lawyers and judges are expected to take an active role in developing the relevant facts. Similarly, some states have created pro se processes through which litigants can quickly and effectively access legal rights and protections without the need for representation by an attorney, for example in simple uncontested divorces.)

The basic human needs identified in this resolution as most critical for low income persons and families include at least the following: shelter, sustenance, safety, health and child custody.

- "Shelter" includes a person or family's access to or ability to remain in an apartment or house, and the habitability of that shelter.
- "Sustenance" includes a person or family's sources of income whether derived from employment, government monetary payments or "in kind" benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers' wage or employment disputes where counsel is not realistically available through market forces.
- "Safety" includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
- "Health" includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an employee benefit, through private insurance, or otherwise.
- "Child custody" embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.[29]

The above categories are considered to involve interests so fundamental and important as to require governments to supply low income persons with effective access to justice as a matter of right. There is a strong presumption this mandates provision of lawyers in all such cases. Trivial threats, however, even to a basic human need would not warrant such an investment of legal

[29] See generally, ABA Standards of Practice for Lawyers Representing Children in Custody Cases (2003) which includes suggested criteria to decide when counsel should be appointed for children in custody cases.

resources. Nor need counsel be supplied at public expense in cases where a lawyer is available to the litigant on a contingent fee basis. Furthermore, in some instances, there are informal proceedings, such as welfare fair hearings, in which government expressly permits trained and supervised non-lawyer advocates to represent both sides and where providing such representation is often sufficient. In still other instances, jurisdictions have redesigned a few select proceedings so they are not adversarial and also furnish self-help assistance sufficient to permit a litigant to have a fair hearing without any form of representation before the court. In such proceedings, the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer. With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.

This resolution focuses the right on "low income persons," but leaves to each individual jurisdiction the flexibility to determine who should be considered to fit within that category. Rather than being bound by the current national LSC eligibility guidelines (which are widely considered to be under-inclusive), it is anticipated jurisdictions will create their own criteria taking account of the applicant's income, net assets (if any), the cost of living and cost of legal services in the state or locality, and other relevant factors in defining the population to which this right attaches.

Because a civil right to counsel is likely to evolve in different ways in different jurisdictions, and also because states presently invest at very different levels, it is difficult to estimate how much a given jurisdiction will have to spend in additional public resources in order to implement such a right. It is possible to estimate the maximum possible exposure at the national level, however, from two sources – legal needs studies in the U.S. and the experience in other countries which have implemented a right to counsel in civil cases. Although there are major disparities among states, the United States is estimated to provide on average less than $20 of civil legal aid per eligible poor person. Most needs studies conclude the U.S. is already meeting roughly 20 percent of the need. This suggests the full need could be met if the U.S. raised the average to $100 per eligible person. But the right advocated in this resolution is substantially narrower and thus could be funded for substantially less than that. This conclusion is reinforced by the experience in England which has a much broader right to counsel than proposed in this resolution and the most generously funded legal aid program in the world, and furthermore uses a more costly delivery system than the U.S.[30] Yet it only spends in the neighborhood of $100 per eligible poor person. Thus, it is reasonable to anticipate the narrower right advocated in this resolution at the worst would result in a tripling of a jurisdiction's current investment in civil legal aid – although it might require somewhat more for states well below the national average and somewhat less for those presently above that average.

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[30] England provides partially-subsidized counsel to those above its poverty line. But completely free civil legal aid is available for the approximately 26 percent of the population below its poverty line, which amounts to approximately 13.5 million people. The English legal aid program currently spends about 1.36 billion dollars providing civil legal services to those in this lowest income stratum who are entitled to free legal services. That amounts to slightly more than $100 per eligible person in this income category.

In any event, put in perspective the increase would be a comparatively minor budgetary item in most states. Compared to Medicaid, for example, which nationally costs over $200 billion a year and spends nearly $4,200 per eligible person,[31] devoting even as much as $60 to $100 per eligible poor person in order to give them meaningful access to justice in their most urgent cases appears to be a minimal and justifiable investment. Funding this right also would only bring the total civil legal aid investment to about 1.5 percent of what American society currently spends on lawyers in this country, about the same share as they had in 1980.[32]

It is often difficult to obtain clear public understanding of the needs of the justice system. The third branch has historically struggled to obtain sufficient resources to fulfill its constitutional mandates.[33] Yet a peaceful and orderly society depends upon the effective functioning of the justice system. Within the sphere of justice system funding, there is a hierarchy of poor and poorer agencies. The courts are frequently under-funded. Even more resource starved are systems for providing constitutionally-mandated services to indigent persons accused of crimes. Last on the list are programs supplying civil legal aid. Implementation of a civil right to counsel as proposed herein is not intended to set up a struggle for the crumbs of finite resources between deserving, but oft-ignored constituencies. The result should not be a diminution of current or future funds allocated for public defense, which is an area that has all too often been inadequately supported by states and counties. Rather, it will be necessary for bar and judicial leaders to assist in educating the public and policy-makers about the critical functions of these parts of the justice system, and the need for our society to guarantee true access to justice for all.

Conclusion

In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed:

> "Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion."

If Justice Rutledge's self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate. The lesson from the past 130 years is that justice for the poor as a matter of charity or discretion has not delivered on

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[31] 2006 Statistical Abstract of the United States, Table 136, reflecting Medicaid alone provided $213 billion in health care to low income people. (This does not include the Medicare funds devoted to elderly poor in addition to their Medicaid benefits. Nor does it include other public funds used for health clinics and other special health care programs for low income patients. In 2003, a total of $279 billion was spent on the combination of Medicaid and other health care for the nation's low income residents. Table 122. This figure still did not include Medicare payments for the elderly poor, however.)

[32] According to the Statistical Abstract of the United States, Table 1263, individuals and institutions spent $194 billion on the services of lawyers in 2002. $3 billion would represent only 1.5 percent of that total societal expenditure on lawyers. This 1.5 percent would be about the same share of total legal resources as low income Americans had in FY 1980. That year the LSC budget was $321million with other public and private resources supplying several million more in civil legal aid, while the total societal investment in lawyer services was $23 billion. This gave civil legal aid roughly 1.5 percent of the nation's legal resources in that year.

[33] See *Funding the Justice System*, A Report by the American Bar Association Special Committee on Funding the Justice System (August, 1992).

the promises of "justice for all" and "equal justice under law" that form the foundation of America's social contract with all its citizens, whether rich, poor, or something in between. The Task Force and other proponents of this resolution are convinced it is time for this nation to guarantee its low income people equality before the law as a matter of right, including the legal resources required for such equality, beginning with those cases where basic human needs are at stake. We are likewise convinced this will not happen unless the bench and bar take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.

Respectfully submitted,

Howard H. Dana, Jr., Chair
Task Force on Access to Civil Justice

August 2006

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that the typestyle and font used in the foregoing BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE SIV JONSSON is Times New Roman 13.

The undersigned also certifies that on the 19th day of November, 2008, a copy of the foregoing was served by first-class mail on the following:

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