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THE COMMITTEE ON LEGAL AID

REPORT ON ASSIGNED COUNSEL

IN CIVIL CASES

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COURT APPOINTED COUNSEL FOR POOR PERSONS IN CIVIL CASES
UNDER ART. II OF THE NEW YORK CIVIL PRACTICE LAW AND RULES

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Introduction

Despite federal efforts through the Legal Services Corporation to ensure that the poor have "minimum" access to the legal system, the legal needs of the poor still remain unmet. Volunteer lawyer programs and the pro bono publico efforts of individual attorneys help to meet the need, but they have not offset the impact of recently reduced Legal Services Corporation funding for local legal services organizations.

If the government does not provide adequate funding to make legal services available to the poor, other means need to be developed to keep the judicial branch of government open to all. One method of making counsel available to the poor, judicial assignment of uncompensated counsel by the Supreme Court, Westchester County, has drawn recent attention. This report examines the authority of judges in New York State to assign uncompensated counsel to represent the poor in civil cases.

Assigned Uncompensated Counsel: N.Y. C.P.L.R. §1102(a)

Article II of the New York Civil Practice Law and Rules governs in forma pauperis rights and procedures. Article II is usually invoked on behalf of poor persons to obtain an order for the waiver of payment for filing fees, transcript fees, the expenses of service of process by publication, and other litigation costs. Less frequently invoked is Section 1102(a), which provides:

"The court in its order permitting a person to proceed as a poor person may assign an attorney."

The most complete discussion of the statute by the New York State Court of Appeals occurred in a 1975 case which presented the claim that an indigent divorce plaintiff is constitutionally entitled to receive free counsel. In a four-three decision, the Court of Appeals narrowly rejected that constitutional argument.

The Court of Appeals held that assignment of divorce counsel for indigents was not constitutionally required in each case, but stressed that a discretionary assignment of uncompensated counsel still could be made under CPLR

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Article II:

"As a practical matter, representation of private litigants, too poor to obtain their own lawyers, has been accomplished through the discretionary assignment of uncompensated counsel by the courts, and in more populated areas by voluntary legal aid and charitable organizations...."

"Of course, the indigent matrimonial litigant is not without practical recourse. The need of counsel for the indigent has been and is still being handled in larger measure in populated communities by legal aid, Federally funded legal services programs, and voluntary organizations. Thus, in the City of New York the Legal Aid Society, and other legal services agencies, handle annually a large number of matrimonial cases. The slack and conflict of interest problems are taken up by the discretionary assignment of uncompensated counsel under CPLR 1102 subdivision (a)." [Emphasis added]

* * * *

"In the meantime, courts and litigants must make do with what exists and what lies within the powers and capacity of the courts and the Bar. The courts have a broad discretionary power to assign counsel without compensation in the proper case (CPLR 1102 subdivision (a)) [Emphasis added]

* * * *

Voluntary organizations and the federally funded programs play their role. As for the Bar, they follow, as they are obliged to do, the Canons of their profession in performing obligations to the indigent and duties imposed by assignment of the court."

In dissent, Judge Fuchsberg would have found a constitutional right to counsel for each indigent divorce plaintiff.¹⁰ As did the majority, he too stressed the inherent power of the courts to assign uncompensated counsel on a case by case basis:

"Our New York lower courts too have been sympathetic to the need for counsel to implement the right to be heard effectively. They have held that indigents have a right to assigned counsel in matrimonial litigation. (See, e.g., Jacox v. Jacox, 43 A.D.2d 716, 350 N.Y.S.2d 435; Matter of Bartlett v. Kitchen, 76 Misc.2d 1087, 352 N.Y.S. 2d 110; and in other actions, Hotel Martha Washington Mgt. Co. v. Swinick, 66 Misc.2d 833, 322 N.Y.S.2d 139 [Due process rights to appointed counsel for indigent who shows merit in summary eviction]; Matter of Linda

G. v. Theodore G., 74 Misc. 2d 516, 345 N.Y.S.2d 361
[Support proceeding]; --"

* * * *

"Indeed, the great majority of divorces for indigents are processed by the many legal aid and legal services institutions throughout the state, which are funded through a combination of federal appropriations, state and local appropriations, and private charitable contributions.

* * * *

"It is only in exceptional cases, involving a conflict between two clients, between a client and a witness, or as in Tobak v. Mojika, (NYLJ May 16, 1973, p.20, col 3), between a client and an overburdened organization's numerous other clients, that the usual legal assistance mechanisms are insufficient and other methods for providing representation must in my view be found."

* * * *

"On the other hand, where an insufficient number of volunteers step forward, the courts may nevertheless assign counsel, and in view of the obligation of all lawyers under EC 2-25 to represent the poor, such assignment does not constitutionally require compensation... [The] private Bar can be expected to meet its service obligations to a substantially greater extent than it is doing at the present time.

* * * *

"I believe that the [failure] of the legislature to make such appropriation [for legal services] cannot ultimately limit the obligation of the independent judicial branch of our government to provide meaningful access to our courts."
[Emphasis added]

Judge Jones in his dissent also mentioned the statutory power of the court to assign divorce counsel, noting that it is discretionary:

"The courts may assign counsel. [Fn.] I agree on this point with the view of the majority, and thus disagree with the opinion expressed in the opinion at the Appellate Division 'that an indigent party to a matrimonial action is entitled to assigned counsel...' Under CPLR 1102 the court may assign counsel. Such authority historically and by express provisions rests in the discretion of the court,

however, the exercise of such discretion in favor of the appointment of assigned counsel is not mandatory."

* * * *

"[I]t is the responsibility of the judiciary to declare the right to counsel, and perhaps in an ultimate, final sense to lend judicially available sanction to the enforcement of such right. As to implementation in general of the declared right to counsel, in my view our court should now exercise responsible judicial restraint, inviting the most careful and prompt consideration of the subject by our Legislature."¹²

Judge Jones correctly noted that the assignment of counsel under §1102(a) is not mandatory. As discussed later in this report, however, the standard for the exercise of discretion in assigning counsel to an indigent person, while¹³ not mandatory, does favor assignment in divorce cases, once certain criteria are met.

In sum, although the Court of Appeals was narrowly divided on its holding concerning the constitutional right to counsel, the majority and the dissenting justices all agreed that N.Y. CPLR §1102(a) does empower the Supreme Court to assign uncompensated counsel to a poor person in a divorce case. The Court further indicated that such assignments are proper where a poor person is unable to obtain counsel from legal services organizations or volunteer lawyer programs.

Handling the Overflow of Divorce Cases by Judicial Assignment

With the sharp reduction in federal funding for legal services organizations in New York, and the inability of volunteer programs to bridge the gap, even fewer poor persons have access to charitable legal services. As legal services programs reduce their staffs and retrench due to the reduction in funding for the Legal Services Corporation, it may become necessary for courts to assign uncompensated counsel more frequently under CPLR 1102(a), particularly in divorce cases.¹⁴

For the uneducated or non-English speaking poor person, proceeding pro se in a New York divorce action is practically impossible.¹⁵ Indeed, even those lawyers who regularly practice in the matrimonial field sometimes find it difficult to fathom the intricacies of divorce practice without the aid of court clerks and continuing legal education programs. Thus self-help representation is not a realistic remedy.¹⁶

For the poor, the unavailability of divorce counsel can make difficult problems worse. Critical child custody, visitation, and property issues are often left in limbo, subject only to self-help remedies that invite unnecessary family strife and violence. The inability to obtain a divorce or to form a new marriage inhibits the free exercise of individual choice in fundamental areas of family life, and may tend to perpetuate unstable family life among the poor. Thus it is not surprising that matrimonial cases have been the most frequently reported instances of judicial assignments of counsel under CPLR 1102(a).¹⁷ Moreover, as the majority of the Court of Appeals has indicated, the divorce cases not handled by legal services organizations or

volunteers "are taken up by the discretionary assignment of uncompensated counsel under CPLR 1102 subdivision (a)."¹⁸

The Standard for Exercising Discretion Under CPLR 1102(a)

Prior to New York's enactment of Article 11 of the CPLR, former Rule of Civil Procedure 36, was construed to require the assignment of counsel whenever poor person's relief was granted.¹⁹ Indeed, it is still common practice to include the assignment of counsel as part of an order granting poor person's relief.²⁰ When the CPLR was adopted, the mandatory assignment feature of old rule 36 was modified, and made discretionary, on the theory that in a remote county with few attorneys, such as Wyoming County, the mandatory assignment of counsel whenever any poor person's relief was granted might eventually become too onerous a burden for the bar.²¹ This is consistent with the ethical requirement in the Code of Professional Responsibility, EC 2-29 that an attorney not seek to withdraw or be relieved of a judicial assignment except for "compelling reasons."²²

To avoid undue burden on any one attorney or group of attorneys, courts might utilize a roster of attorneys obtained from the Office of Court Administration, or bar association membership lists, to develop a rotation system for assignments.²³ An equitable judicial assignment system could help to make legal services available to many poor persons who need divorce counsel before reaching the point of imposing an undue burden upon any individual attorney. Section EC 2-25 of the Code of Professional Responsibility provides that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged," but relatively few members of the bar participate in volunteer lawyer programs. As stated by Judge Fuchsberg, "the Private Bar can be expected to meet its service obligations to a substantially greater extent than it is doing at the present time."²⁴

Compensation for the Assigned Attorney

An assignment under CPLR §1102(a) ordinarily requires an attorney to provide legal services free of charge to an indigent client.²⁵ In general, virtue is its own reward, but there should be no obstacle to prevent the attorney from seeking a statutory award of counsel fees from a non-indigent opposing party. Numerous statutes make such fees available to a prevailing party.

For example, the New York Domestic Relations Law provides that a spouse may be required to pay counsel fees for an indigent divorce plaintiff.²⁶ Thus, if the defendant spouse can afford to pay the indigent plaintiff's counsel fees, the assigned counsel may, serendipitously, receive some compensation.

Even where a statutory fee is not available, compensation for the assigned counsel may still be possible. If a monetary recovery is obtained for an indigent client, e.g., from the sale of marital property, it must be paid to the clerk of the court that granted poor persons's relief.²⁷ Upon application by the attorney, the

court may order reasonable compensation to be paid from the indigent's recovery.²⁸

In general, an attorney who is assigned by a court to represent an indigent person is ethically bound to accept the case, even if there may be no compensation. The Code of Professional Responsibility states as follows:

"When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, the lawyer should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding ... or the belief of the lawyer regarding the merits of the civil case."²⁹

Representing the poor without compensation is not a novel proposition. For centuries, English courts have required lawyers to provide free civil legal services to paupers under an Act of Parliament passed in 1494 during the reign of Henry VII.³⁰ When the United States became independent, the English law governing poor person's relief was made part of the common law of the American states;³¹ New York swiftly enacted its own assignment of counsel statute in 1801 that closely resembled the English Law.³²

Before the Court of Appeals made its reading of CPLR §1102(a) clear in Smiley, one New York court said that the judicial assignment of a lawyer to accept a divorce case³³ without pay would be an unconstitutional taking of the attorney's time and services. The subsequent Appellate Division affirmance in that case was based solely on the Court of Appeals' decision in Smiley, which rejected the constitutional claim that counsel is required for indigent divorce plaintiffs. Thus the Appellate Division did not rule on the constitutionality of assigning uncompensated counsel. In view of the majority and dissenting opinions of all members of the Smiley court that reaffirm the discretionary power of courts to assign uncompensated divorce counsel under CPLR §1102(a), "[i]t would seem ... that should the issue be brought directly to the Court of Appeals, the Court would emphasize the Bar's obligation to serve on an uncompensated basis."³⁴ Significantly, Westchester County Supreme Court recently assigned uncompensated counsel for indigent divorce plaintiffs.³⁵

The Application Process

New York's statute providing for the assignment of counsel for the poor in civil cases appears to be adequate from a formal standpoint. The few decisions that consider CPLR Section 1102(a) generally support the provision of counsel for the poor by assignment. Still, most poor people are utterly unaware of any opportunity to request assigned counsel under CPLR §1102(a), and simple application forms are not readily available.

Assigned counsel could be viewed as a benefit for the poor that is administered by the judicial branch of government. Simple application forms for this benefit could be made available. Without simple forms, however, one almost needs a lawyer to get one assigned.³⁶ The clerks of each Matrimonial Part could make application forms for poor persons relief and assigned counsel available, just as forms are provided for lawyers and pro se litigants in other areas of practice. In the

absence of court-approved forms, local legal services organizations, bar associations and community groups³⁷ could make pro se application forms available, along with instructional materials.

Conclusion

In many situations, meaningful access to the judicial system is not possible without counsel. It is not in the interest of the legal profession or of society in general to deny the poor access to the courts. As stated by the Supreme Court:

"Where money determines not merely 'the kind of trial a man gets,' but whether he gets into court at all, the great principle of equal protection becomes a mockery."³⁸

When voluntary legal services organizations, volunteer lawyer programs and individual volunteer lawyers are unable to meet the need, one remedy is for the courts to assign counsel to represent the poor without compensation. No change in New York law is needed to make additional counsel available to the poor in this fashion.

