

Clearinghouse REVIEW

May–June 2013
Volume 47, Numbers 1–2

Journal of
Poverty Law
and Policy



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A Civil Right to Counsel

Continuing the Discussion

March 2013 marked the fiftieth anniversary of the iconic U.S. Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which found a constitutional right to counsel for anyone charged with a felony and too poor to hire a lawyer. Not only the legal and advocacy communities but also a broad range of mainstream media devoted substantial time to examining *Gideon*'s legacy, whether the ruling has lived up to its promise, and the current state of the indigent defense system.

Some of the commentary also focused on an aspect of the right to counsel that CLEARINGHOUSE REVIEW readers know all too well: the *lack* of any such constitutional right in civil cases, regardless of what clients stand to lose. This discussion continues in the "package" of three pieces of writing that follow. The first, by John Pollock, coordinator of the National Coalition for a Civil Right to Counsel, and Mary Deutsch Schneider, executive director of Legal Services of Northwest Minnesota, looks back at ten years of the national coalition's work. Next, Martin Guggenheim and Susan Jacobs of the Center for Family Representation, in New York City, consider the importance of, and a model for, ensuring counsel for parents at risk of losing their children to state custody. And, third, Earl Johnson Jr., who directed the Office of Economic Opportunity's Legal Services Program at the program's inception and recently retired as an associate justice of the California Court of Appeal, reflects on his nearly fifty years of scholarship and advocacy for a civil right to counsel.—THE EDITORS

A NEW NATIONAL MOVEMENT IN Parent Representation

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As part of the celebration of the fiftieth anniversary of *Gideon v. Wainwright*, here we describe a vibrant national movement for a new kind of court-assigned counsel in the field of child welfare and termination of parental rights.¹ We recognize some irony in this in that the movement for a civil right to counsel was dealt a serious blow by the U.S. Supreme Court's 1981 decision in *Lassiter v. Department of Social Services*.² Parents are not, the Court held in *Lassiter*, entitled to court-assigned counsel in every decision to terminate parental rights. Justice Stevens dissented from the Court's conclusion that the loss of physical liberty deserves greater protection than the loss of parental rights. In Justice Stevens's view, even though the penalty of being sentenced to a term of imprisonment is "serious, often the deprivation of parental rights will be the more grievous" constitutional deprivation.³

The good news in the area of parental defense is that, despite *Lassiter*, most states recognize a statutory or state constitutional right to court-assigned counsel for indigent parents who are at risk of losing their children temporarily or permanently to state custody. One significant setback occurred just last year when the New Hampshire Supreme Court ruled that the legislature's decision to cut funding by abolishing the statutory right to counsel in every case for an indigent parent alleged to have abused or neglected the parent's child did not violate the New Hampshire (or federal) Constitution.⁴ No other state has followed New Hampshire's retreat, and we can only hope that states continue to recognize the enormous value added to cases when parents are well represented in such proceedings. However, in too many jurisdictions in this country, parents' lawyers are unable to secure reasonable fees. According to a survey of parents' lawyers conducted by the American Bar Association a few years ago, some jurisdictions pay parents' lawyers as little as \$200 for an entire case and others pay as low as \$500 for handling a case, regardless of how many court appearances or hours the lawyer actually spent on the case.⁵

Rather than summarize the state of parental representation nationally, here we explain the reasoning behind the claim that parents (and their families, including their children) deserve a particular kind of lawyer in child welfare and termination of parental rights proceedings, and we briefly discuss some examples of a new kind of lawyering that is beginning to sweep across the United States. The movement is spearheaded by the National Project to Improve Representation for Parents Involved in the Child Welfare System housed at the American Bar Association Center on Children and the Law.⁶ The project's staff is advised by a national steering committee consist-

¹*Gideon v. Wainwright*, 372 U.S. 335 (1963).

²*Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

³*Id.* at 59.

⁴*In re C.M.*, 48 A.3d 942 (N.H. 2012).

⁵National Project to Improve Representation for Parents Involved in the Child Welfare System, Center on Children and the Law, American Bar Association, Court Improvement Program Parent Attorney Survey Results 7 (n.d.), <http://bit.ly/10drxws>.

⁶American Bar Association, Parent Representation (2013), <http://bit.ly/X88eYq>.

ing of parents' attorneys, academics, and parent advocates, among others. The project's goals include improving representation through training, holding national conferences, having a place for attorneys to confer with colleagues from across the country, leading national initiatives, and working with court and child welfare leaders in individual states, regionally, and at the national level to improve parent representation throughout the country.

In a number of large cities across the United States a new kind of parents' lawyer is picking up an ever larger percentage of cases filed in family or juvenile court. We helped found and work in one of these offices: the Center for Family Representation in New York City. Although our office was formed in 2002, it was awarded the first-ever contract by New York City officials to represent most of the new child protective cases filed in New York County in 2007. That was a watershed year in the history of parent representation in New York City. Before then, New York City preferred to use solo practitioners who were members of the panel of attorneys eligible for court assignment as the only parent defender arrangement. Because of the caseloads most of these lawyers carried, and because they commonly were solo practitioners, they spent almost all of their time at the courthouse. Even when they prepared diligently for upcoming court appearances, the lawyers were largely unable to work closely with their clients through the myriad out-of-court agency-related activities that are often vital to successful outcomes in their cases.

The Center for Family Representation, along with the Bronx Defenders and the Brooklyn Family Defense Project, is one of three institutional providers of legal representation for indigent parents in New York City. Since 2007, these three organizations have represented most of the city's parents charged with inadequately caring for their children.⁷ What these offices all have in common, besides employing staff attorneys whose salary is not based on the number of cases they carry, is that the offices employ social

workers and often parent advocates who partner on teams with the lawyers offering their clients a broad range of support well beyond the courthouse.

The lawyer member of the team provides expert legal representation in court. The social worker helps the client access stabilizing services, such as housing, employment training, drug treatment, and domestic violence counseling. Together with the lawyer, the social worker helps shape the formal services plan that is endorsed by the agency and the court. The services plan will be the template for gauging whether the parent is taking the necessary steps to resolve the case with an outcome that keeps the family together if the children have remained at home during the court case, or with an outcome that returns the children to the parent if the children have been placed in foster care. Trained professionals who themselves have personally experienced the child welfare system and can empathize with vulnerable families, parent advocates give emotional support and help parents engage in services.

In more and more parts of the United States, parents' lawyers are going well beyond the courtroom when they represent their clients. They work hard at engaging parents to work hard for themselves; insisting on meaningful preventive and reunification services for their clients; ensuring that services are actually tapped and that they are the right ones for the individuals involved; and securing frequent and lengthy visitation in a setting that best mimics family life. Instead of leaving the parents to fend for themselves at the agency-related meetings, they plan for those meetings with their clients and attend them to ensure that correct services are offered and the plan is sensible and based on up-to-date information. Lawyers for parents strive to secure better facts, better information, and fewer delays. When parents' lawyers prevail, everyone wins. Parents' lawyers save money, ensure child well-being, and give parents a sense that they are valued and that they matter.

⁷Daniel Wise, *Agencies Hired to Represent Parents on Abuse and Neglect*, NEW YORK LAW JOURNAL, May 14, 2007, at 1.

We believe that giving parents free representation by lawyers does more than advance social justice for individuals unable to purchase legal services. We believe it is a smart investment by state governments because it furthers the states' goal of reducing unnecessary entry into foster care and reducing the time children spend in foster care (beyond saving money, this avoids needless infliction of trauma on children). The average length of stay in foster care in New York State is twenty-nine months, and the minimum cost of foster care in New York State is \$29,000 per child per year.⁸ By investing in these interdisciplinary (or team-based) services, state and local governments can save considerable dollars otherwise spent on very costly foster care. Preliminary indicators strongly suggest this is true. Consider, for example, that New York City's foster care population shrank from 28,000 in 2002 to 17,000 in 2007.⁹ During the 2012 fiscal year, there were slightly more than 14,000 children in New York City's foster care system.¹⁰ We do not claim that the only explanation for this dramatic reduction in foster care is the changed legal representation arrangement. But we do believe this new kind of lawyering has contributed to the elimination of unnecessary foster care placements by preventing wrongful removals and by accelerating the safe return of children to their families. Center for Family Representation data show that more than 50 percent of children never entered care in the cases handled by the Center for Family Representation and that the average length of stay of those who entered care was 2.5 months.¹¹ The Center for Family Representation conservatively estimates that in over ten years of employing this new model of parent representation it has generated more than \$130 million in public savings.¹²

Other parts of the country have overhauled their parental representation systems. Washington created the Washington State Office of Public Defense Parent Representation in 2003. Key components of the Office of Public Defense program include caseload limits, attorney practice standards, access to expert services and social workers, Office of Public Defense oversight of attorneys, and training and support. A number of excellent parent representation offices throughout the country are in Oregon, California, Pennsylvania, Massachusetts, Vermont, and Arkansas, among other states. One especially innovative office run by the University of Michigan Law School Child Advocacy Law Clinic is the Detroit Center for Family Advocacy, which uses parents' lawyers, social workers, and parent advocates as part of an innovative model to reduce the number of children in foster care. In this program the legal team tackles any legal issue, such as housing or domestic violence, that may be a barrier to the child remaining with the parents. The team helps link parents to social services and collaborates with the agency investigating child maltreatment to identify the family's needs and to meet them in the most family-friendly way.

The results of these new programs are certainly cause to celebrate and underscore the continued vitality of the teachings of *Gideon*.¹³ However, the continued abysmal funding of much representation of parents in this country gives us pause and should concern everyone who cares about the fair administration of justice for all. We redouble our efforts to ensure that the successes of the new parental defense programs will continue to fuel the national movement to increase their numbers.

⁸National Foster Care Month, Facts About Children in Foster Care in New York (March 17, 2011), <http://bit.ly/XC35TF>; New York State Office of Children and Family Services, Ten for 2010 (n.d.), <http://bit.ly/YaEx7H>.

⁹NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS, THE MAYOR'S MANAGEMENT REPORT FISCAL 2002, at 33 (n.d.), <http://on.nyc.gov/XbasEe>; NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS, MAYOR'S MANAGEMENT REPORT 34 (Sept. 2007), <http://on.nyc.gov/11hgJQn>.

¹⁰NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS, PRELIMINARY MAYOR'S MANAGEMENT REPORT 91 (Feb. 2013), <http://on.nyc.gov/16SKdFF>.

¹¹Center for Family Representation, Internal Unpublished Data (Sept. 1, 2012).

¹²*Id.*

¹³*Gideon*, 372 U.S. 335.



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