

## **LEGAL SERVICES TO THE PUBLIC COMMITTEE**

### **RESOLUTION IN SUPPORT OF RECOGNIZING A RIGHT TO COUNSEL FOR INDIGENT INDIVIDUALS IN CERTAIN CIVIL CASES**

WHEREAS, the Pennsylvania Bar Association (PBA) has made the commitment to access to justice for underserved populations a key priority, as set forth in its bylaws, which define one of its purposes as ensuring that “no one on account of poverty is denied his or her legal rights”, and as exemplified most recently in the PBA House of Delegates’ endorsing the goal for each Pennsylvania lawyer to provide pro bono service every year;

WHEREAS, the Pennsylvania Bar Association’s Pro Bono office estimates that only 1 in 5 (20%) truly needy people in Pennsylvania with civil legal aid matters ever receive the assistance of a lawyer, whether from a legal aid provider or through pro bono efforts;

WHEREAS, the Pennsylvania Legal Aid Network states that half (50%) of the poor people across the Commonwealth who make it to a legal aid office are turned away because of the limited resources, both public and pro bono, available to serve the neediest among us; and

WHEREAS, The Pennsylvania Bar Association recognizes that the overwhelming unmet legal needs of low income persons often result in a lack of access to justice where the most basic human needs are at stake, such as legal matters involving shelter, sustenance, safety, health or child custody;

NOW, THEREFORE, the Legal Services to the Public Committee proposes that the Pennsylvania Bar Association endorse the following:

RESOLVED, That the Pennsylvania Bar Association urges the Commonwealth of Pennsylvania 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, safety, health or child custody.

#### **I. The PBA is Committed to Improving Access to Justice for the Poor**

The PBA has a long history of promoting the access to justice for the neediest among us dating back through the past three decades and, this year, the PBA is renewing its strong commitment to improving the access to justice of the poor. Then PBA President-Elect Andrew Susko, building on the civil legal aid work for children focus of his predecessor Ken Horoho, convened a distinguished working group to promote civil legal aid through enhanced pro bono service in early 2007. The work of that group resulted in the PBA Board and House of Delegates passing a strong resolution in support of pro bono service at the 2007 Annual Meeting when Susko became President (see <http://www.pabar.org/pdf/aspirationalresolution.pdf>). Susko brought together an ad hoc group at both the PBA and ABA Annual Meetings this past year to explore next steps in

promoting the access to justice for the poor and this resolution is one of the outgrowths of that effort, as well as the ongoing effort of the PBA's Legal Services to the Public Committee whose mission is to improve civil legal aid in Pennsylvania.

## **II. Proposed Resolution Echoes American Bar Association (ABA) Resolution**

The PBA Resolution echoes an earlier resolution of the ABA. The American Bar Association, in recognition of the overwhelming unmet legal needs of low income persons and the resulting lack of access to justice where the most basic human needs are at stake, has already passed the following resolution:

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.

## **III. Discussion**

This resolution allows the leadership of the PBA to advocate for an expansion of the types of cases in which legal representation, as a matter of right, is provided to indigent individuals in civil cases. The means of implementing this resolution will be studied further by the Delivery of Legal Services to the Public Committee, who will then make recommendations to the Pennsylvania Bar Association by the Annual Meeting.

At present, the Commonwealth of Pennsylvania recognizes this right in certain cases, including but not limited to dependency cases, termination of parental rights, paternity and involuntary commitment pursuant to the Mental Health Procedures Act. Some have been established by court cases; others, such as 42 Pa. C.S. sec 6401, 6405 which provides for a right to counsel in civil commitment proceedings for sexually violent delinquent children, have been established by statute. There are many other categories in which this concept could be expanded.

This resolution does not define which cases would be included. It also does not address many other questions of implementation, such as how the right would be established, who would provide the representation and how it would be funded. The Committee recognizes that these are vitally important questions that will need resolution. It anticipates that the right to counsel would not be granted immediately in all cases in which basic human needs are at stake, as this would raise extensive obstacles in funding and administration. The Committee expects that the right to counsel would be expanded in an incremental fashion, prioritizing the most basic human needs where the need is greatest. Pennsylvania residents already benefit from an existing comprehensive and multi-tiered system of legal aid and voluntary pro bono programs that delivers legal services to the indigent. Expansions of the right to counsel would incorporate this strong foundation and build upon it. The resolution expresses an endorsement of the concept in

principle, with the details to be developed following further study and reporting by the Committee.

#### **A. Other States' Efforts**

The effort to expand a right to counsel on the state level is not unique to Pennsylvania. Pennsylvania would be joining a growing group of states that is endorsing such a right in a true model of federalism. The following information lists the states and the most common substantive areas where some level of a right to counsel has been identified by statute:

- Custody (AK, AZ, CA, LA, MD, MA, MI, NY, OR, TX, WA, WV, DC); neglect and abuse (IN, IA, KS, KY, MD, MS, NE, NV, NM, OK, PA, SC, SD, UT, VA, WV, WY);
- Domestic Violence (AK, CA, NY);
- Adoption (IL, KS, MD, MA, MO, NY, PA, SC);
- Dependency and Termination of Parental Rights (AL, AK, AZ, AS, CA, CO, CT, GA, HI, ID, IN, IA, FL, KN, KY, MD, MO, MS, MT, NC, NE, NV, NH, OK, OR, PA, SC, TN, TX, UT, VT, WA, WV, WY, DC);
- Visitation (AK, AZ, CA, LA, MD, and MA);
- Divorce (DE, OR, VT, and DC);
- Involuntary Commitment for Mental Illness, Drug, or Alcohol Abuse ( AL, AK, AZ, CO, CT, DE, HI, IL, IA, KS, LA, MD, MA, MS, MO, MT, NV, NC, ND, PA, SC, SD, VT, and WI);
- Involuntary Quarantine (AK, CT, DE, MD, NC, SC, and WV);
- Involuntary Protective Services (AL, CO, DE, IN, MA, SC, and TN)
- Involuntary Sterilization(CO, VT, and WV);
- Judicial Bypass of Abortion (AK, DE, FL, IN, MS, MO, NC, SC, and WI).
- Civil Arrest or Imprisonment (NC and ND);
- Individuals under Disability to Sue (MD);
- Petition for Special Immigrant Juvenile Status (FL);
- Release of Mental Health Records(IN);
- Military Personnel (CO, WV, and by Federal Statute);
- Civil Rights Claims(IL);
- Housing Discrimination(AZ, AR, CO, DE, and by Federal Statute); and
- School Attendance (CO).

A report from the Brennan Center on Civil Gideon concludes this background section.

#### **B. Status of “Civil Gideon” Activities in Selected States (as reported by the Brennan Center)**

- 1) **California:** In fall 2006, the California Conference of Delegates of California Bar Associations (a separate entity from the California State Bar Association) passed a civil right to counsel resolution, which reads:

All people shall have a right to the assistance of counsel in cases before forums in which lawyers are permitted. Those who cannot afford such representation shall be provided counsel when needed to protect their rights to basic human needs, including sustenance, shelter, safety, health, child custody, and other categories the Legislature may identify in subsequent legislation.

California Chief Justice Ronald George has endorsed the resolution.

Also, the California Access to Justice Commission has developed several pieces of model civil right to counsel legislation, and it recommended that the state develop pilot civil right to counsel projects in three counties. Chief Justice George and Governor Schwarzenegger supported the pilot project concept, but I believe it has not been funded.

The Los Angeles County Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

- 2) **Colorado:** The Colorado Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 3) **Connecticut:** The Connecticut Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 4) **District of Columbia:** The Bar Association of the District of Columbia co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 5) **Georgia:** As part of this year's State Bar Convention, there will be a moot court on the civil right to counsel which will be argued before the Georgia Supreme Court by law professors.
- 6) **Hawaii:** The Hawaii Justice Foundation and State Bar are engaged in an extensive civil justice needs study which will be released in October 2007. My understanding is that establishing a right to counsel in civil cases will be one of the recommendations.
- 7) **Illinois:** The Chicago Bar Association and Chicago Bar Foundation supported the ABA resolution, with the following caveats:
  - (1) The principal way to fulfill the goals of this resolution is to build on the existing comprehensive and multi-tiered pro bono/legal aid delivery system in our State; and
  - (2) while an appointed counsel element should be a part of this system, there needs to be a mechanism to screen cases for merit before extended representation is provided.
- 8) **Maine:** The Maine State Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

On July 5, 2007, the Justice Action Group – the legal services state planning entity for Maine – issued a draft state legal services planning report, which recommends that the Justice Action Group create a commission to study the adoption “of a civil right to counsel in adversarial proceedings in which basic human needs are at stake.” Among the issues the commission would address would be “costs and evaluation of funding mechanisms; the scope of the right and when it attaches; eligibility criteria; types of representation and/or the scope of services; the types of providers; screening/process; right to counsel on appeal; phasing in of implementation; monitoring and evaluation of a pilot project.” The draft report is available online at <http://www.mbf.org/JAGPLANNINGRPT-7-5-07.pdf>. The final report will be issued in October, 2007. The membership of the Justice Action Group includes individuals from the state and federal judiciary, the Maine Legislature, the Executive Branch, the Maine State Bar Association, the Maine Bar Foundation, the Maine Civil Legal Services Fund Commission, and the boards of legal service providers.

9) **Maryland:** The IOLTA program submitted a brief in *Frase v. Barnhart*, a case in which the state supreme court was considering whether the right to counsel should exist in custody cases. The court did not decide the issue.

10) **Massachusetts:** On May 23, 2007, the Massachusetts Bar Association unanimously passed a resolution endorsing the principles behind the ABA civil right to counsel resolution. It states:

RESOLVED, That the Massachusetts Bar Association urges the Commonwealth of Massachusetts to provide legal counsel as a matter of right at public expense to low income persons in those categories of judicial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as defined in Resolution 112A of the American Bar Association.

The Boston Bar Association, under the leadership of bar president-elect Anthony Doniger (who will become president September 1, 2007), is in the process of forming a task force on the civil right to counsel, to be chaired by Mary Ryan. The Boston Bar also co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

11) **Minnesota:** A committee of the Minnesota State Bar Association will be creating a civil right to counsel task force to begin work in 2008. The Minnesota State Bar Association also co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

12) **New Hampshire:** There is an Access to Justice Commission that has been in operation for a few months and is examining the civil right to counsel issue. In the past, the New Hampshire Bar Foundation provided the funding for a Citizens

Commission on Access to Justice which produced research and a final report containing a recommendation for a civil right to counsel.

- 13) **Pennsylvania:** The Philadelphia Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.
- 14) **New York:** The NY State Bar Association (NYSBA), the Association of the Bar of the City of New York (ABCNY), and the NY County Lawyers Association (NYCLA) all co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006. NYSBA, under the leadership of bar president Kate Madigan, has established a subcommittee on the civil right to counsel. NYCLA has passed a resolution supporting the right to counsel for tenants in eviction cases in New York City. NYSBA, ABCNY and NYCLA were all active in supporting the civil right to counsel in state court litigation in the 1980's.
- 15) **Washington State:** The Washington State Bar Association has submitted an amicus brief in *King v. King*, a case pending before the Washington Supreme Court, in which a woman seeking custody of her asserts a right to counsel under the state constitution. The Washington State Bar Association and the King County Bar Association co-sponsored the ABA civil right to counsel resolution at the ABA House of Delegates in August 2006.

Respectfully submitted,

Victoria Anne Coyle, Co-Chair  
Dveera Segal, Co-Chair  
Legal Services to the Public Committee

September 17, 2007