

INTRODUCTION

The Supreme Court of Pennsylvania has adopted the changes to Rule 152 with this Recommendation. The changes are effective March 1, 2012.

EXPLANATORY REPORT JANUARY 2012

Background

The issue of waiver of counsel has been a topic of discussion and debate since the inception of the Juvenile Court Procedural Rules Project in 1999 and the creation of the Juvenile Court Procedural Rules Committee in 2001.

Despite the recurring debate on various aspects of waiver, research indicates that in most jurisdictions, juveniles are very rarely waiving counsel. According to 2009 statistics from the Juvenile Court Judges' Commission, over 99.2% of juveniles have an attorney for court proceedings. In 2009, one hundred eighty five (<.08%) juveniles waived the right to have an attorney. In the majority of waiver cases, the juvenile was discharged from court supervision, placed on informal adjustment, or the case was dismissed.

Even though waiver of counsel is rarely occurring across this Commonwealth, the unfortunate circumstances that came to light in Luzerne County brought this subject to the forefront more recently. In August of 2009, the Interbranch Commission on Juvenile Justice (ICJJ) was convened to address how the Luzerne County juvenile system failed, to restore public confidence, and to prevent similar events from occurring again. One of the primary issues concerned unrepresented juveniles sent to placement facilities for minor infractions.

One method of protecting juveniles is ensuring that all juveniles have an attorney. In May of 2011, the Supreme Court adopted a rule recommendation presuming all juveniles to be indigent. Effective July 1, 2011, all juveniles are appointed counsel unless they decide to retain a private attorney.

Once counsel is appointed, the question is whether the juvenile may waive his or her right to an attorney. The debate on waiver of counsel has centered on the derivation of the juvenile's right to counsel. The analysis for waiving a right is dependent upon this origin.

It is clear that an adult defendant has a Sixth Amendment right to counsel. The U.S. Supreme Court has also determined that adult defendants have a right to self-representation. See *Faretta v. California*, 422 U.S. 806 (1975). This right was

determined to be derived from the defendant's Sixth Amendment right to counsel.

In juvenile delinquency cases, the U.S. Supreme Court determined that the juvenile has a right to counsel but it is derived from the Fourteenth Amendment's due process clause. *In re Gault*, 387 U.S. 1 (1967). Pennsylvania then recognized the juvenile's right to counsel by providing in its Juvenile Act that a party is entitled to representation by legal counsel at all stages of any proceedings. See 42 Pa.C.S. § 6337.

In re Winship, the U.S. Supreme Court expanded its ruling in *Gault* by providing the juvenile with additional due process rights to confront and cross-examine witnesses, and to the same standard of proof as adult defendants which is a finding of guilty beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970).

However, there is no precedent for a juvenile's right to self-representation. In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the U.S. Supreme Court determined that a juvenile does not have the right to a trial by jury. It found that "a juvenile proceeding is not a criminal prosecution within meaning and reach of [the] Sixth Amendment guaranteeing [a] right to an impartial jury in all criminal prosecutions." *McKeiver, supra*.

In *McKeiver*, all the litigants agreed that the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness. As that standard was applied in those two cases, the U.S. Supreme Court placed an emphasis on fact-finding procedures. The requirements of notice, counsel, confrontation, cross-examination, and standard of proof naturally flowed from this emphasis. "But one cannot say that in our legal system, the jury is a necessary component of accurate fact-finding." *McKeiver, supra*.

Under this same analysis, it can be argued that the right to self-representation is also not a necessary component of accurate fact-finding. It actually tends to lead us to the opposite conclusion as juveniles are not effective advocates with specialized training who can accurately set forth the facts in a case or object to evidence that legally should be excluded.

The next question of whether the juvenile has a right to self-representation under the "law of the land" due process clause of the Pennsylvania Constitution is also addressed by this same analysis. See Pa. Const., Art. 1, § 9.

In re Terry, 265 A.2d 350 (Pa. 1970), the Supreme Court of Pennsylvania held that the juvenile does not have a right to a trial by jury. This case was consolidated with another case and affirmed by the U.S. Supreme Court in *McKeiver, supra*. The Supreme Court of Pennsylvania stated that it was "confident that a properly structured and fairly administered juvenile court system can serve our present societal needs

without infringing upon individual freedoms. If hearings are conducted in accordance with the procedural safeguards, juveniles are not constitutionally compelled to be granted a trial by jury.” *Terry, supra*.

The Committee believes that the constitutional analysis, as stated *supra*, is persuasive and supports the proposition that juveniles do not have an absolute right to self-representation. Therefore, the Committee believes that a juvenile’s right to waive counsel can be limited while protecting the juvenile’s freedoms and fundamental fairness.

There has never been any debate that when a juvenile waives counsel, the waiver must be knowingly, intelligently, and voluntarily made. When looking at this standard for waiver, it is clear to the Committee that any person under the age of fourteen does not have the capacity to understand a complex legal system in which attorneys must be educated and receive additional appropriate training. Therefore, the Committee recommended no juvenile under the age of fourteen can waive counsel.

It can be argued that a minority of juveniles over the age of fourteen may be able to make a knowing, intelligent, and voluntary waiver of counsel. The Court has recognized the rights of juveniles over the age of fourteen to make decisions concerning their mental health treatment, including taking medication. Additionally, the legislature has recognized that juveniles over the age of fourteen can be transferred to and from criminal proceedings for certain offenses. In the adult system, juveniles may be able to waive counsel if their waiver is knowingly, intelligently, and voluntarily made.

Therefore, the Committee balanced the rights of these juveniles with the need to protect them when serious consequences arise from their actions. Protecting juveniles outweighs any right to self-representation in any proceeding that has lifetime implications. Because of the consequences attached to certain proceedings in juvenile court, the Committee recommended a juvenile cannot waive counsel at a detention, adjudicatory, transfer, disposition, or probation revocation hearing.

A juvenile may be sent to an out-of-home placement for any delinquent act. There are also several collateral consequences related to a delinquency adjudication, which include challenges to obtaining employment, licenses, public housing, enrolling in the military; or being expelled from school. See <http://www.pacourts.us/T/BoardsCommittees/JuvenileCourtProcedural/> for the Collateral Consequences Checklist.

Because of the lifetime implications that flow from a delinquency adjudication, juveniles must be protected at the hearing that determines their guilt or innocence. Individual liberties and freedom are at stake at the detention, transfer, dispositional, and probation revocation hearings; therefore attorney representation is needed to

protect the juvenile's rights.

Additionally, once an attorney has been appointed or retained, Rule 150(B) requires the attorney to represent the juvenile until final judgment, including any proceeding upon direct appeal and dispositional review, unless permitted to withdraw. If counsel withdraws, new counsel must be appointed. Therefore, it is expected that a juvenile will always have an attorney at those proceedings.

Rule discussion

As previously stated, the modifications to Rule 152 are consistent with the Recommendations of the ICJJ which emphasize the importance of protecting juveniles who face serious consequences. *Interbranch Commission on Juvenile Justice Report*, May 2010, pp. 50 - 51.

Paragraph (A) allows a juvenile who is at least fourteen years of age to waive counsel if: 1) waiver is knowingly, intelligently, and voluntarily made; 2) the court conducts the colloquy with the juvenile on the record; and 3) the hearing is not one of the specified proceedings.

Because the consequences of a detention, transfer, adjudicatory, dispositional, and probation revocation hearings are too harsh for a juvenile to navigate the system alone, a juvenile may not waive counsel at those proceedings. As implied in the constitutional analysis *supra*, the Committee believes that the juvenile's right to self-representation fails under a balancing test of the Fourteenth Amendment's due process clause.

No changes were made to paragraph (B) & (C). Paragraph (B) allows the court to appoint stand-by if the juvenile waives counsel at any proceeding not enumerated in paragraph (A)(3). Paragraph (C) emphasizes waiver of counsel applies only to one proceeding and the juvenile must be informed of the right to counsel at each subsequent proceeding.

The colloquy requirements were changed in the *Comment* to address the general minimal requirements for information that should be obtained by the court. It is important to understand why the juvenile wishes to waive counsel. If there are any misperceptions by the juvenile, the court can dispel those misperceptions.

Another addition to the *Comment* includes that if a juvenile has a constitutionally protected formal belief system that prohibits attorney representation, the juvenile may move or file a motion under Rule 344(E) requesting the provisions of this rule do not apply to him or her. For example, an individual whose religious belief does not permit attorney representation may claim that his or her First Amendment right would outweigh any Fourteenth Amendment constitutional balancing test.