

ANALYSIS of IN RE: HILARY

The importance of the very recent case IN RE: HILARY, decided February 5, 2008, lies in the expanded interpretation of G.L.c.119, Section 29 articulated by Justice Ireland regarding the appointment of counsel for indigent parents in the dispositional phase of the CHINS proceeding. The child's "right to counsel" in a CHINS case is granted pursuant to G.L. c. 119, section 39F. Before HILARY, an indigent parent's right to counsel only attached when the child was subject to a permanency plan hearing - typically after a child had a CHINS adjudication and had been in the Department's custody for twelve months. HILARY holds that the parent's right to counsel is belated and truncated if it attaches at this late stage. The "right to counsel" granted to parents in a CHINS trial must occur at every stage where there is a possibility that the State may remove the child from the care and custody of the parent, even if the removal may be temporary. The "liberty interest" of every parent in the care, custody and management of his, or her, child is a fundamental right. Whenever a fundamental right is threatened, due process is implicated. The possibility that the State may become the custodian - whether temporarily or permanently - cannot occur without ensuring the parent the maximum safeguards of the judicial system. The right to counsel is an essential element of due process protection.

Despite the Department's claim that the statute does not speak in terms of custody being awarded to the Department, but rather in terms of commitment of a child to the Department, Justice Ireland deemed the net result of either statutory term as having the

potential of depriving a parent of his fundamental liberty interest, regardless of how it is packaged.

After IN RE: HILARY, Juvenile and Probate and Family Court judges may more frequently consider appointing counsel for indigent parents whenever the State seeks custody -- whether on a temporary basis or a permanent basis -- disrupting the parent's fundamental right. This case will be remembered as the Gideon trumpet call, heralding the right of parents to counsel in all civil actions where there exists the potential of permanent or temporary removal of a child to the State's custody. Justice Ireland's decision, while focusing on a specific statutory provision, appears to call for wider parental protection whenever the interests of the State could impinge upon the fundamental right of a parent to exercise care and custody of the child.

Facts: The Supreme Judicial Court agreed to consolidate two cases, one involving Hilary (an assumed name) in the Worcester Juvenile Court Department and the other concerning Annamaria (also an assumed name) from the Essex Juvenile Court. Both cases presented the same issue of first impression: Whether, after a child is adjudicated a child in need of services (CHINS), a parent is entitled to counsel at the dispositional phase of the proceeding, if custody of the child is to be turned over to the Department. In both instances, the trial judges had denied the indigent parent's application for counsel based upon a narrow reading of the statute.

Justice Ireland in his decision sets out an excellent overview of the statutory scheme before detailing the particular facts of each case. Essentially the statutory scheme provides for several levels of hearings before any permanent removal or other disposition can occur. The first hearing, a preliminary hearing, is in the nature of a probable cause

hearing to ascertain if the child is in need of services. At this stage, the judge may make one of three determinations: 1) permit the child to remain in the custody of the parent or guardian, subject to certain conditions; 2) place the child in the custody of a relative, probation officer, other qualified adult, private charitable or childcare agency, or private organization, which the judge finds to be qualified to care for the child; or, 3) commit the child to the department. After the preliminary hearing, the child has the right to appeal for a trial de novo, and thereafter may seek review in the Appeals Court.

If the trial court determines that the third disposition is appropriate, the judge must make the written certification and determinations required by G.L.c.119, Section 29C; the duration of the commitment to the department may not exceed six (6) months. At the expiration of the first period, a second hearing to determine if the child is still in need of services must occur and if it is extended the judge must conduct a permanency hearing by the twelve month mark. Prior to HILARY, only when a child is subject to a permanency plan at the twelve month hearing was counsel for the parent clearly mandated under the statute.

Both the Hilary case and the Annamaria case present facts where counsel was sought by the indigent parents at a stage prior to the permanency hearing - and before twelve months had elapsed since the first determination that the child was in need of services. In Hilary, the mother of Hilary sought counsel for herself and the right to intervene in the first CHINS hearing, which followed upon a care and protection matter in which the mother had had counsel. The trial judge allowed Hilary's mother the right to intervene, but denied her request to appoint counsel for her at the cost of the Commonwealth.

In the companion case considered, Annamaria's mother sought to intervene and have counsel appointed for her at Annamaria's third hearing, which occurred eight months after the initial finding that she was a child in need of services. At the first hearing, it was determined that Annamaria could stay with her parent, subject to certain conditions (option 2 above). The motion judge found that Annamaria's mother did not have a constitutional or statutory right to counsel, that she was not a party to the CHINS proceeding and that she had no right to be heard except at a judge's discretion.

In both cases, the trial courts' determination was appealed to the single justice to reverse the denial of the request for court-appointed counsel and the concomitant right to intervene.

Discussion and Rationale:

The "liberty interest" of a parent to the care, custody and management of one's child is fundamental and due process is implicated whenever the State may deprive a parent of custody of a child. The removal of a child from his parent's home for six months pursuant to a CHINS proceeding is never 'minimal', but always a 'substantial' infringement of a parent's "liberty interest". The opinion quoted G.L.c.119 section 29 which states that "the parent, guardian or custodian of such child shall have and shall be informed of the right to counsel at all hearings under said sections (section 23,24-27 or 29B) and in any other proceeding regarding child custody where the department of social services or a licensed child placement agency is a party, including such proceedings under sections five and fourteen of chapter two hundred and one; and if said parent...is financially unable to retain counsel, the court shall appoint counsel..."

Justice Ireland held that three subsequent amendments to Section 29, which expanded the language to include all child custody proceedings under other sections of the act brought by the department of social services or a licensed child placement agency were added to the list of circumstances where indigent parents had a right to counsel. The legislature intended to expand the circumstances to include all instances where the State interfered with the “liberty interest” of a parent. Whether the expanded phrasing of the amendments encompasses CHINS cases was at issue in the instant cases and ought to be considered in the context of the legislative history and intent.

Justice Ireland further reasoned that even though the statute utilizes the term ‘commit’ in setting forth a CHINS proceeding, the potential outcome of such a proceeding may be the temporary or permanent deprivation of parental custody and the transference of custody to the department. Therefore, after a child is adjudicated a child in need of services, a parent is entitled to counsel at the dispositional phase of the proceeding if custody of the child could be granted to the Department.

Lessons to be learned from IN RE: HILARY:

1. Parents have a fundamental liberty interest in the care, custody and management of their children.
2. Due process is implicated whenever the State may deprive a parent of custody of a child.
3. By necessary extrapolation, children have a fundamental liberty interest in being cared for by their parents.
4. Due process is implicated whenever the State seeks to deprive a child of his or her parents.

5. Every proceeding which has the potential to award custody of a child – permanent or temporary – to the State must be conducted in a manner that comports to the highest standards of due process.
6. The right to counsel, and the concomitant right to intervene, must be granted to both parent and child whenever the State may be awarded custody.
7. In a CHINS case, a child has a right to counsel at every hearing before the court. After an adjudication that a child is in need of services, a parent is entitled to counsel at the dispositional phase of the proceeding if custody of the child could be granted to the department.
8. The right to counsel had been limited to criminal actions and only fairly recently extended to dependency and parental termination cases, which represents the fastest growing category of cases requiring appointed counsel.
9. The duties and obligations of counsel for the child, appointed pursuant to Chapter 119, are not enumerated or specifically set forth in this chapter or elsewhere by statute. Should counsel for the child represent the child's wishes or the best interests of the child?
10. If neither the parent nor the child presents the perspective of the best interests of the child, does the Court have the power to appoint a Guardian Ad Litem? This case does not address this question, but other cases point to the equitable power of the Court, in its discretion, to do so.