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THE OVERDUE RIGHT TO COUNSEL IN CIVIL CASES: FOCUS ON CUSTODY

By Debra Gardner

On August 7, 2006, Michael Greco, then President of the American Bar Association (ABA), called upon the ABA's House of Delegates to address one of the most pressing contemporary problems facing the justice system in this country:[1] "[W]hen 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."[2] The House of Delegates unanimously answered this call by resolving:

> [T]he 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.[3]

The notion of a civil right to counsel did not begin with the ABA Resolution;[4] however, the ABA was in a good position to speak with authority on this issue.[5] Its first two goals are promoting "improvements in the American system of justice" and "meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." The ABA has played a critical role in creating, funding, and preserving civil legal services from its beginning.[6] Its first standing committee, created in 1920, was the Standing Committee on Legal Aid and Indigent Defendants (SCLAID),[7] which signaled the ABA's permanent commitment to the realization of access to justice for the poor.[8]

Notably, this commitment resulted in the ABA's filing an amicus brief in *Lassiter v. Department of Social Services*[9] that urged recognition of a right to counsel in civil termination of parental rights proceedings as a matter of federal due process.[10] Unfortunately, the majority of the Supreme Court did not agree. In a 5-4 decision, the Court held that whether counsel was necessary in a civil matter to satisfy federal due process should be determined on a case-by-case basis.[11] Worse, it announced a presumption that there is no right to counsel in a civil case unless the litigant faces a loss of physical liberty,[12] defined narrowly as confinement.[13]

Predictably, *Lassiter* all but shut the door to progress on achieving a broad civil right to counsel, at least for a time. Eventually, some indigent litigants and their advocates returned to the idea of seeking recognition of a right to counsel, despite the setback of *Lassiter*. Much of this work has focused, for good reasons, on family law and, specifically, custody disputes. One such early effort was *Frase v. Barnhart*,[14] a third-party custody dispute. While the case was decided on grounds favorable to the unrepresented indigent parent,[15] the majority of the court did not reach the issue of the right to counsel. Three members of Maryland's seven-member high court filed a concurring opinion indicating that they would have reached the issue and would have found a right to counsel under the Maryland Declaration of Rights.[16]

This and other advocacy around the country inspired Michael Greco to take up the fight. With its historic resolution, the ABA once again fundamentally rejected the approach taken by the Supreme Court in *Lassiter* as a viable framework for ensuring access to justice in civil proceedings for indigent persons.[17] The resolution was carefully crafted to address the kinds of legal proceedings that have the greatest impact on individual rights and basic human needs.[18]

There are those who might question the inclusion of child custody disputes, especially cases between private parties, among the basic human needs to which a civil right to counsel should be afforded.[19] The ABA, though, did not shy away from making a bold statement that such cases are among those most requiring lawyers for those who cannot afford to hire them.[20]

A parent's right to an unfettered relationship with her child has been called even "more precious . . . than the right of

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life itself."[21]

> This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," and to be more significant and priceless than "liberties which derive merely from shifting economic arrangements."[22]

Private custody disputes utilize the machinery of the state and the courts to alter the family relationship. The purportedly private nature of these cases is rendered less and less significant when trial courts access their own experts to conduct evaluations and studies of the parties, appoint guardians ad litem or counsel for the children, or even participate in questioning during trial.[23] An indigent unrepresented parent can easily face an array of resources and adversaries every bit as formidable as may exist in a state-initiated parental rights termination proceeding.[24] Further, the consequences of the judicial process are highly invasive, and the impacts of potential error reach not only the parent but also the future lives of young children.[25] The notion that a loss of custody is not a permanent and severe intrusion into the parent-child relationship does not withstand scrutiny.[26] Circumstances under which a parent can move for modification of a custody decree are, under most states' jurisprudence, entirely outside that parent's control and may never occur.[27] For these reasons, the right to counsel should flow from the potential loss of custody, rather than from the public or private nature of the adversary.

The ABA Resolution also focuses on adversarial proceedings because such matters are inherently complex, and lack of lawyer representation for indigent persons poses the greatest concern in this context.[28] The presence of lawyers in a civil case makes a substantial difference to the outcome of the proceedings,[29] which is why those who can afford lawyers hire them. Research bears this out.[30] Parties without lawyers are far more likely to fall prey to procedure.[31] For instance, at the most basic level, unrepresented parties have much higher rates of default.[32] During contested proceedings, parties with lawyers make much greater use of procedural mechanisms that are key to success in civil litigation than do parties without lawyers.[33] A comparison of those with lawyers to those without demonstrates that those with lawyers are more likely to file motions (73 percent compared to 8 percent), request discovery (62 percent compared to 0.0 percent), and receive continuances (35 percent compared to 3 percent).[34] A party who is unrepresented but faces a lawyer on the other side is at a significant disadvantage.[35] The unrepresented party's chances of prevailing drop by approximately half.[36] Perhaps obviously, lawyers' knowledge of and ability to raise substantive claims and defenses has also been found to significantly improve outcomes for their clients.[37] First, represented litigants far more frequently raise substantive claims and defenses.[38] Second, as expected, raising substantive claims and defenses greatly increases litigants' chances of achieving outcomes that reflect the underlying merits of their cases.[39] Applicants for domestic violence protection orders with lawyers succeed 83 percent of the time, while only 32 percent of applicants without lawyers successfully obtain such orders.[40] Representation can also ease the burden on the courts.[41] Parties with lawyers are much more likely to achieve settlement than those without.[42]

For these and other reasons, the ABA is not the first, but is among the most powerful, to suggest that *Lassiter* ought to be overruled.[43] One commentator has asserted that "civil litigants are arguably at a greater disadvantage without counsel than are criminal defendants without counsel[,]" and that the doctrines of *Gideon v. Wainwright*[44] and *Lassiter* are "irreconcilable."[45] However, for now, it is wise instead to urge state courts to reject *Lassiter* when determining the parameters of due process under state constitutions.

Gideon's recognition that the lack of counsel distorts the adversary process is no less true in the civil context, at least in cases that implicate fundamental rights or basic human needs.[46] *Gideon*'s "obvious truth" that "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,"[47] applies with equal force to a custody case.[48] Lawyers, in these and other civil matters involving basic human needs, "are necessities, not luxuries."[49] The stakes for indigent civil litigants in such cases may be as great as, or even greater than, those for the criminal defendant.[50] The loss of custody of one's child is a life-shattering event that for most custodial parents would be more profound than the prospect of 30 days in jail.[51]

Due process should protect more than physical liberty—it should also protect one's "freehold, liberties or privileges" and "life, liberty or property."[52] Limiting the due process right to counsel to protection only of physical liberty creates an artificial and illogical distinction.[53] Given what is at stake in many civil cases, the failure to provide counsel "offends a sense of justice [that] impairs the fundamental fairness of the proceeding."[54] Thus, *Lassiter*'s presumption against appointment of counsel in civil matters should be abandoned.

Another significant problem with *Lassiter* is its relegation of this critical right to a case-by-case determination.[55] As 22 amicus states told the Court in *Gideon*, a categorical right is far easier to administer, and to administer fairly.[56] The need for fairness of administration cannot be overemphasized. A categorical right to counsel avoids arbitrarily uneven outcomes.[57] It also avoids the paradox of providing counsel to only those unrepresented parties who are fortunate or sophisticated enough to be able to articulate the nature of their rights and their need for counsel

well enough to meet the relevant test.[58] Justice Blackmun recognized this in his dissent in *Lassiter*, wherein he articulated:

> The flexibility of due process, the Court has held, requires case-by-case consideration of different decision-making *contexts*, not of different *litigants* within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.[59]

The provision of a categorical right to counsel as defined by the Court also promotes judicial efficiency by obviating the need for appellate review of individual cases based on distorted and misleading records.[60] As Justice Blackmun also wrote in his *Lassiter* dissent, "it is difficult, if not impossible, to conclude that the typical case has been adequately presented."[61]

At least one state high court has openly rejected *Lassiter* when deciding the parameters of due process under its own constitution.[62] The court wrote simply that it "reject[s] the case-by-case approach set out by the Supreme Court in *Lassiter*," reasoning that "loss of custody is often recognized as 'punishment more severe than many criminal sanctions' . . ."[63]

Currently, advocates of equal justice for the poor are pursuing a broad spectrum of approaches, each fashioned according to local strategic considerations.[64] Poor litigants in Washington recently suffered a setback when, in *King v. King*,[65] the Washington Supreme Court rejected claims in custody disputes for a civil right to counsel under the Washington Constitution.[66] However, advocates were heartened somewhat by the two-judge dissent, which included the following:

> Ms. King's struggle to represent herself in this case demonstrates the legal hurdles that arise every day in courtrooms across Washington, showing the importance of counsel to a parent in a dissolution proceeding seeking to secure her fundamental right to parent her children. The majority's decision does not begin to address the obstacles an indigent parent encounters when she is unrepresented by counsel, nor does it realistically assess the loss she faces.[67]

In other states, including Maryland, there will be future appeals involving similar state constitutional claims.[68] And in yet others, more incremental litigation is underway. One example is the recent Alaska Superior Court decision in *Gordonier v. Jonsson*,[69] where the court extended an existing right to counsel in cases where representation is provided by a publicly funded agency to cases where there is private representation on the other side.[70] This case is currently pending before the Alaska Supreme Court.[71] There have also been incremental legislative successes in expanding rights to counsel in family law matters.[72] Each such victory is a step on the path to recognition of a right to counsel in civil cases involving basic human needs, including custody disputes.

Debra Gardner has served as Legal Director of the Public Justice Center (PJC) since 2000. Before joining the PJC, she worked at Legal Aid in Maryland for more than 15 years. Among her duties at the PJC, she pursues a judicial recognition of a civil right to counsel under the Maryland Declaration of Rights and coordinates the National Coalition for a Civil Right to Counsel. This article is excerpted and adapted from Debra Gardner, Justice Delayed Is, Once Again, Justice Denied: The Overdue Right to Counsel in Civil Cases, 37 U. Balt. Law Rev. 59 (2007). Ms. Gardner can be contacted at gardnerd@publicjustice.org or 410 625 9409.

1. Michael S. Greco, President, American Bar Association, Remarks to the House of Delegates at the ABA Annual Meeting 6-7 (Aug. 7, 2006) (transcript available at http://www.abanet.org/op/greco/speeches/aba_greco_hod_final_remarks.doc).
2. ABA Task Force on Access to Civil Justice, *ABA Resolution on Right to Counsel*, 15 Temp. Pol. & Civ. Rts. L. Rev. 507, 518 (2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf [hereinafter ABA Task Force].

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3. *Id.* at 508.
4. *See, e.g.,* Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 Clearinghouse Rev. J. Poverty L. & Pol. 170 (2006). For a tracing of the recent revival of efforts to achieve a civil right to counsel, *see* Gardner, *supra*, note 1.
5. *See* ABA, History of the ABA, http://www.abanet.org/about/history.html (last visited Jan. 14, 2008).
6. ABA Task Force, *supra* note 3, at 508–12.
7. *Id.* at 508.
8. *See id.* at 508–10.
9. 452 U.S. 18 (1981).
10. Brief of the ABA as Amicus Curiae Supporting Petitioner, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79-6423).
11. *Lassiter*, 452 U.S. at 31–32.
12. *Id.* at 26-27.
13. *Compare id.* ("[A]n indigent litigant has a right to appointed counsel only when . . . he may be deprived of his physical liberty.") *with id.* at 40 (Blackmun, J., dissenting) ("I do not believe that our cases support the presumption . . . that physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel . . . ").
14. 379 Md. 100, 840 A.2d 114 (2003).
15. *Frase*, 379 Md. at 102, 840 A.2d at 115.
16. *Id.*, 379 Md. at 141, 840 A.2d at 138.
17. ABA Task Force, *supra* note 3, at 517–18.
18. *Id.* at 521 ("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 fundamental nature of these basic human needs is also reflected in international human rights law. *See* International Covenant on Economic, Social & Cultural Rights, art. 10, Dec. 16, 1966, 963 U.N.T.S.14531.
19. *Cf.* ABA Task Force, *supra* note 3, at 508, 522 (resisting Civil Gideon in private child custody disputes by courts led the ABA to include support for the right in its resolution advocating counsel for low-income people in civil cases "where basic human needs are at stake").
20. *Id.* at 522. Besides the high stakes and the complexity of the proceedings, discussed *infra*, contested custody represents the area of greatest unmet need for civil legal services. *See* Gloria Danziger, Center for Families, Children & the Courts, University of Baltimore School of Law, Model Child Custody Representation Project Evaluation Report 1 (2003), *available at* http://www.mlsc.org/ChildCustodyEval.final.pdf.
21. *In re Welfare of Myricks*, 533 P.2d 841, 842 (Wash. 1975) (en banc) (quoting *In re Gibson*, 483 P.2d 131, 135 (Wash. Ct. App. 1971)).
22. *Lassiter*, 452 U.S. at 38 (1981) (Blackmun, J., dissenting) (alteration in original) (citations omitted).
23. *See Frase*, 379 Md. at 121, 820 A.2d at 126.
24. *See, e.g., id.* at 138, 840 A.2d at 136 (Cathell, J., concurring) (expressing fear that, in private custody battles, "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").
25. *See id.* at 140-41, 840 A.2d at 138 (Cathell, J., concurring).
26. *In re Welfare of Myricks*, 533 P.2d at 842.
27. *See, e.g.*, McCready v. McCready, 323 Md. 476, 481–82, 593 A.2d 1128, 1130–31 (1991).
28. ABA Task Force, *supra* note 3, at 517-18, 521.
29. ABA Task Force, *supra* note 3, at 517–18.
30. 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, 419 (2001).
31. *See id.* at 427.
32. *See id.* (indicating that an experiment showed only 16% of represented parties default versus 28% of unrepresented); *see also* Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385, 414, Tab. 18 (1995) (indicating a default rate of 0% for parties with lawyers, 19% for those without).
33. *See* Anthony J. Fusco Jr. et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 Urb. L. Ann. 93, 115 (1979); Gunn, *supra* note 109, at 411-12; *see also* Russell Engler & Craig S. Bloomgarden, Summary Process Actions in the Boston Housing Court: An Empirical Study and Recommendations for Reform 7 (May 20, 1983) (unpublished manuscript, on file with the University of Baltimore Law Review).
34. Fusco Jr. et al., *supra* note 35, at 115 (continuances); Gunn, *supra* note 34, at 412, Tab. 16 (motions); Engler & Bloomgarden, *supra* note 35, at 17, Tab. 10 (discovery).
35. *See, e.g.*, Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?*, *in* Divorce Reform at the Crossroads 37, 64 (Stephen D. Sugarman & Herman Hill Kay eds., Yale Univ. Press, 1990).
36. *Id.* at 64; *see also* Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role Of Legal Professionals*, 24 U. Mich. J.L. Reform 65, 132 (1990); Engler & Bloomgarden, *supra* note 35, at 53–58.
37. *See* Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A study of Detroit's Landlord-Tenant Court*, 7 U. Mich. J.L. Reform 9, 35, 44–45 (1973).
38. *Id.* at 44, Fig. 17 (83% of represented litigants raised available defenses compared to 30% of unrepresented); Engler & Bloomgarden, *supra* note 35, at 19, Tab. 11 (80% versus 2%).
39. Gunn, *supra* note 34, at 413-14, Tab. 18.
40. Jane C. Murphy, *Engaging With the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U.J. Gender Soc. Pol'y & L. 499, 511–12 (2003).
41. Seron et al., *supra* note 32, at 427.
42. Mosier & Soble, *supra* note 39, at 47, Fig. 18 (17% versus 0.1%).
43. ABA Task Force, *supra* note 3, at 513.
44. 372 U.S. 335 (1963). *Gideon* was, of course, the landmark decision recognizing a right to counsel in criminal matters.
45. Joan Grace Ritchey, *Limits on Justice: The United States' Failure to Recognize a Right to Counsel in Civil Litigation*, 79 Wash. U. L.Q. 317, 336 (2001).
46. Roger C. Cramton, *Promise and Reality in Legal Services*, 61 Cornell L. Rev. 670, 676–78 (1976).
47. *Gideon*, 372 U.S. at 344.
48. *See* Cramton, *supra* note 48, at 676–77.
49. *Gideon*, 372 U.S. at 344; *see* Cramton, *supra* note 48, at 676–77.
50. *See* Cramton, *supra* note 48, at 676.
51. *See* Ritchey, *supra* note 47, at 338.
52. Md. Const. Decl. of Rts. art. XXIV.
53. Note, *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322, 1330, 1332-33 (1966).
54. *Sites v. State*, 300 Md. 702, 717, 481 A.2d 192, 200 (1984).
55. *See Lassiter*, 452 U.S. at 31–32.
56. Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Washington, and West Virginia filed an amicus brief urging the overruling of *Betts*. *See* Brief for the

State Government as Amici Curiae Supporting Petitioner, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155). Alabama, joined by North Carolina, filed on the other side. *See* Brief for the State of Alabama as Amici Curiae Supporting Respondent, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).
57. *See id.* (referencing numerous virtually identical pairs of cases in which counsel had been appointed in one and not the other).
58. *See* Bruce A. Boyer, *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, 379 (2005).
59. *Lassiter*, 452 U.S. at 49 (Blackmun, J., dissenting).
60. *See id.* at 50–51 n.19.
61. *See id.* at 51.
62. *See In re* K.L.J., 813 P.2d 276, 282 n.6 (Alaska 1991).
63. *Id.* at 282, 283 (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1145 (1977); *see also Frase*, 379 Md. at 138, 840 A.2d at 136 (Cathell, J., concurring) ("I am drawn more to the well reasoned dissents in *Lassiter*, as a guide to how this Court should consider these issues under our State Constitutional provisions in these evolving times.").
64. For more information on these activities, visit the web site of the National Coalition for a Civil Right to Counsel, www.civilrighttocounsel.org.
65. 162 Wash.2d 378, 174 P.3d 659 (2007).
66. *Id.*, 162 Wash.2d at 395, 174 P.3d at 668.
67. *Id.*, 162 Wash.2d at 403-04, 174 P.3d at 672 (Madsen, J. dissenting).
68. *See generally*, John Nethercut, *Maryland's Strategy for Securing a Right to Counsel in Civil Cases:* Frase v. Barnhart *and Beyond*, 40 Clearinghouse Rev. J. Poverty L. & Pol. 238 (2006).
69. Case No. 3AN-06-8887 CI (3d D. Alaska Super. Ct. Aug. 14, 2007).
70. *Id.* at 10-16.
71. *Office of Public Advocacy v. Alaska Court System, et al*, Case No. S-12999 (Alaska filed Feb. 7, 2008).
72. *See, e.g.*, 2008 La. Acts 778 (eff. Aug. 15, 2008) (codified at La. Child. Code art. 1245.1) (extending the right to counsel to private intra-family adoptions); 2006 Sess. Laws of N.Y., ch. 538, S. 8096 (eff. Aug. 16, 2006) (codified at N.Y. Judiciary Law § 35.8) (extending the right to counsel to custody disputes in matrimonial court).