

Access to Justice Conference 2014
Right to Counsel in Civil Proceedings Panel

Overview Memorandum

Contents

United States Constitution	1
Termination of Parental Rights.....	1
<i>Lassiter v. Dept. of Social Services of Durham County</i>	1
Civil Contempt	2
<i>Turner v. Rodgers</i>	2
Hawaii Constitution	3
Parental Termination Hearings (Child Custody).....	3
<i>In re Doe</i>	3
<i>In re "A" Children</i>	3
<i>RGB</i>	3
<i>In re T.M.</i>	4
Expanding the Right to Civil Counsel Under the Hawaii Constitution	5
Due Process Clause	5
Other Possible Constitutional Provisions	5
Law Review Articles on the Right to Civil Counsel.....	6

UNITED STATES CONSTITUTION:

- ***Right to counsel in civil proceedings has been explored in these cases:***

TERMINATION OF PARENTAL RIGHTS

Lassiter v. Dept. of Social Services of Durham County, 425 U.S. 18 (1981)

Lassiter’s parental rights were terminated in proceedings in which she was not represented by counsel. The North Carolina Court of Appeals declined to afford indigent parents a constitutional right to counsel in parental termination cases based on the Due Process Clause of the Fourteenth Amendment. *Lassiter v. Dept. of Social Services of Durham County*, 425 U.S. 18, 24 (1981); *In re Lassiter*, 43 N.C.App. 525, 527, 259 S.E.2d 336, 337.

The United States Supreme Court upheld its precedent that “an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” *Id.* at 26-27. Although the Court recognized 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[,]” *id.* at 27, the Court refused to extend the right to counsel to every parental termination proceeding. *Id.* at 31. Instead, the Court left it to the trial courts to evaluate the three elements (“the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions[,]” *id.* at 27) propounded in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) in order to decide what due process requires, subject to appellate review. *Id.* at 32.

Blackmun, dissenting:

Justice Blackmun wrote in dissent: “I do not believe that our cases support the ‘presumption’ asserted, . . . that physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause. Indeed, incarceration has been found to be neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant.” *Id.* at 40 (Blackmun, J., dissenting). Instead of adopting what he characterized as the “insensitive presumption,” Justice Blackmun stated that he would “abide by the Court’s enduring commitment to examine the relationships among the interests on both sides, and the appropriateness of counsel in the specific type of proceeding,” using the test set forth in *Eldridge*. *Id.* at 42.

Applying the *Eldridge* test, Justice Blackmun concluded that “where, as here, the threatened loss of liberty is severe and absolute, the State’s role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.” *Id.* at 48. He challenged the majority’s case-by-case approach that evaluated the needs of different litigants, proposing instead that the right to counsel be determined on a categorical basis, *id.* at 49-50, and explaining that “procedural norms are devised to ensure that justice may be done in every case, and to protect litigants against unpredictable and unchecked adverse governmental action[,]” *id.* at 50. Finally, Justice Blackman noted that a case-by-case approach could prove difficult to review on appeal, inasmuch as “the pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent” and “determining the

difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case.” *Id.* at 51. “Even if the reviewing court can embark on such an enterprise in each case,” he wrote, “it might be hard pressed to discern the significance of failures to challenge the State’s evidence or to develop a satisfactory defense.” *Id.* at 51.

CIVIL CONTEMPT

Turner v. Rogers, 131 S.Ct. 2507 (2011)

In 2011, the United States Supreme Court determined that Michael Turner, who was jailed for twelve months for civil contempt based on his failure to pay child support, did not have an *automatic or categorical right* to counsel under the Due Process Clause of the Fourteenth Amendment. *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011). In its limited holding, the Court stated, “where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support).” *Id.* at 2512.

The Court reasoned that civil contempt is distinguished from criminal contempt:

Civil contempt differs from criminal contempt in that it seeks only to coerce the defendant to do what a court had previously ordered him to do. A court may not impose punishment in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order. And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free.

Id. at 2516 (citations, brackets, and internal quotation marks omitted)

In order to determine “what specific safeguards the Constitution’s Due Process Clause” requires, the Court applied the framework established in *Eldridge*, 424 U.S. at 335. *Id.* at 2518-19. The relevant factors “include (1) the nature of the private interest that will be affected, (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards, and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.” *Id.* (citations, brackets, and internal quotation marks omitted). After weighing the factors, the Court determined that in Turner’s case, there had been a violation of the Due Process Clause because in his proceedings, there were no alternative “procedural safeguards equivalent to . . . adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings[.]” *Id.* at 2520. Deprived of both counsel and the “benefit of alternative procedures[.]” the Court ordered that Turner’s case be vacated and remanded “for further proceedings not inconsistent” with the opinion. *Id.*

HAWAII CONSTITUTION:

PARENTAL TERMINATION HEARINGS (CHILD CUSTODY)¹

In *In re Doe*, 99 Hawaii 522, 533, 57 P.3d 447, 458 (2002), the Hawaii Supreme Court affirmed that, independent of the federal constitution, parents have a substantive liberty interest in the care, custody, and control of their children that is protected by the due process clause of article I, section 5 of the Hawaii Constitution. 99 Hawaii at 533, 57 P.3d at 459. *Doe* explained that “parental rights guaranteed under the Hawai‘i constitution would mean little if parents were deprived the custody of their children without a fair hearing.” *Id.* “Indeed, “[p]arents have a fundamental liberty interest in the care, custody, and management of their children and the state may not deprive a person of his or her liberty interest without providing a fair procedure for the deprivation.” *Id.* (quoting *Hollingsworth v. Hill*, 110 F.3d 733, 738-39 (10th Cir. 1997)). *Doe* therefore held that the right to a “fair procedure” required the appointment of interpreters “at family court proceedings where [] parental rights are substantially affected.” 99 Hawaii at 534, 57 P.3d at 460.

In *In re “A” Children*, 119 Hawaii 28, 193 P.3d 1228 (App. 2008), the Hawaii Intermediate Court of Appeals (ICA) held that the court’s failure to timely appoint counsel resulted in the father not receiving notice of hearings. 119 Hawaii at 58, 193 P.3d at 1258. Judge Watanabe, writing for the ICA, pointed out that this created “a chain of events” that led to the termination of his parental rights and “that could have been broken if Father had had counsel.” *Id.* The ICA applied the case-by-case approach adopted by a majority of the Supreme Court in *Lassiter*, where that court balanced the parent’s interests, the state’s interests, and the risk that a parent will be erroneously deprived of his or her child. *Id.* at 57, 193 P.3d at 1257. The ICA concluded that the dispositive factor was the third factor, and ruled that the “belated appointment of an attorney created an appreciable risk [the father] would be erroneously deprived of his parental rights[.]” *Id.* at 58, 193 P.3d at 1258.

However, the ICA “express[ed] grave concerns ... about the case-by-case approach adopted in *Lassiter* for determining the right to counsel.” *Id.* at 60, 193 P.3d at 1260. According to the ICA, “as Justice Blackmun observed,” under the case-by-case approach, “[a] trial judge will be required to determine in advance what difference legal representation might make.” *Id.* (quoting *Lassiter*, 452 U.S. at 51 n.19 (Blackmun, J., dissenting)). The ICA then concluded that “the *Lassiter* dissents present compelling arguments for a bright-line rule regarding the provision of counsel in termination-of-parental rights cases[.]” *Id.*

In *RGB*, 123 Hawaii 1, 229 P.3d 1066 (2010), an indigent parent asserted that her court-appointed counsel was ineffective. 123 Hawaii at 17, 229 P.3d at 1082. Because the family court appointed counsel, the *RGB* majority “declin[e]d to reach the question of whether the Hawai‘i Constitution provides indigent parents a right to counsel in all termination proceedings.” *Id.* at 18, 229 P.3d at 1083.

The dissenting opinion explained that counsel was ineffective for “failing to file a timely motion for reconsideration of the court’s Termination Order,” and the late appointment by the

¹ The discussion of the evolution to the right to counsel in parental termination hearings is adopted from the Hawaii Supreme Court’s recent decision in *In re T.M.*, 131 Hawaii 419, 433-34, 319 P.3d 338, 352-53 (2014).

family court of counsel left Petitioner’s counsel with only “two days in which to file a timely motion for reconsideration.” *RGB*, 12 Hawaii at 62, 229 P.3d at 1127 (Acoba, J., dissenting). The dissent concluded that as “the right to effective assistance of counsel is protected under the Hawai‘i Constitution ... the majority’s opinion implicate[d] [the parent’s] due process right to effective counsel under the Hawai‘i Constitution.” *Id.* at 50, 229 P.3d at 1115 (internal emphasis removed).

This year, the Hawaii Supreme Court in *In re T.M.*, held that indigent parents are guaranteed the right to court-appointed counsel in termination proceedings under the Due Process Clause of the Hawaii Constitution. 131 Hawaii at 421, 319 P.3d at 340. The court explained,

We recognize that parents have a substantive liberty interest in the care, custody, and control of their children that is protected by the due process clause of article I, section 5 of the Hawaii Constitution. Therefore, we additionally hold that parents have a constitutional right to counsel under article I, section 5 in parental termination proceedings and that from and after the filing date of this opinion, courts must appoint counsel for indigent parents once the [Department of Human Services (DHS)] files a petition to assert foster custody over a child.

Id. (internal citation omitted).

In *In re T.M.*, the family court did not appoint counsel for Mother, a minor, until more than nineteen months after her daughter entered foster custody, and only five months prior to the hearing that ultimately terminated Mother’s parental rights. *Id.* at 351, 319 P.3d at 432. Employing the rationale from Justice Blackmun’s dissent in *Lassiter*, the court noted that parents in parental termination hearings “are faced ‘with an adversary – the State – that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State’s expertise.’” *Id.* at 354, 391 P.3d at 435 (quoting *Lassiter*, 452 U.S. at 46 (Blackmun, J., dissenting)).

Ultimately, *In re T.M.* overruled the case-by-case approach of *In re “A” Children*, explaining that mandating the appointment of counsel for indigent parents would remove the possibility that appointment of counsel would be erroneously denied, and would better enable judicial review. *Id.* at 355, 391 P.3d at 436. Accordingly, the court directed “that upon the filing date of [*In re T.M.*], trial courts must appoint counsel for indigent parents upon the granting of a petition to DHS for temporary foster custody of their children.”

EXPANDING THE RIGHT TO COUNSEL UNDER THE HAWAII CONSTITUTION

- *The Due Process Clause of the Hawaii Constitution may be applied to expand a right to counsel beyond the context of parental termination proceedings.²*

Potential areas include:

- Paternity³
- Civil Commitment⁴
- Shelter
- Sustenance, including Benefits and Workers Compensation⁵
- Health/Mental Illness

- *Besides the Due Process Clause, there are other potential constitutional bases under which to expand the right to counsel to other types of cases:*

Equal Protection: paternity and shelter⁶, for example

Article I, Section 5 of the Hawaii Constitution provides:

DUE PROCESS AND EQUAL PROTECTION

Section 5. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Right to Privacy: minors seeking abortions, for example

Article I, Section 6 of the Hawaii Constitution provides:

RIGHT TO PRIVACY

Section 6. The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Public/Personal Safety: domestic violence, for example

Article IX, Section 10 of the Hawaii Constitution provides:

PUBLIC SAFETY

Section 10. The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I-- Let every elderly person, woman and child lie by the roadside in safety--shall be a unique and living symbol of the State's concern for public safety.
The State shall have the power to provide for the safety of the people from crimes against persons and property.

² This section is by no means intended to be exhaustive. The general categories are discussed by John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L. Rev. 763, 789-798 (2013), and other sources referenced therein.

³ *See id.* at 789-798.

⁴ *See id.* at 800-806

⁵ *See id.* at 811-814

⁶ *See id.* at 789-798.

Native Hawaiian Rights

Article XII, Section 7 of the Hawaii Constitution provides:

TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

RIGHT TO COUNSEL IN CIVIL PROCEEDINGS—LAW REVIEW ARTICLES

General Articles

Mark C. Brown, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. Pa. L. Rev. 893 (2011) (summarizes civil Gideon efforts and foundations for the right to counsel and recommends alternative standards for ineffectiveness of counsel claims).

John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 Drake L. Rev. 763 (2013) (exploring cases in which state courts have established a right to counsel in cases of domestic violence, abuse and neglect, private termination of parental rights, paternity, civil commitment, civil contempt⁷, civil forfeiture, and minors seeking abortion).

John Pollack, *It's All About Justice: Gideon and the Right to Counsel in Civil Cases*, 39 Hum. R. Magazine 4, available at http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/its_all_about_justice.html, last accessed June 11, 2014.

Access to Justice – Civil Right to Counsel – California Establishes Pilot Programs to Expand Access to Counsel for Low-Income Parties. – Act of Oct. 11, 2009, 123 Harv. L. Rev. 1532 (April, 2010) (brief examination of California's 6-year pilot program, which began in July 1, 2011, providing legal counsel to unrepresented low income parties in "civil matters involving critical issues affecting basic human needs").⁸

Child Custody/Termination of Parental Rights

Sarah Dina Moore Alba, *Searching for the "Civil Gideon": Procedural Due Process and the Juvenile Right to Counsel in Termination Proceedings*, 13 U. Pa. J. Const. L. 1079 (2011).

⁷ Article 1, section 19 of the Hawaii Constitution prohibits imprisonment for debt.

⁸ For full text of Act of Oct. 11, 2009, ch. 457 (codified in scattered sections of Cal. Bus. & Prof. Code and Cal. Gov't Code) see http://leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.html, last accessed June 11, 2014.

Health

Kia C. Franklin, *Advocacy in Health Proceedings in New York State*, 25 Touro L. Rev. 437 (2009).

Immigration

Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of Gideon: Immigration, Deportation, and the Right to Counsel*, 39 Hum. R. Magazine 4 (2013), available at http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/vol_30_no_4_gideon/extending_the_promise_of_gideon.html, last accessed June 11, 2014.

Personal Safety

Rebecca Fialk & Tamara Mitchel, *Jurisprudence: Due Process Concerns for the Underrepresented Domestic Violence Victim*, 13 Buff. Women's L.J. 171 (2004-05).

Shelter

Risa E. Kaufman, Martha F. Davis, Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 Colum. Hum. Rts. L. Rev. 772 (2014).

Louis S. Rulli, *On the Road to Civil Gideon: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J.L. & Pol'y 683 (2011).

**This Memorandum was prepared pro bono for the Right to Counsel in Civil Proceedings Panel by Jessica Freedman (Hawaii bar admission, November 2013) and Merissa Vélez (Hawaii bar admission, June 2014).