

Fordham Urban Law Journal

Volume 29, Issue 3

2001

Article 16

Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts

Robert M. Elardo*

*

Copyright ©2001 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts

Robert M. Elardo

Abstract

This Article addresses the concerns over the differences in the right to counsel in family law cases depending on the venue. In New York, persons in family court proceedings have a constitutional right to counsel. Yet the same matter, if heard in the New York Supreme Court, does not afford such a right. This Article advocates the correction of this perceived oversight in the law so that all parties in these important proceedings can receive fair representation.

EQUAL PROTECTION DENIED IN NEW YORK TO SOME FAMILY LAW LITIGANTS IN SUPREME COURT: AN ASSIGNED COUNSEL DILEMMA FOR THE COURTS

*Robert M. Elardo**

In New York, the supreme court and the family court enjoy concurrent jurisdiction over many types of family law cases.¹ Among them are those concerning child custody, child and spousal support, adoption, abuse and neglect, parental rights termination, and paternity. For some types of cases, such as those concerning adoption and child guardianship, the surrogate's court also has concurrent jurisdiction.² The supreme court has general jurisdiction and can technically hear cases that the family or surrogate's court may adjudicate.³ As a practical matter, the supreme court does not exercise its theoretical jurisdiction over some of these case types.⁴

* Robert M. Elardo has been the managing attorney of the Erie County Bar Association Volunteer Lawyers Project, Inc. for the past seventeen years. During that time, he has served as president of the National Association of Pro Bono Coordinators, co-chair of the New York Pro Bono Coordinators Network, and consultant to the American Bar Association's Center for Pro Bono. He was a member of the New York State Bar Association President's Committee on Access to Justice, and remains a member of the NYSBA Committee on Legal Aid. He has been a trainer on numerous pro bono topics for the ABA, NYSBA, and in Erie County. Prior to his time at the Volunteer Lawyers Project, he was an associate member of the law faculty at Boalt Hall, University of California at Berkeley.

1. Although the Family Court Act appears to grant "exclusive original jurisdiction" to the family court over many types of cases, it actually only creates concurrent jurisdiction with the supreme court. Article 6, section 7 of the New York State Constitution declares that the supreme court has "general original jurisdiction in law and equity." New York Family Court Act (FCA) section 411, entitled, "Exclusive original jurisdiction," describes the concurrent jurisdiction as follows:

When used in this act, 'exclusive original jurisdiction' means that the proceedings over which the family court is given such jurisdiction must be originated in the family court in the manner prescribed by this act. The provisions of this act shall in no way limit or impair the jurisdiction of the supreme court as set forth in section seven of article six of the constitution of the state of New York.

N.Y. FAM. CT. ACT § 411 (McKinney 2001).

2. N.Y. SURR. CT. PROC. ACT § 201 (McKinney 2001).

3. N.Y. CONST. art. VI, § 7; *Kagen v. Kagen*, 236 N.E.2d 475 (N.Y. 1968); *Levy v. Levy*, 362 N.Y.S.2d 15 (App. Div. 1974).

4. *E.g.*, JOSEPH A. COX, JOSEPH T. ARONSON & STANDISH F. MEDINA, N.Y. CIVIL PRACTICE SCPA § 1702.01, 17-23 (1996).

Nevertheless, the supreme court routinely exercises its concurrent jurisdiction in certain family law areas, one of the most important of which is child custody. Child custody is so important that the New York Family Court Act (FCA) section 261 provides litigants in child custody matters with a right to counsel: "Persons involved in certain family court proceedings may face the infringement of fundamental interests and rights, including the loss of a child's society . . . and therefore have a constitutional right to counsel in such proceedings."⁵

Section 262(a) of the FCA details several types of cases in which the parties have the right to assigned counsel. FCA section 262(c) further provides that "any order for the assignment of counsel issued under this part shall be implemented as provided in article eighteen-B of the county law."⁶ This statutory scheme results in indigent parents⁷ and respondents⁸ in child custody matters being routinely provided assigned counsel and, thus, having protected what FCA section 261 declares to be their "constitutional right to counsel"—at least if their case happens to be in the family court.⁹

5. The language is meant to cover child custody, § 262(a)(iii), (v), as well as several other types of cases covered by FCA section 261's sister statute, FCA section 262. These cases include respondents in child protective proceedings, § 262(a)(i); both parties in family offense proceedings, § 262(a)(ii); various proceedings regarding foster care, § 262(a)(iv); people being held in contempt of court for violation of a prior court order, § 262(a)(vi); the parent of a child in an adoption proceeding who opposes the child's adoption, § 262(a)(vii); the respondent in a paternity proceeding, § 262(a)(viii); and other proceedings in which the judge finds that the New York or United States Constitution mandates the assignment of counsel, § 262(b). For the legislative history, see *infra* notes 84-88.

6. *Id.* § 262(c); see also N.Y. COUNTY LAW § 722 art. 18-B (McKinney 1991). The compensation for the assigned attorney is paid by the county or by the city in which the county is wholly contained. *Id.* § 722(4).

7. N.Y. FAM. CT. ACT § 262(a)(v) (McKinney 2001).

8. *Id.* § 262(iii).

9. Laws of 1975, Chapter 682, included the creation of FCA sections 261 and 262. It was drafted by the Office of Court Administration. Laws of 1975, Chapter 682, Bill Jacket, Letter from Michael R. Juviler, New York Office of Court Administration, to Judah Gribetz, Counsel to the Governor (July 22, 1975). The legislative history makes it clear that FCA sections 261 and 262 only set out in statutory form constitutional rights that many, including the Office of Court Administration, believed already existed in New York. *Id.* at 1-2; ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON THE FAMILY COURT AND FAMILY LAW 2; Letter from E. Judson Jennings, Family Court Section, Office of Projects Development, Appellate Division First Department, to Judah Gribetz, Counsel to the Governor (July 18, 1975); Division of the Budget, 30-Day Bill Budget Report on Bills, Examiner David C. W. Sawyer, dated July 21, 1975. The widely held view that FCA sections 261 and 262 merely codify constitutional requirements was based upon a broad reading of *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972), which involved an appeal from a family court neglect proceeding where the child was

Unfortunately, this right is only guaranteed in family court proceedings. No similar statutes expressly recognize or provide for the implementation of a similar right to assigned counsel in supreme court.

Interestingly, though, the Surrogate's Court Procedure Act (SCPA) expressly provides for the right to assigned counsel for parents and others that find themselves in essentially identical types of cases that may be heard in surrogate's court.¹⁰ SCPA section 407 was enacted just two years after FCA sections 261 and 262.¹¹ This quick follow up was no doubt brought about, at least in part, because when the legislation to create FCA sections 261 and 262 was still pending, the Surrogates' Association had already recognized that litigants in the surrogates' courts were being inappropriately left out in the cold. It wrote:

The declaration of public policy set forth in new Section 261 would seem to cover all courts having jurisdiction over any of the proceedings that are specified. However, in the amend-

taken from parental custody. The court found that the appellant not only had the right to counsel, but also the right to be advised that an attorney would be appointed if she could not afford one. According to Chief Judge Fuld, "In our view, an indigent parent, faced with loss of a child's society . . . is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the state without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer." *In re Ella B.*, 285 N.E.2d 288, 290 (N.Y. 1972) (citations omitted). Chief Judge Fuld found that denying the parent legal assistance was tantamount to a denial of due process and equal protection. *Id.* at 288. Some courts have disagreed with the broad reading of *In re Ella B.*, and have said that FCA section 262 extended the right to counsel recognized by *In re Ella B.* to custody proceedings. *McNeill v. Ressel*, 692 N.Y.S.2d 735 (App. Div. 1999); *Patricia L. v. Steven L.*, 506 N.Y.S.2d 198, 200-01 (App. Div. 1986). Nonetheless, whether or not *In re Ella B.* required that child custody cases be included in FCA section 262 does not seem worth quibbling about. In *People v. Smith*, 465 N.E.2d 336, 339 (N.Y. 1984), the New York Court of Appeals, citing *In re Ella B.*, wrote that FCA section 262 was "a recognition that due process and equal protection require the assistance of counsel when rights and interests as fundamental as those involved in the parent-child relationship are at stake."

10. The structure and wording of the New York Surrogate's Court Procedure Act section 407 closely mirrors that of FCA section 262. SCPA section 407 (1)(a) is identical to FCA section 262(a), except that the SCPA section substitutes the word "surrogate" for the word "judge." Both statutes have a series of subsections detailing essentially similar circumstances when assigned counsel is to be provided. Both statutes also have a subsection (b) that allows the assignment of counsel in other cases if the judge determines that the New York or United States Constitution mandates that counsel be assigned. Each statute ends with a subsection stating that any order for the assignment of counsel must be implemented as provided in article eighteen-B of the county law.

11. SCPA section 407 was enacted pursuant to L. 1977, c. 682, § 10 and was made effective January 1, 1978.

ments to the County Law relating . . . to . . . expenses of counsel assigned to these indigent persons, the sections relate only to proceedings in the Family Court We thus have the anomalous situation of a legislative declaration of public policy which would seem to cover the Surrogates' Courts and at the same time provisions for implementing that policy which relate only to the Family Court and exclude the Surrogates' Courts. This confusion would not be a reason for disapproving the bill. It might leave the Surrogates' Courts in a position where counsel would necessarily be provided without any means of compensating counsel.¹²

With the enactment of SCPA section 407 two years later, this "confusion" came to an end.¹³ The bill's sponsor in the senate discussed the recent statutory changes providing for assigned counsel in family court and addressed the surrogate's court omission:

Inexplicably, the statute failed to recognize that in proceedings such as adoption proceedings and some proceedings for termination of parental rights, the Surrogate's Court has concurrent jurisdiction with the Family Court and did not extend the right to counsel to such proceedings in that Court. As a conforming, if not constitutionally required change, this bill effects necessary conforming amendments to include the Surrogate's Court.¹⁴

12. Laws of 1975, ch. 682, Bill Jacket, Letter, from Paul Powers, Sec'y Emeritus, The Surrogates' Ass'n of the State of N.Y., to Judah Gribetz, Counsel to the Governor, 1-2 (July 22, 1975).

13. New York County Law section 722(4), article 18-B was also amended to include payment by the counties for assignments of counsel made pursuant to SCPA section 407.

14. Memorandum of Senator Joseph R. Pisani re Ch. 682 of laws of 1977, in N.Y. LEGISLATIVE SERVS., INC., NEW YORK STATE LEGISLATIVE ANNUAL: 1977, S. 6835, A. 545, 225-26 (1977). Senator Pisani was the bill's sponsor in the senate. See also Laws of 1977, Ch. 682, Bill Jacket, Letter from Frederick Marshall, Legislative Counsel, State of NY Office of Court Administration, to Judah Gribetz, Counsel to the Governor (Aug. 1, 1977), in which it is written:

This measure fulfills the mandate of counsel to indigent adults facing the loss of custody of a child in Surrogate's Court. In re Ella B., 285 N.Y.2d 288 (N.Y. 1972). The Office of Court Administration and the Family Court Advisory and Rules Committee support this measure which brings the practice of assigning counsel in surrogate's court into accord with the requirement in similar proceedings in family court. *All standards for assigned counsel in custody and adoption matters in Surrogate's Court should be identical to those in Family Court.* (emphasis added).

See also Laws of 1977, ch. 682, Bill Jacket, Letter from John M. Keane, President of the Surrogates' Ass'n of the State of New York, to Judah Gribetz (July 25, 1977); Letter from Milton Beller, Legislative Dir. for the Legal Aid Society [of New York City] to Judah Gribetz (July 27, 1977); ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON TRUSTS, ESTATES AND SURROGATE'S COURT (undated). This correcting legisla-

Unfortunately, there is still no clear statewide pronouncement providing for assigned counsel in similar cases adjudicated in supreme court. A comparison of supreme court rules shows that New York's four judicial departments treat the issue inconsistently. The Second Department rule is by far the most helpful. Section 678.11, entitled, "Assignment of Counsel," begins as follows:

Assignment of counsel by the Family Court, Supreme Court or Surrogate's Court to represent indigent adults in proceedings pursuant to section 262 of the Family Court Act, shall be made from law guardian panels designation [sic] pursuant to Part 679 of this Title (The rules of the Appellate Division, Second Department).¹⁵

This section specifically discusses how supreme court (and surrogate's court) judges are to refer litigants to assigned counsel pursuant to FCA section 262.¹⁶ It does not, however, explain whether such assignments are a discretionary power or a mandated duty. Interestingly, although the Second Department includes the Second, Ninth, Tenth, and Eleventh Judicial Districts, section 678.11 falls under Part 678, which is entitled "Assigned Counsel Plan Second and Eleventh Judicial Districts" and apparently only applies to those two districts.¹⁷ The rules provide no plan for the Ninth or Tenth Districts.

The First Department rule is entitled, "Assignment of counsel in Family Court," but the actual text of the rule does not specifically limit its scope to family court proceedings.¹⁸

tion "inexplicably" failed to include a provision regarding counsel for parents "seeking custody or contesting the substantial infringement of his or her right to custody." Although this protection was provided for in the original enactment of FCA section 262 in 1975, it was not added to SCPA section 407 until 1986.

15. N.Y. COMP. CODES R. & REGS. tit. 22, § 678.11 (2002). Compensation for assigned attorneys under Part 679 is provided pursuant to N.Y. JUD. LAW § 35 (McKinney 2001). N.Y. COMP. CODES R. & REGS. tit. 22, § 679.11 (2002).

16. See generally N.Y. FAM. CT. ACT § 262 (McKinney 2001) (providing means for referring cases for assigned counsel).

17. Section 678.11 looks like a "model rule" but does not solve the problem. The three legal service providers from the Second and Eleventh Districts that responded to my informal survey, see *infra* note 35, all indicated that low income clients had difficulty obtaining assigned counsel. One advocate said that in Kings County (Second District) low income clients "[o]ften [] remain unrepresented. This is scandalous!" Survey Response of Nancy S. Erickson, Senior Trial Attorney, Legal Services for New York City, Brooklyn, New York (Aug. 27, 2001).

18. N.Y. COMP. CODES R. & REGS. tit. 22, § 606.7 (2001) states in full, "Counsel to be assigned pursuant to Family Court Act, section 262, shall be selected from such panels as have been established in the First Judicial Department in conformity with Article 18-B of the County Law, as amended."

The Third and Fourth Department rules do not specifically address this issue or mention FCA section 262.¹⁹ In 1998, however, the Fourth Department heard a series of appeals from a matter in which the Herkimer County Supreme Court had appointed assigned counsel for both a family offense issue and a custody issue.²⁰ The Fourth Department apparently assumed that the supreme court's appointing counsel was proper and that the indigent's right to assigned counsel stemmed from the FCA.²¹ In discussing whether the appellant had the right to have a third appointed counsel for her custody issue (she had dismissed the first two attorneys that the court had assigned her), the court wrote, "An indigent party's right to assigned counsel under the Family Court Act is not absolute."²² In finding that the supreme court "did not abuse its discretion in denying petitioner's request for new assigned counsel," the Fourth Department cited a series of appellate division cases that were appeals from family court cases.²³ Those cases discuss family court litigants' right to assigned counsel. Thus, apparently (but by no means explicitly) the Fourth Department was of the view that the right to assigned counsel in supreme court was the same as in family court.

Nonetheless, without a statute that explicitly applies to the supreme court, indigent parents and others have met with limited and varied success obtaining assigned counsel in supreme court to assist

19. The Third Department rules are found in N.Y. COMP. CODES R. & REGS. tit. 22, § 822 (2001). It discusses assignments for mental health reasons under Judiciary Law § 35(1)(a), N.Y. COMP. CODES R. & REGS. tit. 22 § 822.1(a) (2001), and also states that the "court may assign counsel other than in the manner prescribed in subdivision (a) hereof only when it is satisfied that special circumstances require such assignment." N.Y. COMP. CODES R. & REGS. tit. 22 § 822.1(c) (2001). The Fourth Department rules do not specifically mention assigned counsel. *Id.* § 1000.1-19.

20. *See Petkovsek v. Snyder*, 674 N.Y.S.2d 210 (App. Div. 1998) (involving at least seven different appeals by Ms. Petkovsek and seven different memorandum decisions by the Fourth Department).

21. *Id.*

22. *Id.* (Appeal No. 7) (emphasis added). In addition to dismissing her appointed attorneys, Ms. Petkovsek "represented to the court that she would proceed *pro se* and failed to request assigned counsel during the 90-day period before the hearing." *Id.*

23. *Id.* (citing *Child Welfare Admin. (John R.) v. Jennifer A.*, 630 N.Y.S.2d 379 (App. Div. 1995) (mem.)); *Mooney v. Mooney*, 663 N.Y.S.2d 676 (App. Div. 1997) (mem.); *Mott v. Ransom*, (Appeal No. 1), 624 N.Y.S.2d 1018 (App. Div. 1995) (mem.). In *Petkovsek v. Snyder*, (Appeal No. 4) 674 N.Y.S.2d 208 (App. Div. 1998), the court also held that the supreme court had not denied Ms. Petkovsek her right to a fair trial by refusing to appoint her a second assigned attorney or adjournment when she dismissed her assigned attorney on the day of the hearing without showing good cause. *Id.*

them in cases covered by FCA section 261 and SCPA section 407. This has been true even under the relatively enlightened rules of the Second and Eleventh Judicial Districts.²⁴

Perhaps the most egregious example of injustice resulting from this inequitable treatment occurs when the financially solvent custody litigant chooses to initiate a custody proceeding in supreme court rather than in family court so that the indigent parent will have difficulty obtaining an assigned attorney.

I. FACING THE DILEMMA

In 1984, after two unsuccessful attempts to convince the court to appoint counsel, I brought an Article 78 proceeding²⁵ asking for a writ of mandamus ordering an Erie County Supreme Court justice to appoint assigned counsel for an indigent parent who had been served with a post divorce order to show cause to appear in supreme court regarding custody of his child.²⁶ The underlying case became moot once the matter was referred to family court.²⁷ It did result, however, in a meeting among then Eighth District Administrative Judge Kane, the president of the Bar Association of Erie County, the then administrator of the local Assigned Counsel Program,²⁸ an assistant attorney general (representing the supreme court justice), and myself. Justice Kane agreed that supreme court

24. See *supra* note 17.

25. *Prude v. Sedita*, 104 A.D.2d 735 (N.Y. App. Div. 1984). Prior to bringing the Article 78 proceeding, I had appeared twice as amicus curiae in the underlying matter, *Prude v. Prude*, Index No. H11524 (Sup. Ct. Sept. 1984), to advise the court of the indigent parent's right to assigned counsel. At the first appearance, I also provided the court with a memorandum of law describing two separate grounds for providing the particular litigant with assigned counsel. *Id.* The indigent client had court-ordered custody and his ex-spouse was moving the court for a change in custody. *Id.* I raised an equal protection and substantive due process argument based upon *Borkowski v. Borkowski*, 396 N.Y.S.2d 927 (App. Div. 1977), discussed below. However, the indigent litigant was also threatened with contempt of court and imprisonment for an alleged violation of a prior visitation order. *Id.* This right to assigned counsel was based upon not only FCA section 262, but also section 770 of the Judiciary Law, section 722 of the County Law, and numerous New York and federal cases holding that when indigent litigants are threatened with imprisonment, they have a constitutional right to assigned counsel. *E.g.*, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *Kissel v. Kissel*, 399 N.Y.S.2d 781, 782 (App. Div. 1977); *Hickland v. Hickland*, 393 N.Y.S.2d 192, 195 (App. Div. 1977).

26. See generally N.Y. FAM. CT. ACT § 262 (McKinney 2001) (providing for assignment of counsel for indigent persons).

27. *Prude v. Prude*, 104 A.D.2d 735 (N.Y. App. Div. 1984).

28. The then administrator of the Assigned Counsel Program (now retired) indicated that his County Law 18-B funded program was meant to be a criminal defense program and was never intended to be a family court program (let alone in supreme court). This type of thinking may still be pervasive, which would add to the impedi-

justices could make assignments pursuant to FCA section 262 and agreed to write an internal memo to the supreme court justices in the Eighth Judicial District informing them of this power.

I became the defacto local protector of this right to assigned counsel in supreme court. Other local legal services and legal aid programs were aware of the case that I had brought and they referred to me clients in need of assigned counsel in supreme court. Inevitably I would end up talking to the judge's law clerk about Judge Kane's internal memo (which I had never seen) and about what was required to get the client assistance from the Assigned Counsel Program. The process was inefficient, and I am sure that many people slipped through the cracks and went without counsel. Nonetheless, I was glad to help in the cases that were brought to my attention, and my assistance always resulted in referral to the Assigned Counsel Program and the assignment of an attorney.²⁹

Recently, however, a member of the Board of Directors of the Assigned Counsel Program indicated that the program does not assign attorneys for family law matters in the supreme court because it is not directed by statute to do so. A directive, either in the form of a statute, court rule, or appellate case decision, is clearly necessary to effect change. I have discussed this problem with legal service advocates throughout the state who want to remedy this injustice in their own localities.³⁰ Their attempts to deal with this issue locally have only demonstrated the inefficiency of handling this issue piecemeal.

The Honorable Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, called the New York State Unified Court System Access to Justice Conference, which inspired this article's attempt to bring attention to the issue and, hopefully, plant the seed for a state-wide solution.

ments that bar indigents from securing assigned counsel in family law matters in supreme court.

29. The attempts made were always made pre-divorce, post-divorce, or in custody disputes between unmarried adults.

30. These advocates include advocates in Suffolk County, Monroe County, Nassau County, and New York City. The access to justice issues raised by this inequitable treatment for litigants in supreme court has also been discussed by the New York State Bar Association (NYSBA) President's Committee on Access to Justice, the NYSBA Committee on Legal Aid, and the New York Pro Bono Coordinators Network.

Judge Newton's staff³¹ forwarded a request for information to the team leaders³² of the delegation each judicial district sent to the conference. Some of the team leaders forwarded the request to other knowledgeable court personnel within their district. At about the same time, an identical request for information was sent to legal services and pro bono programs.

The information request sought to determine whether low income litigants attempting to obtain assigned counsel in the supreme court to handle cases for which the litigants would have obtained counsel in family court were having trouble doing so. It further surveyed whether there is any mechanism established for indigent family law litigants to obtain assigned counsel in the supreme court, if so, whether such mechanism covers all of the areas of law covered by FCA section 262, and what indigents do if they cannot get assigned counsel.³³ The responses provided information on the practices in thirty-six of New York's sixty-two counties.³⁴ Of the thirty-six counties, twenty-nine (80.5%)³⁵ reportedly have no

31. Thanks to Beverly Russell for all of her help.

32. Team leaders were either the administrative judges or executive assistants for each district.

33. After an explanation of the issue, the information request included the following questions:

1. Do you believe that there is a problem in _____ County.
2. Is there an established mechanism to get people assigned counsel for family law cases in supreme & surrogate's courts?
3. If so, does it cover all of the types of cases covered by FCA section 262? Which, if any, are not covered?
4. Are there logistical problems which inhibit the process?
5. If clients cannot get assigned counsel, what do they do?
6. Who is responsible for administering the assigned counsel system that should be providing counsel in these cases? (please provide e-mail address, snail mail address, phone #, fax #, if possible)

34. Survey (on file with author).

35. These included the following twenty-nine counties: New York (First Judicial District); Richmond, Kings (Second District); Franklin, Essex, Fulton, Montgomery, Washington (Fourth District); Jefferson, Oneida, Herkimer (Fifth District); Madison, Ostego, Delaware, Chenango, Broome, Cortland, Tompkins, Tioga, Chemung, Schuyler (Sixth District); Monroe (Seventh District); Niagara (Eighth District); Dutchess, Orange, Putnam, Rockland, Westchester (Ninth District); and Queens (Eleventh District). Court representatives for several of the counties stated that indigent family law litigants in the supreme court must either represent themselves or attempt to obtain assistance from a legal aid program or a pro bono attorney. Inclusion on this list does not mean that an empirical review of actual cases in the counties listed would absolutely show a serious problem. However, people (working for the courts or in legal assistance programs for low income people) in those counties and in a position to be aware of problems that clients face in their attempts to obtain assigned counsel, have replied that they perceive that this problem exists in their counties. Additionally, no response was received from court personnel or legal services advocates for twenty-six

mechanism established for indigent family law litigants to obtain assigned counsel in supreme court. Contacts for the court system in three counties³⁶ reported that they have a functional system in place.³⁷

In four other counties, it seems some indigent family law litigants in supreme court can obtain assigned counsel, while others cannot.³⁸ In two of these counties (Onondaga and Nassau), it simply depends upon which supreme court justice is assigned the case.³⁹ In one county, litigants involved in original custody disputes could obtain assigned counsel in either family court or supreme court, but litigants involved in a modification of custody proceeding could not obtain assigned counsel in either supreme or family court.⁴⁰

In Erie County, pursuant to an Administrative Rule, all post-divorce custody and visitation matters brought within eighteen months of the divorce judgment must be heard in supreme court.⁴¹ Indigent litigants in those particular post-divorce cases can and do routinely obtain assigned counsel. However, as discussed earlier, the status of attempts by those who do not fit into this group is in doubt.

Thus, the above look around the state indicates that not only does the likelihood of actually receiving assigned counsel drop off significantly if you end up in supreme court instead of family court, but the court rules vary dramatically from judicial department to judicial department, and within each department the informal survey shows variances in practice do not even break down by judicial district. They, at best, vary by county. At worst, even within a county, it depends upon which judge your cases are assigned to.

of New York's counties. Presumably, if responses were received from all twenty-six of those counties, many of them would appear on this list.

36. The different court personnel replying for Schenectady and St. Lawrence Counties (both in the Fourth Judicial District) reported no problems in those counties. The established mechanism is triggered by a litigant filling out an application form that covers all types of cases within FCA section 262. They reported that there are no logistical problems with the system. The response on behalf of Suffolk County Courts (Tenth Judicial District) reported that they have an informal system for all cases covered under FCA section 262.

37. Survey (on file with author)

38. *Id.*

39. *Id.*

40. If this actually is the practice in Chautauqua County, then it raises another concern. FCA section 262(a)(iii) and (v) do not exclude litigants in modification proceedings from those that are entitled to assigned counsel.

41. . Administrative Rule RE: Modification of Divorce Decrees Involving Custody and Visitation, Justice Doyle, Administrative Judge, Eighth Judicial District (effective Oct. 1, 1999).

This inequity in litigant treatment should offend all fair-minded people and should be particularly disturbing to our courts, as the guardians and dispensers of justice.

II. COURT DECISIONS

There are only two published decisions dealing directly with this issue.⁴² Each is a supreme court decision. Unfortunately, the analyses and conclusions of these two decisions are in conflict.

In *Borkowski v. Borkowski*,⁴³ Justice Pine was faced with an indigent defendant's request for assigned counsel in a divorce case where custody was in dispute.⁴⁴ She first noted that in *In re Smiley*, the New York Court of Appeals had decided that a divorce litigant "has no constitutional right to have the court assign and compensate counsel."⁴⁵ Justice Pine went on to find that *In re Smiley* was controlling for the case presented to her, unless there has been a "legislative change".⁴⁶ She then wrote:

However, subsequent to the *Smiley* decision, the legislature enacted section 262(a)(v) of the Family Court Act requiring the court to assign compensated counsel to an indigent parent seeking or contesting the substantial infringement of his right to custody.

If the custody issue in this divorce action were referred to Family Court, pursuant to section 652 of the Family Court Act, the

42. There have been several related unpublished decisions since the enactment of FCA sections 261 and 262. *In re Burrows*, No. 45271-92 (N.Y. Sup. Ct. 1993). Like *Borkowski v. Borkowski*, 396 N.Y.S.2d 962 (NY Sup. Ct. 1977) (discussed below), it involved a request for assigned counsel in a divorce action and resulted in the indigent litigant being granted assigned counsel only for the custody issue. *Id.* Even though this case was decided sixteen years after *Borkowski*, it did not cite *Borkowski*. *Id.* Instead, the court wrote, "[T]his court may appoint counsel pursuant to Judiciary Law Section 35(b), in the same manner that counsel is appointed in Family Court, pursuant to Family Court Act Section 262(a)(v)." *Id.* It is unclear to what section of the Judiciary Law the Judge was referring. There is no section 35(b). A section 35-b was subsequently enacted, but not until 1995 (two years after the decision in *In re Burrows*). The section deals with "[a]ssignment of counsel and related services in criminal actions in which a death sentence may be imposed." N.Y. JUDICIARY LAW § 35(b) (McKinney 2001). More likely, the judge was referring to section 35(1)(b), but that section deals with the power of the court of appeals and the appellate division to appoint counsel in appeals from criminal cases, family court matters, and surrogate's court matters. § 35(1)(b). This is another example of the confusion surrounding this issue.

43. *Borkowski v. Borkowski*, 396 N.Y.S.2d 962 (Sup. Ct. 1977).

44. *Id.* at 958.

45. *Borkowski v. Borkowski*, 396 N.Y.S.2d 962, 963 (Sup. Ct. 1977) (citing *In re Smiley*, 330 N.E.2d. 53 (N.Y. 1975)).

46. *Borkowski v. Borkowski*, 396 N.Y.S.2d 962, 963 (Sup. Ct. 1977).

defendant would now be entitled to assigned counsel in that court. Clearly, Supreme Court may exercise every power of Family Court.⁴⁷

Borkowski held that the right to assigned counsel “extends only to the issue of custody” and resulted in the defendant being assigned counsel for the custody issue only.⁴⁸

The *Borkowski* court, without the necessity of reaching the constitutional issues of equal protection and due process which might have required the supreme court to assign compensated counsel, found that it had the power to assign compensated counsel if it chose to do so—and then, did choose to do so.⁴⁹ The logic of the *Borkowski* decision is bolstered by other court decisions that have held that, at least in some instances, the supreme court must follow the substantive and procedural rules of the FCA.⁵⁰

The only other published opinion that directly tackles this issue is a Suffolk County decision, *McGee v. McGee*.⁵¹ *McGee* is one of a series of at least eleven cases presented to at least seven different supreme court justices in Suffolk County during the late 1990s.⁵² Of the eleven cases, five resulted in the granting of compensated assigned counsel;⁵³ three were transferred to family court, where

47. *Id.* at 958 (citing *Kagen v. Kagen*, 289 N.Y.S.2d 195 (N.Y. 1968)).

48. *Id.* at 959.

49. *Id.* at 961-62.

50. *Pierot v. Pierot*, 373 N.Y.S.2d 592 (App. Div. 1975); *Levy v. Levy*, 362 N.Y.S.2d 15 (App. Div. 1974); *People v. DeJesus*, 250 N.Y.S.2d 317, 322 (App. Div. 1964).

51. *McGee v. McGee*, 694 N.Y.S.2d 269 (Sup. Ct. 1999).

52. The motions requesting assigned counsel in these eleven cases were all made by the Touro Law Center by, or under the direction of, attorney Jane Reinhardt.

53. *Garner v. Garner*, Index No. 18991-95 (N.Y. Sup. Ct. Mar. 31, 1998) (appointing counsel to defendant for custody issue only in divorce); *Olivieri v. Olivieri*, Index No. 91-22317 (N.Y. Sup. Ct. May 9, 1998) (appointing counsel appointed to respondent in post divorce motion for change of custody); *Neftleberg v. Neftleberg*, Index No. 30418-95 (N.Y. Sup. Ct. June 24, 1998) (relying upon *Garner*, counsel was appointed to respondent in post divorce visitation dispute); *Torregrossa v. Torregrossa*, Index No. 92-15193 (N.Y. Sup. Ct. Sept. 29, 1999) (appointing counsel to respondent in post divorce motion for change of custody); *Nielson v. Nielson*, Index No. #96-294 (NY Sup. Ct. undated, no written decision) (Justice Blydenburgh transferred the custody issue in a divorce to Judicial Hearing Officer Freidenberg, who apparently appointed counsel to defendant on issue of custody only); Memorandum From Lewis Silverman and Jane Reinhardt, Esqs., Touro Law Center, Regarding: Publicly Compensated Counsel for Supreme Court Custody Cases (June 1999).

the indigent parent presumably received assigned counsel;⁵⁴ and in two the issue was ruled moot.⁵⁵

The eleventh Suffolk County Case was *McGee v. McGee*, in which the court agreed with the *Borkowski* opinion that “the Supreme Court is constitutionally empowered to exercise every power of the Family Court.”⁵⁶ However, unlike *Borkowski*, the court concluded that “in this case, the court is of the opinion that to assume to itself the empowerment of Family Court Act section 262 would be inappropriate.”⁵⁷ In dicta, however, Justice Oliver made statements that would seem to indicate that he would never find a case that would be “appropriate” for using his power to apply FCA section 262 to assign counsel in supreme court:

For the Supreme Court to be consistent with the body of law relating to appointment of free counsel to indigent litigants in civil actions, it would appear more suitable to leave this legislative dispensation exactly where the Legislature placed it: the Family Court.⁵⁸

The Judge in *McGee* could have referred the child custody issue to family court, but instead declined:

Until defendant has presented proof of her own indigence *and that of plaintiff*, this court is loath to refer the custody part of this case to Family Court, even if that financial circumstance were, alone, sufficient reason to warrant a transfer.⁵⁹

54. *Roethel v. Roethel*, Index No. 4380-93 (N.Y. Sup. Ct., Mar. 5, 1999) (referring post divorce motion for change of custody to family court); *Vogt v. Vogt*, Index No. 91-10400 (N.Y. Sup. Ct. Feb. 2, 2000) (referring post divorce motion for change of custody to family court); *Moore v. Moore*, Index No. 93-7961 (N.Y. Sup. Ct. Mar. 20, 1998) (referring post divorce custody matter to family court).

55. In *Pirola v. Pirola*, Index No. 97-03464 (N.Y. Sup. Ct. Mar. 18, 1998), the court found that the party requesting assigned counsel did not meet the test for indigence. In *Mauro v. Mauro*, Index No. 84-2604 (N.Y. Sup. Ct. undated, no written decision), the underlying motion regarding visitation was dismissed for lack of jurisdiction because the parties' children were all over eighteen years of age.

56. *McGee v. McGee*, 694 N.Y.S.2d 269 (Sup. Ct. 1999) (citing *Borkowski v. Borkowski*, 396 N.Y.S.2d 962 (Sup. Ct. 1977) and *Kagen v. Kagen*, 289 N.Y.S.2d 195 (N.Y. 1968)).

57. *McGee*, 694 N.Y.S.2d at 275.

58. *Id.* The Second and Eleventh Judicial Districts, which are covered by the Assignment of Counsel Rule at N.Y. COMP. CODES R. & REGS. tit. 22, § 678.11 (2002) and the Tenth Judicial District, which includes Nassau County where the *McGee* case was heard, all fall within the Second Judicial Department.

59. *McGee*, 694 N.Y.S.2d at 273 (emphasis added). Regarding the power to transfer the custody matter to the Family Court, see *Kagen v. Kagen*, 289 N.Y.S.2d 195 (N.Y. 1968).

This finding was made even though the defendant had submitted a sworn affidavit stating that she was receiving public assistance and had no savings.⁶⁰ The court did not cite any authority in support of requiring that the defendant prove the indigence of the opposing party in order to obtain appointed counsel.⁶¹

This reasoning shows a lack of understanding of the plight of the indigent person called into an important and probably confusing legal proceeding. The court seems to be considering fee shifting⁶² and the possibility of ordering the opposing party to pay for some or all of the indigent litigant's attorney's fees.⁶³ Fee shifting is an important factor in leveling the playing field and facilitates access to justice for some low income parties. It works, however, only where the indigent party has an attorney whose fees can be paid by the other side. An indigent parent facing a custody battle and lacking money for even an initial retainer fee can have a difficult or impossible time finding an attorney to take her case on the hope of obtaining a fee award (and collecting it from the opposing party). If she cannot find an attorney to take her case, then the possibility that her non-existent attorney will be paid by the opposing side is of little comfort.

The *McGee* court goes on to discuss the indigent defendant's claim that denial of her request for appointed counsel on the issue of custody in supreme court would amount to a denial of her constitutional right to equal protection.⁶⁴ The court quickly dismissed that notion because it believed that there were not even two classes of people to look at to see if they were receiving unequal treatment. The Court stated that the defendant

argu[es] that a failure by the Supreme Court to apply Family Court Act section 262 to a case before the Supreme Court is a violation of the Equal Protection Clauses, reasoning that the Legislature wrongly created two classes: "one class of poor custody-case litigants (parties in Family Court)" where free legal

60. *McGee*, 694 N.Y.S.2d at 272.

61. *Id.* at 273. The *McGee* court neither cites nor addresses *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972), *People v. Smith*, 465 N.E.2d 336 (N.Y. 1984), or the important constitutional cases cited in *In re Ella B.*: *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Bodie v. Connecticut*, 401 U.S. 371 (1971), regarding the fundamental interest that parents have in the care and custody of their children. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

62. Fee shifting is allocating the costs of private litigation. Martha Pacold, *Attorney's Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 U. CHI. L. REV. 1007 (2001).

63. *McGee*, 694 N.Y.S.2d at 273-74.

64. *Id.* at 276-77.

counsel is available while denying such free legal counsel to “a similarly situated class of poor custody-case litigants (parties in Supreme Court).” The court finds this argument to be founded on a faulty premise. The “class” is comprised of indigent persons in child custody litigation. What defendant is arguing is forum, not class. All persons in the class who qualify are entitled to free legal counsel in the Family Court. Defendant argues that, as a member of the class, she is entitled to select her forum. However, the Legislature has already done that and selected the Family Court.⁶⁵

While Justice Oliver may have assumed that the legislature has selected the family court as the forum for those qualifying for free legal counsel,⁶⁶ unfortunately for this indigent defendant, the plaintiff trumped what the court called the “Legislature’s selection” and forced her to litigate the child custody case in the supreme court.⁶⁷ Even if *McGee*’s view of the “class” is correct for plaintiffs who can decide in which forum to litigate their action, it is a cruel joke to tell an indigent defendant (with no control over when or where the action was initiated) that he will be denied assigned counsel in supreme court because he should be litigating in family court,⁶⁸—and then refuse to transfer the custody issue to family court.

In trying to bolster its argument that there was not a denial of the indigent defendant’s equal protection rights, the court stated that “no argument can be made that the defendant has more rights or better protections in Supreme Court than in Family Court.”⁶⁹ Again, the court missed the point. The problem is not that the defendant has “more rights or better protections in Supreme Court,” it is that she has less: she was forced to litigate the child custody issue in supreme court without the assistance of an attorney.

65. *Id.* at 276.

66. *Id.*

67. *Id.* at 277.

68. Justice Oliver’s discussion raises another due process and equal protection issue. If, as he stated—the legislature, in essence, decided that poor litigants will litigate child custody cases in only family court, while wealthier litigants could choose either the family court or the supreme court—would such a statute stand up to a constitutional challenge?

69. *McGee*, 694 N.Y.S.2d at 277. Justice Oliver also questioned whether custody cases were meant to be included in those described in FCA section 261 as involving “the loss of a child’s society” and/or involving constitutional protection. *Id.* at 274. The legislative history of chapter 682, section 2 of the Laws of 1975 which enacted FCA section 261 makes it clear that child custody cases were meant to be included in both the phrase “the loss of a child’s society,” and the constitutional protection. See *infra* text accompanying note 88.

What is equally disturbing about the *McGee* court's opinion is that within its discussion of the equal protection issue, the court raises the cost of assigned counsel as an important concern.⁷⁰ Even though the court had earlier found that it had the power to act under FCA section 262 but decided it was "inappropriate" to do so,⁷¹ the court wrote:

Should the Supreme Court open the Pandora's box of free counsel for indigent litigants in civil actions where the litigant claims an unenumerated constitutional right or some "fundamental interest?" The court thinks not. These matters involving the public treasurer and treasury must be left to the Legislature. This financial thicket is no place for the courts.⁷²

Not all courts agree that cost to the public is a sufficient reason for the courts not to determine whether indigent litigants have a constitutional right to assigned counsel.⁷³ Three years before FCA sections 261 and 262 were enacted, the New York Court of Appeals found that parents in parental rights termination proceedings were entitled to assigned counsel and that to deny that right would be a denial of due process and equal protection.⁷⁴

In looking at the fifteen cases discussed above where the court was asked to provide assigned counsel for a custody issue, fourteen of the fifteen requests were for an indigent litigant that was in a defensive posture.⁷⁵ They were either a divorce defendant or responding to an Order to Show Cause or motion regarding child custody. They had no control over which forum was selected. Although a divorce plaintiff could arguably choose to file a family

70. *McGee*, 694 N.Y.S.2d at 274.

71. *Id.* at 275

72. *Id.* at 279.

73. *In re Ella B.*, 334 N.Y.S.2d 133, 136 (1972).

74. *Id.* at 136. Here, the equal protection claim was based merely on the fact that the statute allowed those that could afford to pay for counsel to have their counsel present. *See also* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

75. *Prude v. Prude*, Index No. H11524 (N.Y. Sup. Ct. 1984); *Borkowski v. Borkowski*, 396 N.Y.S.2d 962 (N.Y. Sup. Ct. 1977); *McGee v. McGee*, 694 N.Y.S.2d 269 (N.Y. Sup. Ct. 1999); *In re Burrows*, Index No. 45271-92 (N.Y. Sup. Ct. 1992); *Garner v. Garner*, Index No. 18991-95 (N.Y. Sup. Ct. 1998); *Olivieri v. Olivieri*, Index No. 91-22317 (N.Y. Sup. Ct. 1998); *Neftleberg v. Neftleberg*, Index No. 30418-95 (N.Y. Sup. Ct. 1998); *Torregrossa v. Torregrossa*, Index No. 92-15193 (N.Y. Sup. Ct. 1999); *Nielson v. Nielson*, Index No. #96-294 (NY Sup. Ct. undated, no written decision); *Roethel v. Roethel*, Index No. 4380-93 (N.Y. Sup. Ct. 1999); *Vogt v. Vogt*, Index No. 91-10400 (N.Y. Sup. Ct. 2000); *Moore v. Moore*, Index No. 93-7961 (N.Y. Sup. Ct. 1998); *Pirolo v. Pirolo*, Index No. 97-03464 (N.Y. Sup. Ct. 1998); *Mauro v. Mauro*, Index No. 84-2604 (N.Y. Sup. Ct. (undated, no written decision)). Only in *In re Petkovsek*, 674 N.Y.S.2d 210 (App. Div. 1998), was the person requesting assigned counsel the one who had initiated the proceedings in supreme court.

court petition to decide the custody issue before filing a divorce action, and a party that initiates a child custody proceeding could chose to do so in family court,⁷⁶ an indigent parent or guardian that finds herself summoned to supreme court does not have the luxury of choice. Their unenviable situation makes the most compelling case for the need of a clearly articulated pronouncement of their right to assigned counsel in supreme court.

III. THE LAW GUARDIAN ANALOGY

The history of the plight of indigent adults in custody matters in supreme court is, unfortunately, not unique. Until the passage of FCA sections 261 and 262, there was similar confusion about the appointment of assigned counsel in the family court.⁷⁷ After the statutory establishment of the right to compensation for law guardians of minors who were subjects of certain family court proceedings, there was confusion and lack of uniformity about appointing law guardians in similar types of proceedings in the supreme court.⁷⁸

FCA section 249 sets out circumstances in which the family court shall appoint law guardians for minors and other circumstances where the family court judge may appoint a law guardian.⁷⁹ *Borkowski v. Borkowski* was also the leading case for the proposition that a supreme court judge could exercise all of the powers of a family court judge under FCA section 249.⁸⁰ In order to make it clear that supreme and surrogate's court judges could exercise the same powers as the family court judge in ensuring that the appointed law guardians received compensation (thus better assuring that law guardians would be found), the legislature added subsection 7 to section 35 of the Judiciary Law:

Whenever the supreme court or the surrogate's court shall appoint counsel in a proceeding over which the family court might have exercised jurisdiction had such proceeding been commenced in family court or referred thereto pursuant to law, and

76. An exception is a post divorce proceeding where the supreme court has retained exclusive jurisdiction for future issues regarding custody.

77. Laws of 1975, chapter 682 included FCA sections 261 and 262. In its Bill Jacket, see Letter from Michael R. Juviler, New York Office of Court Administration, to Judah Gribetz, Counsel to the Governor (July 22, 1975).

78. Jennifer Frey, *Divorce Judges Seeking More Pro Bono Counsel*, MANHATTAN LAW., Feb. 16-22, 1988, at 1.

79. Appointment of law guardians in custody disputes is not mandated, but within the judge's discretion. N.Y. FAM. CT. ACT § 249 (McKinney 2001).

80. *Borkowski v. Borkowski*, 396 N.Y.S.2d 962, 964-65 (Sup. Ct. 1977).

under circumstances whereby, if such proceeding were pending in family court, such court would be authorized by section two hundred forty-nine of the family court act to appoint a law guardian, such counsel shall be compensated in accordance with the provisions of this section.⁸¹

The wording of this subsection is somewhat confusing because the precatory and final language talks about appointing "counsel" instead of appointing a "law guardian," as it does in the middle. A broad reading might include cases where the supreme or surrogate's court appoints counsel to adults under FCA section 262, as long as a law guardian could be appointed in family court under FCA section 249. The legislative history, however, shows that this amendment was aimed solely at resolving the funding of law guardians for minors.⁸²

The analogy between the FCA section 249 problem, which was solved by Judiciary Law section 35(7), and the FCA section 262 problem, which still needs to be addressed, is apparent in the conclusion of Assembly Member Oliver Koppell's letter of support for the passage of Judiciary Law section 35(7):

Each year, thousands of children are affected by judicial proceedings in New York State. It is ironic that we recognize their legal rights in Family Court, but not in other courts. This oversight must be corrected by authorizing the compensation of law guardians in Supreme and Surrogate [sic] Courts, thus ensuring that, where appropriate, counsel will be appointed and the child's interests will be protected.⁸³

81. N.Y. JUD. LAW § 35(7) (McKinney 2001). Subsection 7 was enacted in 1989 and became effective in 1990. Subsection 5 of the same statute provides that the compensation shall be a state charge.

82. Mem. of Sen. John R. Dunne, in 1989 LEGISLATIVE ANNUAL 252. Senator Dunne was the sponsor of the bill in the senate. His memorandum states, in part:

This measure would add a new subdivision seven to section 35 of the Judiciary Law to provide that whenever the Supreme Court or a Surrogate's Court appoints counsel for a minor to fill a role comparable to that of a law guardian (FCA § 249) such counsel shall be compensated with State funds.

Unfortunately, his memo explaining the legislation was more clearly written than the statute that was created. Regarding the intended meaning of N.Y. Jud. Law § 35(7), see, Bill Jacket to Laws of 1989, ch. 571, § 1. The Senate bill was S. 3571. The Assembly bill was A. 5912. At pages 5 and 6, respectively, letters from the bills' sponsors, Sen. John R. Dunne and Assembly Member G. Oliver Koppell, show they believed the supreme and surrogate's court already had the power to appoint law guardians for minors and that this legislation was to ensure that those law guardians were paid. The same is true for the report submitted by the Office of Budget, Laws of 1989, ch. 571, Bill Jacket § 1, at 8-9, and the report submitted by the Office of Court Administration in favor of the bill's passage, Laws of 1989, ch. 571, Bill Jacket § 1, at 10-11).

83. *Id.* at 6.

CONCLUSION

Twelve years after the protection of the rights of minors was ensured by the addition of Judiciary Law section 35(7), confusion and inequitable treatment for the rights of adults remains in those same cases in the supreme court. The decision in *McGee* illustrates there is a real problem for indigent adults trying to obtain assigned counsel in supreme court. This is particularly alarming because the imbalance of power created by only one parent having an attorney is likely to affect the outcome of proceedings where the court's ultimate goal is to determine the best interests of the child.⁸⁴ In its memorandum supporting passage of FCA sections 261 and 262, the New York Department of Social Services advised:

If the State is to continue to seek out the best interests of the child and yet preserve the individual rights of all persons having a legal interest in the child, it must recognize that the time-honored system of assuring representation of counsel is probably the best method of insuring the protection of individual rights.⁸⁵

The Office of Court Administration had drafted and requested the introduction of the bill which created FCA sections 261 and 262.⁸⁶ In recommending that the governor sign the bill into law, the Office of Court Administration stated: "This measure is a long overdue restatement of New York law, and is limited by its terms to instances where there is a constitutionally mandated obligation to assign counsel for poor persons involved in Family Court proceedings and subsequent appeals."⁸⁷

The Office of Court Administration's letter, which became part of the bill's legislative history, went on to say that FCA sections 261 and 262 covered all "proceedings where assignment of counsel to adults in Family Court proceedings is constitutionally mandated. Specifically, these include [among others] any proceeding involving the issue of custody. . . ."⁸⁸

84. *Daghir v. Daghir*, 439 N.E.2d 324 (N.Y. 1982); *Friederwitzer v. Friederwitzer*, 432 N.E.2d 765, 769 (N.Y. 1982); *Bennett v. Jeffreys*, 356 N.E.2d 277, 287 (N.Y. 1976).

85. Laws of 1975, Chapter 682, Bill Jacket, Memorandum Accompanying Comments on Bills Before the Governor for Executive Action, from New York State Department of Social Services 2 (Aug. 1, 1975).

86. Laws of 1975, Chapter 682, Bill Jacket, Letter from Michael R. Juviler, New York Office of Court Administration, to Judah Gribetz, Counsel to the Governor (July 22, 1975).

87. *Id.*

88. *Id.* at 2. The other types of cases covered by FCA section 262 were also listed in the letter.

Now, after the years of working with FCA sections 261 and 262, the courts routinely move without question or delay to provide for the assignment of counsel to indigent family court adult litigants involved in proceedings listed in FCA section 262. Indeed, just two years ago the Second Department, in deciding an appeal from a family court matter, wrote:

The assistance of counsel in child custody proceedings helps assure that determinations concerning the fundamental parental rights identified in *Matter of Ella B.* (supra),⁸⁹ and those concerning the best interests of a child, are not made without a fully developed record, after a full and fair hearing. Thus, in a child custody proceeding, a parent must be afforded a meaningful opportunity to appear and to present evidence and arguments in his or her favor, which includes the right to the assistance of counsel.⁹⁰

It is difficult to understand how these interests are any different in the supreme court. It would benefit children, parents, the court, and our system of justice to ensure that the constitutional right to assigned counsel afforded and protected in family court be just as vigorously afforded and protected in the supreme court.

The courts, bar associations, legal services programs, and pro bono programs recently came together to collaborate on access to justice issues.⁹¹ This paper has attempted to present a distinct, real, and gravely important access to justice issue around which that collaboration may congeal. What could be more devastating in the lives of parents or guardians than to face the loss of their children because they cannot obtain assigned counsel—especially, if the opposing party and their counsel have selected the supreme court as the forum, thus making it difficult or impossible for the indigent adult to obtain the assigned counsel that they would so readily obtain in family court. I hope, for the sake of the children involved, their indigent parents and guardians, the courts, and, indeed, our system of justice, that we are up to the task of correcting this oversight in the law.

89. *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972).

90. *McNeill v. Ressel*, 692 N.Y.S.2d 735, 737 (App. Div. 1999) (citations omitted).

91. The Access to Justice Conference was held on September 11-12, 2001 in Albany, New York.