



September 2, 2011

Clerk of Supreme Court
Attention: Carrie Janto, Deputy Clerk
P.O. Box 1688
Madison, WI 53701-1688

Re: Rule Petition 10-08 to Establish a Right to Counsel in Civil Cases

The National Coalition for
a Civil Right to Counsel

www.civilrighttocounsel.org

c/o
The Public Justice Center
One N. Charles St. Ste. 200
Baltimore, MD 21202
Tel. 410-625-9409
Fax 410-625-9423

The Civil Right to Counsel
Support & Leadership
Initiative:

Brennan Center for Justice
at NYU School of Law

The Public Justice Center

Sargent Shriver National
Center on Poverty Law

Standing Committee on
Legal Aid and Indigent
Defendants of the ABA

The Committee for Indigent
Representation and Civil Legal
Equity at the Northwest Justice
Project

Contact the NCCRC at:
info@civilrighttocounsel.org

We are pleased to submit these comments in support of Rule Petition 10-08 to Establish a Right to Counsel in Civil Cases, on behalf of the National Coalition for a Civil Right to Counsel (“National Coalition”).

The National Coalition supports the Rule Petition because it would establish a wise and systematic method of increasing access to justice in Wisconsin’s courts. Specifically, it not only authorizes the appointment of government-funded counsel in cases where the litigant’s basic human needs will not otherwise be protected, but also provides judges with specific and essential guidance on when such an appointment is warranted. Such appointments in turn will increase the accuracy of judicial decision-making, reduce the burden on courts struggling with the flood of unrepresented litigants, and better enable trial judges to maintain their neutrality.

Moreover, we believe the Rule Petition’s approach is already outlined by two U.S. Supreme Court decisions decided thirty years apart. In *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32 (1981), the Court recognized that trial courts must determine in each case whether due process necessitates the appointment of counsel. And in *Turner v. Rogers*, 131 S.Ct. 2507 (2011), the Court adhered to this approach¹ when it identified factors in contempt cases for trial

¹ *Turner* did not foreclose the possibility of a categorical due process right to counsel in a non-incarceration context. Although the *Lassiter* Court observed that, as of that date, no right to counsel had been recognized except “where the litigant may lose his physical liberty,” it held that absent a threat to physical liberty, there is only a *presumption*, not a bar, against recognition of the right. 452 U.S. at 25, 26-27. In *Turner*, the Court held that its statements in *Lassiter* had not established that a threat to physical liberty (such as that which results from civil contempt) would create a presumption in *favor* of appointing counsel, as some lower courts had held. See e.g. *In re Adoption of K.L.P.* 735 N.E.2d 1071, 1075-76 (Ill. App. 2000) (“The [*Lassiter*] Court noted that an indigent litigant has an automatic right to appointed counsel only when he may be deprived of his physical liberty.”) The Supreme Court opined, “We believe those [*Lassiter*] statements are best read as pointing out that the Court previously had found a right to counsel ‘only’ in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).” 131 S.Ct. at 2517. In other words, the *Turner* Court only clarified a single aspect of its original *Lassiter* statements; it did not create a bar against recognition of a categorical right to counsel in non-incarceration cases.

courts to examine in making the decision of whether to appoint counsel, such as an imbalance of power between the parties and whether the case is “unusually complex.”

In urging adoption of the Rule Petition, we also suggest a single modest amendment. Specifically, we recommend revising Rule 11.02(2) to authorize a trial judge to take into account, as part of the deliberation over whether to appoint counsel, the additional factor of whether the opposing party is represented. Thus, Rule 11.02(2) would state:

... In making the determination as to whether the assistance of counsel is needed, the court may consider the personal characteristics of the litigant, such as age, mental capacity, education, and knowledge of the law and of legal proceedings, the fact of whether the opposing party is represented, and the complexity of the case.

Our reason for this suggestion is that the presence of an attorney on the opposing side of a case can sometimes dramatically change the balance of power between the parties, as the U.S. Supreme Court recently recognized in *Turner*. 131 S.Ct. at 2519. Consequently, consideration of this factor among the others can help guide the trial judge’s evaluation of whether the litigant can adequately protect his/her rights without counsel.

In further support of the Rule Petition, please consider the following research findings on a few of the approaches taken within the 50 states regarding the appointment of counsel in civil cases, research that we believe supports the approach outlined in the Rule Petition.

I. Eight States Authorize a Trial Judge to Appoint Counsel in Any Civil Case

Eight states already authorize civil court judges via statute to appoint counsel in any civil case (subject in some instances to certain prerequisites), just as contemplated in the Rule Petition. The states with these statutory provisions are Illinois,² Indiana,³ Kentucky,⁴ Missouri,⁵ New York,⁶ Tennessee,⁷ Texas,⁸ and Virginia.⁹ These statutory provisions are

² 735 ILCS 5/5-105(g).

³ Ind. Code § 34-10-1-2.

⁴ Ky. Stat. § 453.190(1).

⁵ Mo. Stat. Ann. § 514.040(1).

⁶ N.Y. C.P.L.R. § 1102(a).

embedded within each state's *in forma pauperis* procedures, reflecting the state's recognition that a) waiving court costs is not always enough to protect the basic needs of indigent litigants without counsel; b) various types of civil cases might warrant appointment of counsel; and c) trial court judges at least should be able to examine the circumstances of each case to determine whether counsel is necessary to protect the litigant's basic rights. The proposal outlined in the Rule Petition would establish equivalent authority in Wisconsin while providing more guidance to the trial courts than that provided by these statutes.

II. In Eight States, Courts Have Exercised Rulemaking Power to Authorize or Require a Trial Judge to Appoint Counsel in Types of Civil Cases Where a Right to Counsel Does Not Exist By Statute

In eight states, courts have used their rulemaking power to empower trial court judges to appoint counsel for certain types of civil cases even absent specific statutory authorization, just as the present Rule Petition suggests. We believe the courts in these states exercised their power in this way for the same reason this Court cited as a principal purpose of the judiciary, namely to insure "the due administration of justice in the courts of this state." *In re Kading*, 235 N.W.2d 409, 413 (Wis. 1975). The Rule Petition's recommendation to this Court to use its rulemaking power in the manner suggested would do much to ensure that such justice is done. The rules in these eight states are described below:

- **Delaware:** In 2002, the court enacted two rules providing for appointment of counsel in dependency cases. The first, De. R. Fam. Ct. RCP Rule 206, requires the court to "notify parents in writing that they may be represented by counsel," while Rule 207 adds, "[a] parent determined by the Court to be indigent may have counsel appointed by the Court during the parent's initial appearance on a petition, or such other time as deemed appropriate by the Court." While this language might seem to make appointments of counsel discretionary, the high court in *Hughes v. Division of Family Services*, 836 A.2d 498, 509 (Del. Supr. 2003), stated, "In 2002, the Family Court Civil Procedure Rules were amended to provide for *mandatory* appointment of an attorney in the case of an indigent party if so requested by that party..." (emphasis added).

⁷ Tenn. Code Ann. § 23-2-101.

⁸ Tex. Govt. Code § 24.016 (district court) and Tex. Govt. Code § 26.049 (county court).

⁹ Va. Code Ann. § 17.1-606.

- Kentucky: The Kentucky Rules of Civil Procedure provide that in a civil suit against a prisoner, “If for any reason the prisoner fails or is unable to defend an action, the court shall appoint a practicing attorney as guardian ad litem, and no judgment shall be rendered against the prisoner until the guardian ad litem shall have made defense or filed a report stating that after careful examination of the case he or she is unable to make defense.” Ky. R. Civ. P. 17.04.
- Michigan: While a statute provides that a court must appoint “an attorney *or* guardian ad litem” for minors seeking a judicial waiver of the parental consent requirement to have an abortion, M.C.L.A. § 722.904(2)(e), a court rule provides for the right to appointment of both an attorney *and* a GAL upon request by the minor. Mi. R. Spec. P. MCR 3.615(F), (G). Additionally, pursuant to Mi. R. Spec. P. MCR 3.217, an indigent putative father in a paternity action is entitled to an attorney at public expense. This particular rule might be the implementation of *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 249 (Mich. 1976) (finding right to counsel in paternity proceedings under state constitution’s due process clause).
- Minnesota: While Minn. Stat. Ann. § 260C.176 subd. 3(7) provides children with a right to counsel in dependency/termination of parental rights proceedings only if they are being placed in a detention or shelter care facility, Minn. R. Juv. Prot. P. 25.02 expands this right: “if the child desires counsel but is financially unable to employ it, the court shall appoint counsel to represent the child who is ten (10) years of age or older and may appoint counsel to represent a child under age ten (10) in any case in which the court determines that such appointment is appropriate.” Thus, children over 10 are entitled to counsel regardless of placement in a facility, pursuant to the court rule. Furthermore, Minn. Gen. R. Prac. 357.03 requires appointed counsel in contempt cases when incarceration is a potential outcome, which may be the implementation of *Cox v. Slama*, 355 N.W.2d 401, 403 (Minn. 1984) (recognizing right to counsel in contempt cases based on supervisory power).
- New Jersey: A court rule states, “In all cases where custody or parenting time/visitation is an issue, the court may, on the application of either party or the child or children in a custody or parenting time/visitation dispute, or on its own motion, appoint counsel on behalf of the child or children.” N.J. R. Ch. Div. Fam. Pt. R. 5:8A. Additionally, in all family matters, if a proceeding could “result in the institutional commitment or other

consequence of magnitude to any family member,” the court must provide counsel. N.J. R. Ch. Div. Fam. Pt. R. 5:3-4.

- Rhode Island: A court rule specifies that upon a filing of a petition for termination of parental rights, “A preliminary hearing shall be held on said petition for the court to: (4) Appoint an attorney to represent the parent(s) and any person having such care or custody of such child when said parent(s) or custodian are unable to afford such representation...” R.I. Juv. P. Rule 18(c). In *In re Bryce T.*, 764 A.2d 718, 721 (R.I. 2001), the Rhode Island Supreme Court noted that the rule requires appointment of counsel “despite the lack of a constitutional mandate” and apparently despite the lack of a statutory provision as well.
- Tennessee: In juvenile proceedings, Tenn. R. Juv. P. Rule 36(b) extends the right to counsel for parents/children to the appellate stage.
- Washington: A court rule provides that appointment of counsel can be one type of reasonable accommodation provided to litigants with disabilities. Wash. GR 33.

We applaud this Court’s recognition that it has the inherent power “to adopt those statewide measures which are absolutely essential to the due administration of justice...” *Kading*, 235 N.W.2d at 413. By focusing on cases involving basic human needs, which is consistent with the ABA’s call for jurisdictions to provide counsel at public expense in adversarial civil proceedings when basic human needs are at stake,¹⁰ Rule Petition 10-08 is responsive to that recognition. The National Coalition stands ready to offer any assistance to the Court in evaluating or implementing the Rule Petition, and commends the Court on its willingness to consider moving forward on this very important issue.

Sincerely,



Debra Gardner, Coordinator



John Pollock, ABA Section of Litigation Civil Right to Counsel Fellow

¹⁰ See American Bar Association, Resolution 112A (Aug. 2006), available at http://www2.americanbar.org/sdl/Documents/2006_AM_112A.pdf.