“‘Justice for all’ was never meant to be ‘justice for all who can afford it.’”¹

“A lawyer who represents herself is said to have a fool for a client. That problem is compounded . . . when the ‘fool’ also lacks any legal training or experience.”²

Every year hundreds of thousands of United States citizens appear in court to represent themselves in a civil matter, whether it is in a foreclosure proceeding, a child custody dispute, or a dispute over health care coverage. Most individuals lose their case. Thousands more never appear in court to address their legal problem at all. This is not a statement about the validity of these individuals’ claims; it is a statement about our legal system and who we permit to access it.

The reality is that individuals with financial means are more likely to access our civil courts than are those without the ability to pay for an attorney. Further, a litigant with an attorney is more likely to win his case than a litigant appearing pro se, which is why those who can afford to hire an attorney do so. In 2005, the Legal Services Corporation (LSC) conducted a study to assess whether the civil legal needs of the poor were being met. It found that “there is one lawyer providing personal civil legal services for every 525 people in the general population” and “only one legal aid lawyer (including all sources of funding) per 6,861 low income people in the country.”³

In order to more fully understand the extent of the problem in its own state, North Carolina formed its own Equal Access to Justice Commission in November of 2005. The

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¹ Mary Deutsch Schneider, Trumpeting Civil Gideon: An Idea Whose Time has Come?, 63 BENCH & B. OF MINN. 1 (April 2006).
² Carl Ashley, et al., Judges’ Views of Pro Se Litigants’ Effect on Courts, 40 CLEARINGHOUSE REV. 228, 228 (July-Aug. 2006).
committee is currently chaired by Chief Justice Sarah Parker, and it released its Initial Report in May of 2008. This report concluded that there is one attorney for every 442 North Carolinians while there is only one legal aid attorney for every 15,500 low income North Carolinians, far worse than the national average. At $7.58 per eligible North Carolinian, funding for civil legal assistance in North Carolina is also quite low compared to other states. In fact, North Carolina is thirtieth in the country in terms of the funding available for civil legal assistance. There was a 23.7 million budget for civil legal assistance in North Carolina in 2008, and this number is likely to decrease in our current economic climate, despite the fact that more individuals will have a need for these types of services.

In August of 2006, the American Bar Association House of Delegates unanimously recommended that “federal, state, and territorial governments . . . provide legal counsel as a matter of right at [the] public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake . . . .” It went on to identify shelter, sustenance, safety, health, and child custody as areas in which basic human needs were at

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5 Id.
6 Id. at 14.
7 Id. at 8.
9 The ABA stated that shelter “includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.” ABA Report, supra note 4, at 13.
10 “[A] person or family’s sources of income whether derived from employment, government monetary payments or ‘in kind’ benefits . . . Typical legal proceeding involving the basic human need include denials of or termination of government benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.” Id.
11 “[P]rotection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.” Id.
12 “[A]ccess to appropriate health care for treatment of significant health problems whether that health care is financed by government . . . or as an employee benefit, through private insurance . . .” Id.
13 “[P]roceedings where the custody of a child is determined or the termination of parental rights is threatened.” Id.
stake. These five identified areas are the focus of most legislation and litigation being done across the country and in North Carolina. Since the ABA’s recommendation was released in 2006, every state in the country has formed some version of an Access to Justice Commission.

Legal Background

The historic case of *Gideon v. Wainwright*\(^\text{15}\) established the constitutional right to counsel for all criminal defendants, regardless of their ability to pay and regardless of whether they appeared in federal or in state court. The court held that the Sixth Amendment right to counsel in federal criminal cases also applied to the states through the Fourteenth Amendment, requiring the states to provide indigent criminal defendants with counsel.\(^\text{16}\)

Eighteen years later, Abby Gail Lassiter appeared before the Supreme Court and asked it to declare that her constitutional right to appointed counsel had been violated during a proceeding that sought to, and ultimately did, terminate her parental rights to her infant son.\(^\text{17}\) The Court held that the petitioner had no such absolute constitutional right, as a parental rights termination proceeding is civil, and not criminal, in nature. The Court held, instead, that there is a “presumption that an indigent litigant has a right to appointed counsel only when, if [s]he loses, [s]he may be deprived of [her] physical liberty.”\(^\text{18}\) The Court went on say that if the loss of physical liberty was not an issue, in order to determine whether due process required the appointment of counsel to an indigent civil litigant, the trial court needed to weigh the factors set

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\(^{14}\) It should be noted that the ABA does not endorse the appointment of counsel to indigent persons when the threat to a basic human need is only trivial or when an attorney is able to take the case on a contingency fee basis. *See id.* at 14-15.

\(^{15}\) 372 U.S. 335 (1963).

\(^{16}\) *Id.* at 342-43.


\(^{18}\) *Id.* at 26-27.
out in *Mathews v. Eldridge* against the aforementioned presumption. The factors that must be weighed against one another are 1) “the [g]overnment’s interest,” 2) “the private interest that will be affected by the official action,” and 3) “the risk of an erroneous deprivation of such interest” without the appointment of counsel.

Because *Lassiter* does not interpret the Constitution to grant an absolute right to counsel in civil cases, and because the Supreme Court is currently recognized to be quite conservative, advocates of the “civil Gideon” movement have focused their efforts at the state level. Advocates use a two-pronged approach in their battle. Through legislative advocacy, they argue for statutory amendments that require the appointment of counsel in specific civil cases; through litigation, they argue that the court must recognize a constitutional right to counsel in civil cases. Advocates have had more success implementing legislation that provides for the civil right to counsel than they have had through litigation. That being said, a significant number of states have found a constitutional right to counsel in very narrow situations, mostly in cases where a parent faces termination proceedings. Litigation seeking to establish a broad constitutional right to counsel in civil cases has been largely unsuccessful.

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19 See id. at 27.
21 For example, forty-eight states (including North Carolina) and the District of Columbia recognize a statutory right to counsel for parents in proceedings where their parental rights may be terminated.
22 See *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991) (holding that court appointed counsel is constitutionally required when the state seeks to terminate parental rights); *In re Welfare of Luscier*, 524 P.2d 906, 908 (Wash. 1974) (stating that indigent parents have a due process right to counsel when the state initiates parental termination proceedings); *State ex rel. Johnson*, 465 So.2d 134, 138 (La. Ct. App. 1985) (finding that constitutional due process requires the automatic appointment of counsel in cases where the state initiates the termination of parental rights); *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626-27 (Tenn. Ct. App. 1990) (determining that the interests of the parent and the state are “evenly balanced,” making the determinative factor whether failing to appoint counsel would result in an erroneous decision); see generally Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186, 187-88 (July-Aug. 2006) (reviewing various states’ interpretation and implementation of *Lassiter*).
23 See *Frase v. Barnhart*, 840 A.2d 114 (Md. Ct. App. 2003) (declining to address whether there was a constitutional right to counsel); *King v. King*, 174 P.3d 659, 663 (Wash. 2007) (holding that there is no constitutional right to counsel in a custody proceeding). However, three judges in *Frase* issued a concurring opinion where they stated that a constitutional right to counsel in matters of child custody and visitation should be recognized. See *Frase*, 840 A.2d at 136-37.
A Constitutional Right to Counsel in Civil Proceedings in North Carolina

The North Carolina courts have consistently held that “[b]y its terms, the Sixth Amendment applies only to criminal cases” and that “the Sixth Amendment right to counsel . . . does not extend to civil proceedings.” For example, in *State v. Adams*, the court held that because “[t]he filing of a petition alleging abuse and neglect [of a child is] a civil proceeding[,]” a parent against whom a petition alleging abuse and neglect has been filed has no constitutional right to counsel. The court has used its finding in *Adams* to limit other Sixth Amendment rights in civil proceedings. For example, it reasons that if the Sixth Amendment does not require a parent to be given counsel when the State files an abuse and neglect petition, neither does it require the parent against whom the petition has been filed be mirandized. not strayed far from the Supreme Court’s decision in *Lassiter*, even when interpreting the North Carolina constitution. They

With regards to due process in North Carolina, courts have not strayed far from *Lassiter*, even when interpreting the North Carolina constitution. In *Carrington v. Townes*, the court held that a defendant does not have a “right to appointed counsel at a paternity hearing” because if the defendant was found to be the father of the child, it would not result in imprisonment. The state’s goal in initiating the paternity suit in *Townes* was to require that the defendant pay child support. The defendant argued that if he is was found to be the father of the child he could

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26 483 S.E.2d 156 (1997).
27 Id. at 157.
eventually be imprisoned if he could not or would not pay the child support. The court held that this chain of events was too tenuous to require that the defendant be awarded counsel and that “the necessary menace to personal liberty [was] clearly absent.”

Similarly, the North Carolina Court of Appeals held, “an indigent party is [not] entitled to appointed counsel at a motion for modification of child support, as there is no liberty interest at stake.” Thus, there was no due process violation when the trial court refused to appoint counsel to a mother requesting the modification of the child support she owed.

The North Carolina Supreme Court has held that there is also no automatic, constitutional right to counsel in child support delinquency proceedings. However, the Fourth Circuit does find that there is a presumption created by Lassiter that an indigent litigant has a constitutional right to counsel if the result of the proceedings could be the litigant’s “deprivation of his physical liberty.” Therefore, the trial court must determine whether imprisonment may result from a child support delinquency proceeding. If the court does find that imprisonment is a probable result, it will be required to appoint counsel to the indigent defendant. “[P]rinciples of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent contemnors may not be incarcerated for failure to pay child support arrearages.”

A Statutory Right to Counsel in Civil Proceedings in North Carolina

While the North Carolina courts have not recognized a constitutional right to counsel in civil proceedings, the North Carolina legislature does recognize a statutory right to counsel in

30 Townes, 293 S.E.2d at 98.
32 Id.
35 McBride, 431 S.E.2d at 19-20.
civil proceedings in limited cases. North Carolina General Statute section 7A-451(a) requires that the trial court appoint an attorney for an indigent individual in sixteen different situations.\(^36\)

While some of the statute’s provisions provide indigent criminal defendants with an attorney,\(^37\) most of these provisions serve to provide counsel to indigent individuals involved in various civil proceedings.

For example, an indigent person is entitled to an attorney during proceedings seeking involuntary commitment,\(^38\) the declaration of incompetency,\(^39\) and the termination of parental rights.\(^40\) A disabled adult is entitled to court appointed counsel in a proceeding for the provision of protective services where the disabled adult has been allegedly abused, neglected, or exploited.\(^41\) Additionally, the parents of a juvenile who has been allegedly abused, neglected, or dependent are also entitled to representation.\(^42\) Section 451(a)(16) provides counsel for an unemancipated pregnant minor who wishes to have an abortion and needs consent from her parent or guardian.\(^43\) Counsel must also be appointed during a “hearing on a petition for a writ

\(^{36}\) N.C. Gen. Stat. § 7A-451(a) (2007). It should be noted that while this section provides a comprehensive list of situations in which an indigent person has a right to an attorney, there are other statutes that authorize the court to appoint an attorney in specific situations. For example, both section 7A-451(a) and section 7B-1101.1 of the North Carolina statutes provide a parent with an attorney during parental termination proceedings.

\(^{37}\) An indigent criminal defendant is entitled to a court-appointed attorney in cases where “imprisonment, or a fine of five hundred dollars . . . or more . . . is likely to be adjudged[,].” N.C. Gen. Stat. § 7A-451(a)(1) (2007). Additionally, counsel is provided for indigent defendants during probation revocation hearings and extradition hearings. See § 7A-451(a)(4); § 7A-451(a)(5).

\(^{38}\) See § 7A-451(a)(6) (stating that an indigent person in a “proceeding for an inpatient involuntary commitment” due to mental illness or substance abuse” is entitled to an attorney); § 7A-451(a)(8) (providing counsel for a juvenile when a hearing may result in the juvenile being committed to an institution “or transfer[red] to the superior court for trial on a felony charge”).

\(^{39}\) § 7A-451(a)(13).

\(^{40}\) See § 7A-451(a)(15), § 7B-1101.1(a). The right to counsel is also granted during “a proceeding to terminate parental rights where a guardian ad litem is appointed” to a parent who is under the age of eighteen. § 7A-451(a)(14). See also N.C. Gen. Stat. 7B-1101.1(b) (2007) (providing that a parent who is under the age of eighteen will receive a guardian ad litem in addition to receiving a court appointed attorney).


of habeas corpus\textsuperscript{44} or during a “civil arrest and bail proceeding . . . .”\textsuperscript{45} Though the bill is in its infancy, House Bill 506 also seeks to amend § 451(a) by requiring that counsel be provided to any indigent individual who has been adjudicated as a sex offender and, upon release from his/her active sentence, will be placed in a satellite-based monitoring program.\textsuperscript{46}

Most of the case law analyzing the statutory right to counsel involves parents’ right to counsel during termination proceedings. This right to counsel is afforded to indigent parents in all proceedings related to the termination of parental rights.\textsuperscript{47} In \textit{Matter of Maynard},\textsuperscript{48} the court held that the appellant-mother’s rights were violated when she was not provided counsel during out-of-court adoption discussions proceedings since those discussions were a direct “consequence of a neglect proceeding which [the government] initiated . . . .”\textsuperscript{49} While the court has interpreted “termination proceedings” fairly broadly, it has strictly construed the meaning of “parent,” refusing to extend the statutory right to counsel to individuals other than indigent parents.\textsuperscript{50}

Included in this right to counsel is the right to effective assistance of counsel.\textsuperscript{51} What good would the right to an attorney be, the court reasons, if the attorney does not effectively perform her responsibilities?\textsuperscript{52} Similarly, when the government moves to terminate parents’

\textsuperscript{44} § 7A-451(a)(2).
\textsuperscript{45} § 7A-451(a)(7).
\textsuperscript{48} 448 S.E.2d 871 (N.C. App. 1994).
\textsuperscript{49} Id. at 873.
\textsuperscript{50} See In re G.T., 670 S.E.2d 644 (N.C. App. 2008) (holding that the trial court’s appointment of counsel to the non-custodial maternal grandmother was an error, though non-prejudicial) (unpublished disposition appears in reporter table).
\textsuperscript{52} \textit{Matter of Oghenekevebe}, 473 S.E.2d at 396.
rights, it is required to give notice to the parents.\textsuperscript{53} With this notice comes the duty to inform the parents that they are entitled to appointed counsel if they cannot afford such representation.\textsuperscript{54} If the parents do not already have appointed counsel, they may request it from the clerk immediately.\textsuperscript{55}

\textbf{Progress through the North Carolina Equal Access to Justice Commission}

The North Carolina Equal Access to Justice Commission has taken steps to expand free civil legal services in North Carolina, both by increasing available funding for programming and by increasing actual services provided to low-income North Carolinians. The Commission increased potential funding in two distinct ways. The first way was to require mandatory participation in the IOLTA program for all practicing attorneys.\textsuperscript{56} Because such a high percentage (75 percent) of practicing attorneys already participated in the program, this program on its own will not generate a tremendous sum, but it will significantly contribute to the funding produced by the program.\textsuperscript{57} The second way the Commission seeks to increase funding for legal service providers is to increase the funding for the Access to Civil Justice Act (ACJA) by considerably increasing the amount of court costs that are allocated to the ACJA.\textsuperscript{58}

The Commission has also increased the number of services provided to low-income citizens in two ways. First, retired lawyers with inactive status can now take pro bono cases with the supervision of a nonprofit organization.\textsuperscript{59} These attorneys are not required to fulfill Continuing Legal Education requirements, but they are still required to abide by the Rule of

\textsuperscript{54} \textit{In re CSB}, 669 S.E.2d at 16.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id. at} 14-15
\textsuperscript{59} \textit{Id. at} 15.
Professional Ethics.60 Second, members of the North Carolina Bar Association are encouraged to participate in the 4ALL Campaign, where any North Carolina citizen can call in to toll-free hotlines and ask an attorney for help with a specific legal question. 61 More than 500 attorneys have participated in this event, answering more than 7,000 questions about the law in 2008.62 By all accounts the 2009 Campaign was also a success. Neither the Commission nor any other North Carolina nonprofit seems to be pursuing changes via litigation or legislation.

60 Id.
62 Id. at 13.