

SURVEY OF LAW: THE RIGHT TO COUNSEL FOR INDIGENT PARENTS IN CHILD WELFARE CASES

JOANNA WELLS*

I. INTRODUCTION

Nearly forty years ago, in *Lassiter v. Dep't of Soc. Servs.*, the United States Supreme Court ruled that indigent parents whose parental rights are being terminated by the state do not have an absolute right to court-appointed counsel.¹ The *Lassiter* Court emphasized the lack of deprivation of physical liberty involved in cases regarding the termination of parental rights and upheld the Court's long-held due process presumption that the right to appointed counsel exists only when an indigent individual may be deprived of physical liberty.² Because civil child welfare cases do not present a risk of deprivation of physical liberty for the parents, no presumption exists for the right to counsel.³ In its due process analysis, the Court used the three balancing factors from *Mathews v. Eldridge* to determine that termination of parental rights cases generally, and the mother in *Lassiter* specifically,⁴ cannot overcome the presumption against the right to counsel.⁵ Instead, the Court favored a case-by-case approach in which the state trial court would

* B.S. 1971 University of Illinois. J.D. 1998, Southern Illinois University School of Law. Joanna Wells is a Clinical Assistant Professor and Director of the Juvenile Justice Clinic at Southern Illinois University School of Law, where she teaches and supervises law students who provide legal representation as *guardians ad litem* to children in the child welfare court in the First Circuit Court of Jackson County, Illinois. Prior to opening the Juvenile Justice Clinic in June 2011, she spent seven years in full-time private practice in Southern Illinois, where she practiced in a wide variety of areas of law, including family law, as well as represented hundreds of parents in the neglect, abuse and dependency court in the First Circuit Court of Williamson County, Illinois. Before that, she worked for law firms in Carbondale and Mt. Vernon, Illinois, primarily handling complex adversary bankruptcy cases and business disputes; worked for the Illinois State's Attorneys Appellate Prosecutor office for the Fifth District; and served for two years as a judicial law clerk to the Honorable J. Phil Gilbert of the United States District Court for the Southern District of Illinois. She would like to thank SIU Clinic Director John Erbes and colleague Gail Thomas for offering support, encouragement and advice, as well as SIU Interim Dean Cindy Buys for adjusting my summer teaching assignment to help with this writing.

¹ *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33-34 (1981).

² *Id.* at 25-27.

³ *Id.*

⁴ *Id.* at 33.

⁵ *Id.* at 31 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), balancing the government's interest, the private interests and the risk of an erroneous decision).

make the decision as to whether or not to appoint counsel, “subject, of course, to appellate review.”⁶

The Court rejected the indigent mother’s arguments on constitutional grounds, but encouraged state courts and legislatures to consider that “wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution”⁷ while noting that as of that time, “33 states and the District of Columbia provide statutorily for the appointment of counsel in termination cases.”⁸ Significantly, the Court also recognized that appointment of counsel implicated not just termination of parental rights cases but also all child welfare cases involving neglect, abuse, and dependency; in which termination may be only one of many outcomes.⁹

In the intervening decades, the Supreme Court has not revisited this issue, and state courts have dealt with it in varying ways by creating a patchwork of statutes, case law, and practices that impact hundreds of thousands of families each year.¹⁰ In addition, even in states that now provide a right to counsel for indigent parents, vast differences exist in regard to the conditions under which counsel may or must be appointed, the length of that representation, training requirements, remuneration, and many other issues that impact the child welfare system.

II. STATE COMPARISONS

This survey will examine Illinois’ law regarding appointment of counsel in comparison to nearby and adjacent states, as well as an outlier state that recently granted limited rights to appointed counsel.

A. Illinois

In Illinois, an indigent parent does have an absolute right to counsel in child welfare cases. This right derives from the Illinois Juvenile Court Act of 1987, and encompasses not just termination proceedings, but all stages of the child neglect, abuse, and dependency processes that may lead to termination.¹¹ Parents’ counsel shall appear at each and every trial court

⁶ *Id.* at 32.

⁷ *Id.* at 33.

⁸ *Id.* at 34.

⁹ *Id.* at 33-34.

¹⁰ As of September 30, 2017, 442,995 children were in foster care in the United States resulting from court involvement, and 69,525 foster children were waiting to be adopted following the termination of their parents’ parental rights. Adoption and Foster Care Analysis and Reporting System (AFCARS) data for FY 2017, United States Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau (2017).

¹¹ 705 ILL. COMP. STAT. ANN. 405/1-5(1) (West 2020).

hearing on these cases unless substituted or ordered by the Court to withdraw.¹² Unlike some other jurisdictions, Illinois does not require trial court counsel to continue representation at the appellate level according to the Illinois Juvenile Court Act.¹³ This right to legal representation does not depend on the facts of the case, the complexity of the issues, or on the parent's likelihood of prevailing. It exists from the start of the case through to its trial court conclusion.¹⁴

In 2019, an Illinois appellate court recognized, however, that a parent may waive the right to counsel by his or her own actions or statements.¹⁵ Recognizing that indigent parents do have a statutory right to counsel in a proceeding pursuant to the Illinois Juvenile Court Act, the *Davion* appellate court nevertheless upheld the trial court's adjudicatory finding of neglect and abuse, despite the fact that the trial court had vacated the appointment of a father's court-appointed attorney prior to the adjudication and dispositional hearings.¹⁶ The lower court vacated the appointment of father's counsel because the father sought numerous times to fire his court-appointed attorney and after the court allowed his counsel to withdraw, the father refused numerous opportunities for subsequent appointed counsel.¹⁷ Despite his conduct, however, the father argued on appeal that the court erred in vacating his appointment of counsel.¹⁸ The appellate court strongly disagreed.¹⁹

As of the time of this article, Illinois limits the absolute right to appointment of counsel to cases pursuant to neglect, abuse, and dependency cases brought under the Juvenile Court Act, and so far has not granted that right to parents in wholly privately-initiated termination of parental rights cases, such as private adoptions.²⁰ In a 2002 case that essentially involved the payment of appellate legal fees, the Illinois Supreme Court upheld a mother's right to court-appointed counsel in a privately-initiated adoption case, but based its holding on the unique facts of that case and did not extend its ruling to cases litigated solely under the Adoption Act.²¹ The court gave great

¹² *Id.* (the Court may require appointed counsel to withdraw following the dispositional hearing if a party fails to attend any subsequent proceedings).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *In re Davion R.*, 2019 IL App (1st) 170426, ¶¶ 58-59.

¹⁶ *Id.* ¶ 73-81.

¹⁷ *Id.* ¶ 71.

¹⁸ *Id.* ¶ 56.

¹⁹ *Id.* ¶ 69.

²⁰ *In re Adoption of K.L.P.*, 198 Ill.2d 448, 468, 763 N.E.2d 741, 753 (2002).

²¹ *Id.* Here, the mother had been appointed counsel in a neglect and abuse case brought by the State under the Juvenile Court Act. As the case proceeded, the state's attorney declined to proceed to termination of parental rights, and the court instead awarded the father custody and guardianship of the children. When he and his wife later sought to adopt the children (in what Illinois refers to as a "related adoption"), the mother asked for legal counsel, but the adoption court denied her request. The Illinois Supreme Court, however, overruled the lower courts on equal protection grounds, finding that this mother should have been granted court-appointed counsel because the case

weight to the fact that the parents and children initially appeared in a neglect case brought under the Juvenile Court Act, and that the trial court had closed the case and granted custody and guardianship to the father without terminating the mother's parental rights.²²

B. Indiana

Only in the last five years has Indiana provided a statutory right to counsel for indigent parents in child welfare and termination of rights cases.²³ Unlike Illinois, Indiana qualifies and limits that right in significant ways. In 2014, the Indiana Supreme Court clarified that Indiana Code 31-34-4-6 requires appointment of counsel but does not necessarily require the trial court to inquire in each and every case whether or not the parent wants counsel appointed. Rather, the court must appoint counsel only if the parent affirmatively requests it.²⁴ Prior to the court's ruling in *G.P.*, in which the Indiana high court reconciled conflicting statutes to find a right to appointed counsel, Indiana appellate courts routinely found a presumption *against* appointment of counsel in child welfare cases by using the fact that the parent's individual liberty was not at stake and that the *Mathews v. Eldridge* factors usually did not compel appointment.²⁵

In 2018, an Indiana appellate decision in a termination case reverted fully to the *Mathews* balancing analysis despite Indiana's statutory right to counsel at termination proceedings.²⁶ In a somewhat convoluted opinion that upheld the father's termination, the X.S. court ruled that the trial court did not violate a father's right to counsel in a termination proceeding by using the *Mathews* balancing factors to support its decision and concluding that (1) the father took no affirmative steps to obtain representation despite being given notice that he could do so;²⁷ and (2) "the risk of erroneous disposition due to lack of representation is much lower than in most other legal proceedings."²⁸ The court even seemed to minimize the need for parents' counsel in general,

originated under the Juvenile Court Act. The Court specifically declined, however, to require counsel for all indigent parents facing termination in all adoption actions.

²² *Id.* at 754.

²³ See IND. CODE ANN. § 31-34-4-6 (West 2020); IND. CODE ANN. 31-32-2-5 (West 2020).

²⁴ *J.A. v. Ind. Dep't of Child Servs. and Child Advocates (In re G.P.)*, 4 N.E.3d 1158, 1163, n. 7 (Ind. 2014).

²⁵ *Id.* at 1162 (discussing *M.M. v. Elkhart Off. of Fam. and Child (In re M.M.)*, 733 N.E.2d 6, 10-11 (Ind. Ct. App. 2000) and *In re E.P. v. Marion Cty. Office of Family and Children*, 653 N.E.2d 1026, 1031-32 (Ind. Ct. App. 1995)).

²⁶ *S.S. v. Ind. Dep't of Child Servs. (In re X.S.)*, 117 N.E.3d 601, 606-07 (Ind. Ct. App. 2018).

²⁷ *Id.* at 608.

²⁸ *Id.* at 607 (including a vigorous dissent which noted (a) the unexplained failure by the trial court to appoint counsel for the father at the initial hearing, despite his request for counsel; and (b) an expression of belief that termination proceedings carry a high, not low, risk of error).

stating “the juvenile court is looking out for the parent's interests in a termination proceeding even if an attorney is not.”²⁹

C. Missouri

Missouri approaches indigent parents’ right to counsel differently from both Illinois and Indiana by requiring appointment if (1) the parent desires it, and (2) if a “full and fair hearing requires appointment of counsel for the custodian.”³⁰ In a widely-cited 2015 Missouri appellate case, *In re K.G.*, the court ruled that the trial court has a “clear obligation . . . to determine” whether or not a parent seeks appointment of counsel and that “failure to do so constitutes reversible error.”³¹ So, whereas Indiana courts do not have an obligation to inquire and appoint counsel unless the parent requests, Missouri, like Illinois, requires the trial court to conduct an inquiry.³² Missouri trial judges, however, are permitted to determine whether a parent can receive a full and fair hearing without appointed counsel, a standard that neither Illinois nor Indiana uses.³³

Interestingly, Missouri also provides that one attorney may represent both the child and his or her parent(s), where no conflict of interest exists.³⁴ Neither Illinois nor Indiana allow that.

In fact, at least one Illinois appellate court reversed and remanded a mother’s termination of rights specifically because at one point in the case the same attorney represented both the mother and her son.³⁵ The *Darius* Court therefore concluded that the mother received ineffective assistance of counsel precisely because one attorney represented two parties in the same case, and the Court considered that to be a per se conflict of interest.³⁶ “[T]he right to effective assistance of counsel is the right to undivided loyalty from one's attorney.”³⁷ No cases in Missouri appear to address this conflict of interest issue in the context of child welfare cases.

D. Kentucky

Kentucky statutes and courts robustly provide broad and expansive rights to counsel to indigent parents at each and all stages. Courts must

²⁹ *Id.*

³⁰ MO. ANN. STAT. § 211.211 (West 2020); Mo. Sup. Ct. R. 115.03.

³¹ *In re K.G. v. K.G.*, 472 S.W.3d 230, 236-37 (Mo. Ct. App. W.D. 2015).

³² *Id.*

³³ *E.g.*, *Juvenile Officer v. T.R.E. (In re G.M.G.)*, 525 S.W.3d 162, 164 (Mo. Ct. App. W.D. 2017) (holding the “mother can have a full and fair hearing at this stage absent counsel”).

³⁴ MO. ANN. STAT. § 211.211 (West 2020).

³⁵ *People v. Tracie G. (In re Darius G.)*, 406 Ill.App.3d 727, 739, 941 N.E.2d 192, 201 (2d Dist. 2010).

³⁶ *Id.* at 733, 941 N.E.2d at 197.

³⁷ *Id.*

appoint provisional counsel for these parents upon the initial filing of a petition alleging abuse, neglect, and/or dependency,³⁸ although the parent will waive that right, however, if he or she does not show for the first court hearing.³⁹ In addition, the court must appoint a guardian ad litem, in addition to counsel, for an unemancipated or unmarried parent under the age of 18, and the court may appoint a guardian ad litem for any parent deemed incompetent, regardless of age.⁴⁰

Kentucky also requires appointment of counsel for indigent parents in involuntary termination of rights actions and, unlike Illinois, for parents who request an attorney in a voluntary termination for adoption purposes.⁴¹ These expansive rights to counsel appear to be strongly protected by Kentucky courts, with appellate courts routinely finding clear error by trial courts who fail to provide counsel in an involuntary termination adoption case.⁴² As a result, appellate courts will set aside the termination of the parental rights, as well as the subsequent adoptions, and remand the case to the lower courts for more proceedings.⁴³

While recognizing that *Lassiter* did not find an absolute right to counsel in termination cases, Kentucky's legislature and courts unequivocally seem to agree with the *Lassiter* admonishment that "[a] wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution."⁴⁴ "[T]he law in this Commonwealth is that the due process clause, and KRS 625.080(3) and 620.100(1) require that the parental rights of a child not be terminated unless the parent has been represented by counsel at every critical stage of the proceedings."⁴⁵ In contrast to the appellate case in Indiana, which held that the presence of counsel perhaps would not have made a determinative difference at termination, the Kentucky court firmly stated, "[w]e believe there is no more fundamental right than to have counsel present at the termination hearing."⁴⁶ Additionally, we cannot say that the failure to be represented by counsel at the hearing did not impact the subsequent termination of parental rights."⁴⁷ *L.H.R.*, although it should be noted as persuasive authority, establishes

³⁸ KY.REV.STAT.ANN. § 625.080 (West 2020).

³⁹ See generally, *C.M.J. v. Cabinet for Health and Family Services*, 389 S.W.3d 155, 163-63 (Ky. Ct. App. 2012) (finding parents were not represented at the dependency proceeding and had therefore waived their right to counsel).

⁴⁰ KY.REV.STAT.ANN. § 625.080 (West 2020).

⁴¹ *Id.* § 625.0405(1).

⁴² *S.S. v. Cabinet for Health and Family Servs.*, 537 S.W.3d 834, 837 (Ky. Ct. App. 2017).

⁴³ *Id.*

⁴⁴ *Lassiter*, 452 U.S. at 33.

⁴⁵ *L.H.R. v. Cabinet for Health and Family Services*, No. 2012-CA-001018-ME, 2013 WL 1002250, at *1 (Ky. Ct. App. Mar. 15, 2013) (citing *Z.T. v. M.T.*, 258 S.W.3d 31, 36 (Ky. Ct. App. 2008)).

⁴⁶ *S.S. v. Ind. Dep't of Child Servs. (In re X.S.)*, 117 N.E.3d 601, 606-07 (Ind. Ct. App. 2018).

⁴⁷ *Id.*

precedent of requiring counsel for parents as the Kentucky court here reversed the parent's termination of rights due to the lack of counsel.⁴⁸

E. Wisconsin

Wisconsin remains one of only a very few number of states that does not offer any right for appointed counsel to indigent parents accused of neglect and/or abuse. Wisconsin courts retain complete discretion over whether or not to appoint counsel for indigent parents until a case reaches the termination stage.⁴⁹ Prior to termination, “[a]t any time, upon request or on its own motion, the court may appoint counsel for the child or any party, unless the child or the party has or wishes to retain counsel of his or her own choosing.”⁵⁰

In involuntary termination of parental rights, Wisconsin requires appointment of counsel for indigent parents, but with strict terms under which the court can determine whether the parents have waived their right to counsel.⁵¹

[A] parent 18 years of age or over is presumed to have waived his or her right to counsel and to appear by counsel if the court has ordered the parent to appear in person at any or all subsequent hearings in the proceeding, the parent fails to appear in person as ordered, and the court finds that the parent's conduct in failing to appear in person was egregious and without clear and justifiable excuse. Failure by a parent 18 years of age or over to appear in person at consecutive hearings as ordered is presumed to be conduct that is egregious and without clear and justifiable excuse.⁵²

F. Mississippi

Until 2016, indigent parents in Mississippi had no right at all to appointment of counsel in abuse, neglect or termination cases, even at the court's discretion. Even with the passage of the 2016 statute that allows these appointments, the courts still retain complete discretion.⁵³ “If the court determines that a parent or guardian who is a party in an abuse, neglect or termination of parental rights proceeding is indigent, the youth court judge may appoint counsel to represent the indigent parent or guardian in the proceeding.”⁵⁴

⁴⁸ *Id.*

⁴⁹ WIS. STAT. ANN. § 48.23(3) (West 2020).

⁵⁰ *Id.*

⁵¹ *Id.* at (2)(b)(3).

⁵² *Id.*

⁵³ MISS. CODE ANN. § 43-21-201(2) (West 2020).

⁵⁴ *Id.*

In termination cases, Mississippi law now requires courts to advise parents of their potential right to counsel, as well as other rights.⁵⁵ The 2016 statute mandates that courts determine “whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution of 1890, or statutory law and, if so, appoint counsel”⁵⁶ As of this writing, only one reported case challenged a termination in part on this provision, and so it remains to be seen how Mississippi courts will interpret the Court’s mandates for parents’ rights to counsel.

III. IMPACT AND IMPORTANCE OF PARENTS’ COUNSEL IN THESE CASES

The United States has long recognized that parents’ right to care and raise their children without interference from the State “is perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁵⁷ Yet, it took many states several decades after *Lassiter* before they began to guarantee even the possibility of appointed counsel for indigent parents at risk of losing custody of their children, and several still do not guarantee any representation, even at the termination stage.

Numerous studies have concluded that the presence of parents’ counsel positively impacts outcomes for the parents, the children, and the courts.⁵⁸ Influential organizations, such as the American Bar Association and the National Council of Juvenile and Family Court Judges, have long identified parent representation as a “best practice” in abuse and neglect cases and consistently seek to use their considerable clout and influence on this issue.⁵⁹ Some of the benefits highlighted include (1) increased parent participation both in and out of court; (2) improvement of the perception of fairness; (3) a reduction in delays to achieving permanency for children and families; (4) better judicial decision-making; and (5) saving jurisdictions money by reducing the amount of time children spend in the foster care system.⁶⁰

Prior to the passage of the 2016 Mississippi statute referenced above, the Casey Family Program funded and implemented a four-county pilot program to provide indigent parents in child welfare cases with legal

⁵⁵ MISS. CODE ANN. § 93-15-113(2)(a).

⁵⁶ *Id.* at (2)(b).

⁵⁷ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

⁵⁸ Leonard Edwards, *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, JUDGE LEONARD EDWARDS (explaining that parent representation improves outcomes, such as timely hearings, more frequent reunification and fewer terminations of parental rights).

⁵⁹ *Legal Representation in Child Welfare Proceedings*, ABA CENTER FOR CHILDREN AND THE LAW, https://www.americanbar.org/content/dam/aba/administrative/child_law/cwrepinfoGraphic.pdf (last visited Mar. 3, 2021).

⁶⁰ *Id.*

counsel.⁶¹ This research project found that at least in one county, parent representation increased services to mothers, an improvement in case timeliness and more case dismissal, while it did not cause a corresponding increase in delays or continuances.⁶²

A similar but larger 2016 Texas study found that very early counsel appointment resulted in quicker permanency, such as reunification, than in cases in which counsel was appointed later in the proceedings.⁶³ As a former parents' counsel, my experience supports the notion that the earlier parents have the court processes and requirements explained to them, the better they may understand and be willing to meaningfully participate in those processes. In addition, studies exist "linking early appointment of counsel (at or prior to a party's initial appearance in court) and effective legal representation in child welfare proceedings to improved case planning, expedited permanency and costs savings to state government."⁶⁴

IV. NO UNIFORM STANDARDS FOR EFFECTIVE, QUALITY REPRESENTATION

Since no federal right to counsel exists, no uniform nationwide standards exist to guarantee effective, quality representation. Even in states that require attorneys for parents, many do not address training, caseload size, and compensation.⁶⁵ I am still unaware of any jurisdiction that directly addresses a parent's right to effective and high-quality legal representation. As a rule, these considerations do not get codified. This is in spite of the urging and encouragement for such standards by the American Bar Association, the federal Administration of Children and Families, and the National Council of Juvenile and Family Court Judges.⁶⁶

⁶¹ *Research Snapshot*, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, (April 2015), <https://www.ncjfcj.org/wp-content/uploads/2015/05/DCST-Research-Snapshot.pdf>.

⁶² *Id.*

⁶³ *See*, U.S. DEP'T OF HEALTH AND HUMAN SERV., ADMIN. FOR CHILD. AND FAM., ACYF-CB-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS (Jan. 17, 2017) (citing Steve M. Woods, Alicia Summers, & Crystal S. Duarte, *Legal Representation in the Juvenile Dependency System*, 54 FAM. CT. REV. 127, 277-87 (April 2016)).

⁶⁴ *Id.*

⁶⁵ *See* 705 ILL. COMP. STAT. 405/2-17 (2019) (requiring training for guardians ad litem (GALS) in counties with a population of 100,00 or more but less than three million); *see also* Ill. Sup. Ct. R. 906 (stating that other size counties in different circuits impose varying court-approved training requirements on GALS, no training requirement exists for parents' counsel under the Juvenile Court Act).

⁶⁶ *See* U.S. DEP'T OF HEALTH AND HUMAN SERV., ADMIN. FOR CHILD. AND FAM., ACYF-CB-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS (Jan. 17, 2017); *Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation*, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (Aug. 2003), http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf.

Parents' counsel often face very difficult challenges in representing their clients, including low pay, high caseloads, inadequate training, late-in-the-case appointments, and lack of resources to adequately and zealously represent these parents.⁶⁷ The timing of appointments varies widely across the country. Some states, such as Illinois, mandate representation as of the very first court appearance. Others merely offer, but don't require, the appointment of counsel only at the termination stage.⁶⁸ Yet, there is data showing that remedying some of these challenges leads to greatly improved outcomes in some of these cases.⁶⁹

In 2010-2011, the Washington State Office of Public Defender conducted a project that sought to improve the quality of this representation by offering higher rates of pay, lowered caseloads, enhanced training, and greater support for these attorneys.⁷⁰ These changes resulted in a 50% increase in reunifications, a 45% decrease in terminations, and a 50% reduction in older youth "aging out" of the system without achieving permanency.⁷¹ A substantial change, considering that in 2017, less than 50% of cases nationwide closed as a result of successful reunification.⁷²

Federal law requires that child welfare courts provide court-appointed representation to children, even though that representation does not necessarily need to be by an attorney.⁷³ Parents, however, do not have that protection under federal law. In recent years, some scholars have begun to advocate for a federal statute that would provide for a right to counsel for these parents.⁷⁴

V. FUNDING FOR PARENTS' COUNSEL

Whenever and wherever courts appoint these attorneys, they do not work for free and nor should they be expected to. Some entity must pay for their legal work, and naturally that has been and continues to be a challenge for many states, counties, and courts. In late 2018, in a major change to federal policy, the Department of Health and Human Services (HHS) opened

⁶⁷ Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 CHILD L. PRAC. 97, 103-04 (2009).

⁶⁸ See Edwards, *supra* note 58.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUM. SERV., *ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) DATA FOR FY 2017* (2017), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport25.pdf>.

⁷² *Id.*

⁷³ 42 U.S.C. § 5106a(b) (2019) (requiring states to document in their state plan provisions for appointing a guardian ad litem to represent the child's best interests in every case of abuse or neglect that results in a judicial proceeding under the Child Abuse Prevention and Treatment Act).

⁷⁴ Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. LEGIS. 1 (2017).

up a new source of federal funds for states and courts to use for counsel for both parents and children, potentially freeing up hundreds of millions of federal dollars for these cases.⁷⁵

In December 2018, the federal Administration for Children and Families (ACF) quietly updated its Child Welfare Policy Manual to allow states to seek a federal match through the entitlement for legal fees for indigent children and parents.⁷⁶ Since 2004, HHS had expressly forbidden states from claiming legal counsel funds through Title IV-E, the program that provides money for most federal child welfare spending. Now, through a simple and brief change in the ACF Policy Manual, states can obtain up to a 50% match in funding for any state and county money spent on legal representation for both children and parents.⁷⁷

The process to access this money remains complicated and bureaucratic, but essentially, because of this policy change, an agency such as the Illinois Department of Children and Family Services now can claim the funds for legal representation from the federal government, and then pass those funds on to courts or a public entity that provides legal representation.⁷⁸ Also, this funding may be used for a child's representative, potentially freeing up even more money for parents' counsel.⁷⁹ This one change alone in funding sources may significantly impact states', counties', and courts' reluctance, ability, and incentive to provide counsel for parents in child welfare cases.

VI. CONCLUSION

As of September 30, 2017, more than 440,000 children lived in foster care in the United States.⁸⁰ Neglect accounted for 62% of these cases, while 36% involved parental substance abuse (including alcohol and illegal substances) and 12% inflicted physical abuse on a child (categories are not mutually exclusive and often exist within the same case).⁸¹ Once these children are removed from their parents, the parents usually need an array of services to help them be able to safely parent again. Many barriers exist to successful reunification, a topic beyond this paper, but having represented hundreds of parents in the past, I understand the great benefits these parents (and their children) can derive from having an attorney to help them navigate the child welfare system. Lawyers for these parents not only explain the court

⁷⁵ 45 C.F.R. § 1356 (2014).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ CHILDREN'S BUREAU, *supra* note 71.

⁸¹ *Id.*

process and the demands that will be made upon them, but also advocate for the parents to the court, the social service agencies, and others in the system.

In addition, I believe that effective representation involves encouraging these parents to seek help for their problems and use this painful circumstance as an opportunity to make them better parents. In my experience, these parents very often arrive in court with many disadvantages: poor education, serious substance use problems, untreated mental health, past trauma of their own, poverty, and cognitive deficits, just to name a few. To expect them to navigate this complex system on their own without the benefit of an attorney is unjust. Additionally, although many parents may not succeed in getting their children back even with an attorney, not having the benefit of counsel does not serve the court, the children, nor society in general.

In the decades after *Lassiter*, the great majority of states now recognize that these parents should be afforded the right to counsel. However, the right to counsel varies greatly depending on the jurisdiction, despite studies that show clear benefits to the families and court systems. Even in states providing robust rights to counsel, these jurisdictions can benefit their courts and citizens by addressing parent representation issues such as caseload size, funding, adequate training, improved resources, and increased remuneration for the attorneys who do this work.