

Internal Operating Policy 02-05

Submitted by Director to the Georgia Public Defender Standards Council: 5/27/2005

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Authority: O.C.G.A. § 17-12-5(c) (2)²

Subject: Determining Indigence

Introduction

The Standards Council has adopted standards relating to the determination of indigence. This Memorandum sets out the implementation procedures to be followed by all members of the circuit public defender offices and the conflict defender offices.

The Sixth Amendment to the Constitution of the United States provides, in part, that “[I]n all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence.” The Constitution of the State of Georgia at Article I, Section I, Paragraph XIV provides, in part, that “. . . [E]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel;”

The Georgia Indigent Defense Act of 2003, enacted Article I, Chapter Twelve, Title 17 of the Official Code of Georgia Annotated which creates, the Georgia Public Defender Standards Council and provides at OCGA Section 17-12-1(c) that

The [Georgia Public Defender Standards] council shall be responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter.

¹ This policy is amended pursuant to the enactment of SB 503 adopted in the 2006 Legislative Session.

² O.C.G.A. § 17-12-5 (c) (2) provides as follows: “(c) The director shall...(2) Develop such rules, policies, procedures, regulations, and standards as may be necessary to carry out the provisions of this chapter and comply with all applicable laws, standards, and regulations, and submit these to the council for approval.”

The General Assembly has also given the Georgia Public Defender Standards Council the responsibility and authority to determine the financial eligibility by which persons may qualify as “indigent.” OCGA Section 17-12-24(a) provides that

(a) The circuit public defender and any other person or entity providing indigent defense services shall determine the financial eligibility of any person or juvenile arrested, detained, or charged in any manner in accordance with the definition of an indigent person set forth in Code Section 17-12-22 that would entitle him or her to representation under this chapter.

Procedures to Be Used When Determining Indigence

In determining whether a person qualifies for public defender services, the Office of the Circuit Public Defender, or the director of an alternative indigent defense delivery system authorized by the Standards Council, shall follow the statutory provisions and the guidelines promulgated and adopted by the Standards Council. These guidelines and procedures are applicable in all cases including those cases in which a conflict of interest has been declared by the circuit public defender.³

Unless otherwise ordered by the court, the Circuit Public Defender or his designee shall make the initial determination of indigence. This inquiry shall be based upon an appropriate inquiry into the financial circumstances of the person seeking public defender representation in the format as required by the Standards Council.⁴ If the person seeking representation by the public defender’s office fails or refuses to provide the required information, he or she shall be considered to have waived their right to be represented by the circuit public defender office. The failure or inability of an otherwise qualified applicant to pay the application fee as required by OCGA Section 15-21A-6 shall not prevent the applicant from being represented by the circuit public defender office. The judge presiding over the disposition of the case may impose the payment of the application fee as a condition of any sentence or condition of any probated sentence. It should be noted that

³ OCGA Section 17-12-22(a) provides “The council shall establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest. . . .”

⁴ The circuit public defender office or its designee make the determination of indigence based upon the applicant's answer to questions concerning his or her financial resources as requested on the application form. This information includes, but is not be limited to, the applicant's assets, liabilities, employment, earnings, other income, number and ages of dependents, as set forth in Standard Council’s guidelines. The circuit defender, in close cases considers the severity of the charges and the punishment which may be inflicted upon conviction of those charges. The Georgia Public Defender Standards Council suggests that all circuit public defender offices use the forms that are available to each circuit public defender until a uniform application form has been fully and finally adopted by the Council.

the presiding judge in any indigent case may, upon request by the applicant, waive the application fee. If a waiver is granted, an order indicating that the court has waived the application fee shall be included in the applicant's file and a copy forwarded to Georgia Public Defender Standards Council central office.

Definition of Indigence⁵

An "indigent" is a person who has been arrested or charged with a crime punishable by imprisonment who lacks sufficient income or other resources to employ a qualified lawyer to defend him or her without undue hardship on the individual or his or her dependents.

Felony, Felony Probation Revocation, Juvenile Cases Involving Felony Charges

Each Circuit Public Defender Office shall apply the following criteria in determining whether an individual is an indigent entitled to legal representation under the Georgia Public Defender Act:

(a) **Persons Earning Less Than 150% of Federal Poverty Guidelines:**

A person who earns less than 150% of the Federal Poverty Guidelines is presumed to be indigent and entitled to legal representation in all cases covered by the Act unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person or his or her dependents.

Misdemeanor, Probation Revocation, Juvenile Cases and Cases Involving Municipal or County Offenses

A person charged with a misdemeanor, violation of probation, or a municipal, county or juvenile offense punishable by imprisonment who earns or, in the case of a juvenile⁶, whose parents earn, more than 125% of the Federal Poverty Guidelines is

⁵ Paragraph 1 of "Standards for Determining Indigence" adopted in principle by The Georgia Public Defender Standards Council on November 21, 2003 and ratified by the Standards Council on August 27, 2004.

⁶ In the event a juvenile is denied indigent status because his or her parents do not meet the criteria for indigence, the application fee may be waived by the juvenile court judge or the superior court judge where there is no independent juvenile court. In those instances when a parent does not meet the criteria for indigence but still refuses to provide for the juvenile's representation the circuit defender shall treat the juvenile as an indigent. In those instances where the presiding judge in a juvenile court case determines that there is a conflict

presumed to be ineligible for legal representation under the Act unless the person can show, to the satisfaction of the Circuit Public Defender's Office, that he or she earns less than 125% of the Federal Poverty Guidelines.

What is income?

The amendments to the Official Code of Georgia Sections 17-12-2, 17-12-8, and 17-12-24, as noted, change the definition of indigence and removes any discretion by the Council to deviate from the percentages of the federal poverty guidelines. However, the responsibility of the Council remains in determining the process by which the earned income of a potential client is determined.

The Act and the Amendment to the Act refers to the income earned by a client or a client's parents. The Generally Accepted Accounting Procedures usually defines "earned income" as "adjusted gross income." Adjusted Gross Income is defined as: "Income after adjustments for social security taxes; federal, state, and local taxes; health-care costs; business income or loss; retirement and/or social security benefits; also referred to as net income."

Therefore for the purposes of determining qualifications for services by a public defender the Georgia Public Defender Standards Council determines that the Generally Accepted Accounting Procedures definition of "earned income" includes only an applicant's take home pay, which is the gross income earned by an applicant minus those deductions that are required by law or as a condition of employment. Accordingly, in calculating a client's "earned income" for the purposes of determining whether or not the client is entitled to services the circuit public defender shall employ use the client's net income, or adjusted gross income, as the client's earned income. In order to insure a standardized application of the Council's rules and policies **this procedure is to be used system wide in all circuit public defender offices and conflict defender offices.**

What are reasonably available resources?

The amendment to the Indigent Defense Act also provides that public defender services might not be available for those individuals who might otherwise qualify for services. The Amendment, as noted, provides that even if a person's income is below the established levels he or she is not eligible for public defender services "if there is evidence that a person has other resources that might reasonably be used to employ a lawyer without undue hardship on the client or his dependents".

"Other resources" is usually defined as liquid assets or assets which can quickly be turned into cash without significant loss. Cash, checking accounts, savings accounts and

of interest between the parent(s) and the juvenile (regardless of the indigence qualification vel non), the circuit defender will provide representation for the juvenile.

money market accounts are all liquid assets which can readily be converted to cash. Trust Funds and life insurance policies are also considered to be liquid assets.

If there is only one owner of a bank account, insurance policy, or liquid asset access by the owner is unlimited and that asset is reasonably available to the defendant. If a liquid asset is available but there is a co-owner or joint owner of the asset, such as jointly owned bank accounts, then the intentions of the co-owner may be controlling.

For example if an account is in the name of the applicant “or” [another person] this means that either person on the account may withdraw all funds without the permission of other owner(s). With these accounts, the entire asset is reasonably available to the defendant.

If an account is in the name of the applicant “and” [another person] this means that the signatures of both names on the account are required to withdraw any funds. In situations such as this, if the other owner consents to or participates in withdrawal for the applicant, the entire asset is reasonably available for the applicant and is considered as an asset. However, if the other owner refuses to consent or participate, the asset is not reasonably available to the defendant.

If an account is denominated as a “for” account this means that the applicant is acting as a guardian for the other as established for the depositor. The guardian has no ownership interest and the fund in the account is not considered reasonably available to the defendant.

Appeal by a Person Denied Representation⁷

A person who is deemed by the Circuit Public Defender to be ineligible for representation under the Act may apply to the judge of the court in which his or her case is pending who has been assigned the case, or to a presiding judge of the court in the event there is no assignment system in the Court, for an order appointing an attorney to represent him or her in the case. This authority would generally fall into the category of the judge’s responsibility to ensure that the constitutional rights of an individual are protected. However, because of the application of the definition set forth in the amendment to the Indigent Defense Act, the public defender’s office is prohibited from representing an individual who fails to qualify pursuant to the legislative definition of indigence as set forth in the amendment. The determination of who will make the payment for the independently appointed attorneys would presumably be the responsibility of the presiding judge in any particular case.

⁷ Paragraph 4 of “Standard s for Determining Indigence” adopted in principle by The Georgia Public Defender Standards Council on November 21, 2003 and ratified by the Standards Council on August 27, 2004.

Conclusion

The Constitution of the United States and the Constitution of the State of Georgia require the State of Georgia to provide counsel to **indigent** defendants for the defense of the accusations made against them. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2nd 799 (1963), Gibson v. Turpin, 270 Ga. 855, 513 S.E. 2d 186 (1999). The Indigent Defense Act of 2003 created a state wide public defender system to accomplish these constitutional mandates. It is our responsibility to insure that no poor person in Georgia who is charged with a criminal defense in any court or a juvenile charged with a delinquent act or a juvenile accused of being an unruly child is denied an attorney. These guidelines and procedures are intended to reflect the Standards Council's commitment to fulfilling this responsibility.