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**THE RIGHT TO APPOINTED COUNSEL  
IN TERMINATION OF PARENTAL  
RIGHTS PROCEEDINGS:  
THE STATES' RESPONSE TO *LESSITER***

Rosalie R. Young<sup>1</sup>

In 1981, the United States Supreme Court held in *Lessiter v. Department of Social Services*<sup>2</sup> that there was no constitutional right to counsel for indigent parents facing involuntary termination of parental rights.<sup>3</sup> The *Lessiter* Court mandated a case by case evaluation of the need for counsel based upon the balancing test described in *Mathews v. Eldridge*<sup>4</sup> which requires a consideration of the private interests, the interests of the state, and the risk of an erroneous deprivation.<sup>5</sup> Observers worried that

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<sup>2</sup> 452 U.S. 18 (1981).

<sup>3</sup> *Id.* at 33.

<sup>4</sup> 424 U.S. 319, 335 (1976). The Supreme Court held that an evidentiary hearing is not required prior to termination of disability benefits because administrative procedures fully complied with due process. *Id.* at 349.

<sup>5</sup> *Id.* at 335. See also *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 561, 570 (1996). In December 1996, the Supreme Court held that denying a parent the transcript necessary to appeal the termination of her parental rights because of her inability to pay the record preparation fees would be a denial of rights granted in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* at 561-70. Writing for the Court, Justice Ginsburg recognized that the importance of parental rights required deference and protection, while citing, without question, the *Lessiter* Court's holding that when parental rights are threatened a case-by-case evaluation of the need for

the *Lassiter* decision had removed any incentive for states to provide indigent parents with full due process protection<sup>6</sup> by prompting state courts and legislatures to determine that indigent parents “do not need -- or do not deserve -- legal representation.”<sup>7</sup> There was fear that the *Lassiter* decision might encourage those states that required counsel to curtail their efforts and discourage others states from mandating counsel.<sup>8</sup> Were indigent parents better off before their appeal to the Supreme Court?

Answering this question requires responding to three separate queries: How has the *Lassiter* decision been utilized by state courts? Have there been alterations in the provision of counsel in the thirty-three states that guaranteed parental representation prior to *Lassiter*? How has the right to counsel in termination proceedings evolved in the seventeen states that denied the right to counsel prior to *Lassiter*?

Although lower courts frequently expand individual rights in response to an anticipated Supreme Court decision,<sup>9</sup>

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counsel, subject to appellate review, is sufficient. *Id.* at 564 (citing *Lassiter*, 452 U.S. at 32).

<sup>6</sup> Anthony H. Trembley, *Alone Against the State: Right to Counsel in Parental Termination Proceedings*, 15 U.C. DAVIS L. REV. 1123, 1143-44 (1982).

<sup>7</sup> Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 FAM. L. Q. 205, 219 (1981). Besharov did suggest that the *Lassiter* might also be seen as “a cautious, but nevertheless striking, expansion of due process doctrine to include the right to counsel in ‘civil’ proceedings.” *Id.* at 217. While the decision did not guarantee counsel, the Court did indicate that there was a right to counsel in civil proceedings under special circumstances. *Id.* at 216-217.

<sup>8</sup> Douglas J. Besharov, *Parents' Right to Counsel in Proceedings to Terminate Parental Rights: Factors to Consider*, 61 CHILD WELFARE 247, 248 (1982).

<sup>9</sup> Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 8-10 (1984). See, e.g., *Davis v. Page*, 640 F.2d 599 (5th Cir. 1981) (en banc). In *Davis*, a decision rendered while *Lassiter* was under consideration by the Supreme Court, a divided Fifth Circuit held that there was a right to counsel for indigent parents in jeopardy of loss of parental rights. *Id.* at 604. The *Davis* court viewed loss

constitutional interpretation “is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a political order.”<sup>10</sup> This paper offers evidence that while state court decisions acknowledge and respect the precedents of the Supreme Court, state courts continue to operate independently, reflecting differing state experiences, statutes, constitutions, and mores,<sup>11</sup> often interpreting rights more broadly than the Supreme Court.<sup>12</sup>

## THE RIGHT TO COUNSEL PRIOR TO *LASSITER*

Beginning with *Gideon v. Wainwright*<sup>13</sup> in 1963 and *In re Gault*<sup>14</sup> in 1967, the Supreme Court appeared to be paving the way for an expanded right to counsel based on the Fourteenth Amendment guarantee of “procedural due process through a fair hearing.”<sup>15</sup> State courts have expanded the right to counsel for

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of parental rights to be a threat to “family integrity,” a liberty interest protected by the Constitution. *Id.*

<sup>10</sup> Paul W. Kahn, *Commentary: Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147-48 (1993).

<sup>11</sup> *Id.* at 1161.

<sup>12</sup> Barry Latzer, *Toward the Decentralization of Criminal: Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 66 (Fall 1996). Latzer suggests that state courts are at least as “rights-sensitive” as the United States Supreme Court. Barry Latzer, paper presented at the New York Political Science Association Annual Meeting, Ithaca, New York (March 30, 1996).

<sup>13</sup> 372 U.S. 335 (1963). The Supreme Court ruled that a criminal defendant has a fundamental right to counsel in state courts under the Fourteenth Amendment. *Id.* at 335.

<sup>14</sup> 387 U.S. 1 (1967). The Supreme Court held that a juvenile whose liberty interests are threatened in delinquency proceedings is entitled to due process rights, including notification of the right to counsel and the appointment of counsel if neither the juvenile nor his parents can afford to retain counsel. *Id.* at 41.

<sup>15</sup> Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R.3d 1141, 1144 (1977). A survey of statutory and case law is indicative of a trend toward establishing the right of an indigent parent to appointed

criminal defendants, basing their decisions on interpretations of Supreme Court holdings, on state constitutions, on state statutes, and on their own rule-making authority.<sup>16</sup> Both state and federal courts, however, have frequently differentiated between criminal and civil due process rights.<sup>17</sup>

The requirements of due process are neither clearly defined, nor static. When the state uses its "enforcement power to transfer property from one person to another," the state must satisfy due process requirements.<sup>18</sup> As Justice Blackmun stated in his dissenting opinion in *Lassiter*, "what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decision making without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process."<sup>19</sup>

By the late 1970s, however, state and federal case law frequently recognized the right to counsel in termination of parental rights proceedings, including the requirement of state sponsored appointment of counsel for indigent parents.<sup>20</sup> Prior to

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counsel in a proceeding to determine involuntary termination of parental rights. *Id.*

<sup>16</sup> Larry W. Miller, *The Right to Counsel: State Courts on the Front Line*, 1984 ANN. SURV. OF AM. L. 179, 190-91 (1985). "[S]tate courts are not limited by the United States Constitution in expounding the rights of their own citizens. A state court, interpreting its own law, may grant broader protections than established federal minimums." *Id.* at 190.

<sup>17</sup> See *Rutherford v. Rutherford*, 464 A.2d 228 (Md. 1983). Where a party's liberty interest is threatened, however, courts generally require that a full quantum of rights be provided, including the right to counsel, whether the case is criminal or civil in nature. *Id.* at 234.

<sup>18</sup> Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 276-77 (1982) (citing *Giacco v. Pennsylvania*, 382 U.S. 399, 402-03 (1966)).

<sup>19</sup> *Lassiter*, 452 U.S. at 37.

<sup>20</sup> Robert Catz & John T. Kuelbs, *The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 J. FAM. L. 223 (1974). The courts based this fast developing right to counsel on Fourteenth Amendment due process and equal protection grounds "requir[ing] that an indigent parent in a child neglect or

*Lassiter*, anticipating a similar Supreme Court decision, both state and federal courts regularly held that the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments required that parents facing termination of parental rights proceedings must be informed of the right to appointed counsel.<sup>21</sup> Even after the *Lassiter* Court held that there was no constitutional right to counsel for parents threatened with the loss of their parental rights, some state courts have interpreted similar due process clauses in their state constitutions to mandate the appointment of counsel.<sup>22</sup>

Both state and federal courts have recognized the “fundamental nature” of the right to parental custody.<sup>23</sup> Since the parents whose parental rights have been terminated may have no knowledge of or control over the location of their children or the right to visitation,<sup>24</sup> termination of parental rights is a drastic process. In some states, children retain the right to support and inheritance until there is an adoption, despite the parent’s loss of

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parental rights termination proceeding be afforded counsel at no cost, and . . . be advised of this right.” *Id.*

<sup>21</sup> *Crist v. Div. of Youth & Family Servs.*, 320 A.2d 203, 211 (N.J. Super. Ct. Law Div. 1974); *In re Ella R.B.*, 30 N.Y.2d 352, 356, 285 N.E.2d 288, 290, 334 N.Y.S.2d. 133, 136 (1972); *State ex rel. Heller v. Miller*, 399 N.E.2d 66, 70 (Ohio 1980); *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140, 145 (W.Va. 1974).

<sup>22</sup> *See V.F. v. Alaska*, 666 P.2d 42 (Alaska 1983). The Supreme Court of Alaska held that the Due Process Clause of the Alaska Constitution provided for the right to counsel in proceedings intended to terminate parental rights. *Id.* at 44. *But see Carroll v. Moore*, 423 N.W.2d 757, 767 (Neb. 1988) (holding that both the Nebraska and United States Constitutions require an “absolute right to court-appointed counsel for a putative father in a paternity proceeding to avoid the risk of a “one-sided trial.”). *See also Right to Counsel in Parental Rights Proceedings*, 69 A.B.A. 1756-57 (1983).

<sup>23</sup> *See Smith*, *supra* note 15 at 1145. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (holding that an unwed father could not be denied due process rights or presumed to be unfit without a hearing to determine fitness before he could be separated from his children).

<sup>24</sup> 3 DONALD KRAMER, *LEGAL RIGHTS OF CHILDREN* 10 (Donald Kramer ed., 2d ed. 1994).

visitation and control.<sup>25</sup> Other state statutes provide that when parental rights are terminated, for that parent "the child shall forever thereafter cease to exist."<sup>26</sup>

## THE COMPETITION FOR WILLIAM LASSITER

In 1975, William, the infant son of Abby Gail Lassiter, was adjudicated a neglected child. William was transferred to the custody of the Department of Social Services of Durham County, North Carolina, after the district court heard evidence that he was not receiving adequate medical care and was malnourished. According to the state, William's mother had declined to appear for the custody hearing for the youngest of her five children and had visited the child only once since he entered foster care.

A year after William was removed from his home, Ms. Lassiter was convicted of second-degree murder and was sentenced to 25 to 40 years in prison.<sup>27</sup> According to the Department of Social Services, Ms. Lassiter's mother had custody of the older children and had previously stated that she

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<sup>25</sup> ARIZ. REV. STAT. ANN. § 8-539 (West 1989). The text of the statute states in relevant part: "Th[e] right of inheritance and support shall only be terminated by a final order of adoption." *Id.* See also HAW. REV. STAT. § 31-571-63 (1993). The text of the statute states in relevant part: "No judgment of termination of parental rights . . . shall operate to terminate mutual rights of inheritance of the child and the parent or parents involved, or to terminate the legal duties and liabilities of the parent or parents, unless and until the child has been legally adopted." *Id.*

<sup>26</sup> DEL. CODE ANN. tit. 13, § 1113 (1993). The text of the statute states in relevant part:

Upon the issuance of an order terminating the existing parental rights and transferring such parental rights to another person or organization, the effect of such order shall be that all of the rights, duties, privileges and obligations recognized by law between the person or persons whose parental rights are terminated and the child shall forever thereafter cease to exist.

*Id.*

<sup>27</sup> See generally *In re J.L.D.*, 794 P.2d 319 (Kan. Ct. App. 1990) (stating that imprisonment may, however, prevent the parent from fulfilling his or her parental responsibilities, but the interest of the child must be maintained).

could not handle an additional child. At the termination hearing, the grandmother denied making this statement. During the termination proceeding, Ms. Lassiter represented herself. The transcript reveals that she had difficulty understanding the court rules of examination and cross examination and was unable to effectively challenge conflicting testimony. At every stage of the hearing, whether or not such statements were appropriate, Ms. Lassiter denied her lack of interest in her child and asserted her desire that William be raised with his siblings.<sup>28</sup> The North Carolina trial court approved the termination of her parental rights.

Abby Gail Lassiter appealed the decision to terminate her parental rights, claiming that the Due Process Clause of the Fourteenth Amendment required that she be provided with counsel during the termination proceedings. After North Carolina courts affirmed the termination, Ms. Lassiter brought her case to the United States Supreme Court, which granted *certiorari*.

Despite the broadening of the right to counsel during proceedings to terminate parental rights by numerous state and federal courts,<sup>29</sup> the *Lassiter* Court declared that indigents had a constitutional right to appointed counsel only when their liberty was in jeopardy.<sup>30</sup> Justice Stewart lauded the thirty-three states that have statutes requiring counsel for indigents threatened with termination of parental rights.<sup>31</sup> The Court held that counsel might be required only if the case was complex, if complicated expert testimony was involved, if the parent was unable to understand the legal process, or if the possibility that criminal charges of neglect or abuse might arise.<sup>32</sup> The Court held that the determination of whether to assign counsel must be made on a

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<sup>28</sup> See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 23 (1981).

<sup>29</sup> See generally *Smith*, *supra* note 15, at 1145.

<sup>30</sup> *Lassiter*, 452 U.S. at 25.

<sup>31</sup> *Id.* at 34.

<sup>32</sup> See generally *Lassiter*, 452 U.S. at 18 (holding that appointment of counsel to an indigent parent is not required unless the trial court first finds that counsel is necessary for due process, subject to appellate review).



case by case basis,<sup>33</sup> leaving the parent uncertain of his or her rights until the parent has “gone through the process of determining whether the balance of interests entitles him” or her to receive counsel.<sup>34</sup>

Justice Stewart expressed fitting respect for the “lofty” concepts of “due process” and “fundamental fairness.”<sup>35</sup> In his elaboration, however, he declared these terms to be ambiguous and suggested that the requirements of due process and fundamental fairness could be fulfilled only “by first considering any relevant precedents and then by assessing the several interests that are at stake.”<sup>36</sup>

The *Lassiter* majority ignored Justice Blackmun’s dissenting argument that “[b]y emphasizing the value of physical liberty to the exclusion of all other fundamental interests, the Court today grafts an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test.”<sup>37</sup> While balancing tests are increasingly viewed as a rational method of dealing with competing interests, formulas may inadvertently devalue or promote the interests of one party over the interests of another.<sup>38</sup> Balancing requires evaluating fundamental fairness, formality and informality, public interests and costs, and private interests, among other considerations.<sup>39</sup> Justice Blackmun argued that the prospect of error is enhanced by a lack of representation.<sup>40</sup> The standards by which a parent is judged are

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<sup>33</sup> *Id.* at 31.

<sup>34</sup> Peter Westen, *The Rueful Rhetoric of “Rights,”* 33 UCLA L. REV. 977, 998-99 (1986).

<sup>35</sup> *Lassiter*, 452 U.S. at 24.

<sup>36</sup> *Id.* at 25.

<sup>37</sup> *Id.* at 41 n. 8. The Court has accepted the balancing test described in *Mathews*, *supra* note 4, which requires a consideration of private interests, interests of the state, and the risk of an erroneous decision.

<sup>38</sup> T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 1004 (1987).

<sup>39</sup> Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1147 (1984).

<sup>40</sup> *Lassiter*, 452 U.S. at 44.

not simple, nor easily defined; they are imprecise and responsive to the values of the presiding judge.<sup>41</sup>

Justice Blackmun admitted that the results in *Lassiter* might have been the same if counsel had been provided, but he cautioned that fairness and due process required counsel to minimize the danger of an erroneous decision and increase confidence in the results of the court proceedings.<sup>42</sup> As the North Dakota Supreme Court noted in 1993, “[w]e are skeptical that the denial of counsel in an adoption proceeding which results in the termination of parental rights can ever be ‘harmless’ under any standard.”<sup>43</sup> Legal scholar Laurence Tribe suggested that “the real basis for *Lassiter* may lie in the singularly unsympathetic facts of the case,” rather than the broader issue of the right to counsel.<sup>44</sup> Regardless of the rationale, the decision of the *Lassiter* court became the standard upon which the right to counsel was evaluated.

## THE IMPORTANCE OF THE PARENT-CHILD RELATIONSHIP

The courts have long recognized the value of family, often keeping children with their natural parents in a questionable home so long that the children are no longer likely to be adopted.<sup>45</sup>

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<sup>41</sup> *Id.* at 45.

<sup>42</sup> *Id.* at 57. Abby Gail Lassiter had expressed little interest in her son subsequent to his placement in adoption. *Id.* at 18. Ms. Lassiter was serving a 25 to 40 year prison sentence for second degree murder at the time of her appeal. *Id.* at 17. *But see In re Gault*, 387 U.S. 1 (1967) (stating that after being confined for years because of a lewd phone call, the juvenile made a much more appealing petitioner).

<sup>43</sup> *In re Adoption of K.A.S.*, 499 N.W.2d 558, 567 (N.D. 1993).

<sup>44</sup> LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1652 (2d ed. 1988). In a case with similar controversy, a father of four challenged the termination of his parental rights following his conviction for murdering the mother of his children. *In re Rodriguez*, 34 Cal. App. 3d 510, 110 Cal. Rptr. 56 (Cal. Ct. App. 1973). The California court held that Rodriguez had a right to counsel. *Id.*

<sup>45</sup> HARRY KRAUSE, *FAMILY LAW IN A NUT SHELL* 242 (2d ed. 1986).

Many state courts have acknowledged that the importance of this relationship necessitates counsel,<sup>46</sup> since the loss of a child “forever” certainly demands the same protections as one day in jail.<sup>47</sup> The Washington Supreme Court held that “an indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel. “This is particularly so where the State, her adversary, is not only represented by counsel but also has vastly superior resources for investigation and presentation of its case.”<sup>48</sup>

Despite these decisions and the statutes of thirty-three states and the District of Columbia that had previously required counsel, the bare majority of the Court in *Lassiter* decided that denial of counsel did not violate the Due Process Clause of the Fourteenth Amendment.<sup>49</sup> The resulting case by case determination of the right to counsel for parents facing the involuntary termination of their parental rights<sup>50</sup> perpetuated a policy that had earlier been found to be ineffective, “messy and friction-generating”<sup>51</sup> in other contexts.<sup>52</sup> Unrepresented parents are unlikely to understand ambiguously worded balancing tests or legal processes. In addition, without legal assistance or prior experience, parents may not recognize that a case is unusually complex or that complicated expert testimony is involved, the

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<sup>46</sup> See *Danforth v. Dep’t of Health & Welfare*, 303 A.2d 794 (Me. 1973). “[T]he necessity of a particular safeguard is to be evaluated in light of the nature of the proceeding and by the nature of the interest upon which the government seeks to infringe.” *Id.* at 799.

<sup>47</sup> *In re Luscier*, 524 P.2d 906, 909 (Wash. 1974) (en banc) (holding that the Constitution of the state of Washington and the Fourteenth Amendment to the United States Constitution mandate counsel to guarantee due process when permanent deprivation of a child is threatened).

<sup>48</sup> *Dep’t of Public Welfare v. J.K.B.*, 393 N.E.2d 406, 408 (Mass. 1979).

<sup>49</sup> *Lassiter*, 452 U.S. at 33.

<sup>50</sup> *Id.* at 31.

<sup>51</sup> JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 125 (1980) (noting fewer problems when counsel was required in all felony cases); ANTHONY LEWIS, *GIDEON’S TRUMPET* 123-27 (1966) (noting confusion in state courts’ determination of right to counsel).

<sup>52</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

requirements which mandate the provision of counsel according to *Lassiter*.<sup>53</sup>

## THE SPECIAL NEEDS OF THE INDIGENT LITIGANT

Because poor children are much more likely to be removed from their homes following allegations of neglect or abuse, the right to counsel is vital to indigent parents.<sup>54</sup> For the indigent parent, the right to "hire an attorney at their own expense is a cruel sham; the protection it confers is a fiction."<sup>55</sup> When financial resources differentiate between those who can effectively represent themselves through counsel and those who cannot, those with funds are labeled as "normal," while the poor are considered to be "deviant."<sup>56</sup> Even the level of poverty one must reach to qualify for the protection of counsel remains unclear.<sup>57</sup>

The coercive power and resources of the government representatives seeking the termination of parental rights can be especially intimidating to the indigent parent.<sup>58</sup> A parent appearing *pro se* must deal with complex procedures, confusing issues, and vague and broad statutes.<sup>59</sup> That parent must "execute basic advocacy functions to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly

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<sup>53</sup> *Lassiter*, 452 U.S. at 30.

<sup>54</sup> *Id.* at 153-55.

<sup>55</sup> Catz & Kuelbs, *supra* note 20, at 233.

<sup>56</sup> Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L. J. 1499, 1500 (1991).

<sup>57</sup> Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L. J. 257, 287 (1985).

<sup>58</sup> Note, *Child Neglect: Due Process for the Parent*, 70 COL. L. REV. 465, 477-78 (1970) (noting that state's extensive legal resources can be extremely intimidating to indigent parents).

<sup>59</sup> Catz & Kuelbs, *supra* note 20, at 228-29.

manner, cross examine witnesses, make objections, and preserve a record for appeal.”<sup>60</sup>

Research offers evidence that counsel is critical to the maintenance of legal rights, even in matters less fundamental than parental rights. Housing studies reveal that as many as 75 percent of those who enter housing court would be evicted without representation, while more than 78 percent of those who are represented retain their housing.<sup>61</sup> Unrepresented litigants often are not aware of their rights or, if aware, are unfamiliar with the legal terminology necessary to gain judicial attention.<sup>62</sup>

Although the North Carolina Department of Social Services was represented by counsel, the *Lassiter* majority maintained that “the case presented no specially troublesome points of law, either procedural or substantive,” that necessitated the appointment of representation for Abby Gail Lassiter.<sup>63</sup> Even when the state is represented by a social worker or other non-legal authority, that representative’s prior courtroom experience gives the state an edge over the emotionally involved, legally unsophisticated, or inexperienced parent.<sup>64</sup> The result is a “gross disparity in power and resources between the State and the uncounseled indigent parent.”<sup>65</sup>

The Court has continued to limit the right to counsel to instances where there is some loss of personal liberty, holding that there is no right to counsel in a criminal case where a

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<sup>60</sup> Amicus Brief, American Bar Association at 9, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1980) (No. 79-6423).

<sup>61</sup> ARLEN SUE FOX, BROOKLYN LEGAL SERVS CORP. A, REPORT ANALYZING THE FIRST TWO YEARS OF OUR HRA DEMONSTRATION HOMELESSNESS PREVENTION PROJECT 11 (1989).

<sup>62</sup> *Id.* at 14-15. See also Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282, 287 (1981).

<sup>63</sup> *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. at 32-33.

<sup>64</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 107, 113 (Fall 1974). The “repeat player” has an edge over the first time legal participant, even when neither litigant is a lawyer. *Id.*

<sup>65</sup> *Lassiter*, 452 U.S. at 44 (Blackmun, J., dissenting). See also *In re Friesz*, 208 N.W.2d 259, 261 (Neb. 1973).

conviction occurs without incarceration.<sup>66</sup> As Douglas Besharov pointedly observes, "*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child."<sup>67</sup>

## THE STUDY

Individual states may expand citizen rights beyond those required by the federal courts and legislatures. Although states may not provide fewer rights than those guaranteed by the United States Constitution, "[a] wise public policy ... may require that higher standards be adopted than those minimally tolerable under the Constitution."<sup>68</sup> Therefore, at a minimum, the states must apply the *Eldridge* balancing test<sup>69</sup> to determine the need for counsel in involuntary termination of parental rights proceedings, as outlined in *Lassiter*.<sup>70</sup> Since there is no absolute right to

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<sup>66</sup> *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

<sup>67</sup> Besharov, *supra* note 7 at 221. The courts have recognized the irony. In 1982, the Supreme Court of Iowa indicated that when loss of liberty is threatened, there should be no distinction between civil and criminal matters. *McNabb v. Osmundson*, 315 N.W.2d 9, 14 (Iowa 1982). A few months later, the same court acknowledged the high cost of providing counsel for all parties who might ignore court rulings and later be held in contempt of court and incarcerated, such as defendants who fail to pay court-ordered support following a hearing to establish paternity. See *State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740, 743-44 (Iowa 1982). The *Hamilton* court indicated that neither the United States Constitution nor the Iowa Constitution required counsel and urged the legislature to handle this sticky issue. *Id.* In such situations, the parent who has failed to pay support has a right to counsel, while the parent in financial distress because of the lack of support payments is not entitled to counsel. Other state courts have held that the contempt defendant in such a situation is not entitled to counsel. See *Courtney v. Courtney*, 475 N.E.2d 1284, 1292 (Ohio Ct. App. 1984).

<sup>68</sup> *Lassiter*, 452 U.S. at 33-34; Miller, *supra* note 16, at 190.

<sup>69</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>70</sup> *Lassiter*, 452 U.S. at 27-32.

counsel,<sup>71</sup> on appeal a parent may only question whether the *Eldridge* standards were applied appropriately.

The current statutes in the seventeen states that denied parental right to counsel in termination of parental rights proceedings prior to 1981 can be divided into three categories: provision of counsel on a case by case basis as provided in *Lassiter*, without a guarantee of counsel; a right to counsel only when legal representation is requested by the parents; and a mandated representation statute in which the judge must indicate on the record why counsel was not appointed.

Of the seventeen states that failed to guarantee the right to counsel prior to *Lassiter*, five states continue to follow the *Eldridge* standards and a case by case evaluation as outlined in *Lassiter*. In Delaware, Hawaii, South Carolina, Tennessee, and Wyoming, the appointment of counsel for indigent parents in termination of parental rights proceedings is left to the discretion of the trial judge. While neither statute nor case law may require counsel for every case, some courts and legislatures have clearly indicated that representation should be the custom, rather than the exception.<sup>72</sup> (See Table I for a summary of the current status of the right to counsel in the seventeen states which denied the right

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<sup>71</sup> *In re Carolyn S.S.*, 498 A.2d 1095, 1098 (Del. 1984). Chief Justice Herrmann of the Delaware Supreme Court agreed that both the Delaware and United States Constitutions permit judicial discretion in the appointment of counsel for parents threatened with termination of parental rights. *Id.* at 1098. Justice Herrmann recommended that the General Assembly of Delaware consider legislation that would require counsel for indigent parents threatened with termination of their parental rights, consistent with the majority of the states, as noted in *Lassiter*. *Id.* at 1098-99.

<sup>72</sup> S.C. CODE ANN. § 20-7-1570 (Law. Co-op. 1996). The South Carolina Children's Code requires a case by case determination of the need for counsel, but adds a caveat: "If the parent is indigent and counsel is not appointed, the judge shall enter on the record the reasons counsel was not required." *Id.* See South Carolina Dep't of Soc. Servs. v. Vanderhorst, 340 S.E.2d 149 (S.C. 1986). In *Vanderhorst*, the South Carolina Supreme Court indicated that although due process standards do not require counsel in all proceedings to terminate parental rights, "we caution that under our interpretation of *Lassiter*," those "cases in which appointment of counsel is not required should be the exception." *Id.* at 153.

to counsel prior to *Lassiter*. See Table III for citations to the relevant state statutes).

Six of the seventeen states require the appointment of counsel for all indigent parents threatened with the termination of parental rights *if, and only if*, the parents request the appointment of counsel and meet the trial judge's interpretation of indigence or hardship. Arkansas, New Mexico, Oregon, Pennsylvania, and South Dakota insist that parents be notified of the right to the assistance of counsel and the right to the appointment of counsel, if parents are indigent or if retaining counsel would present a hardship. In Georgia, there is no requirement that parents be notified of the right to counsel, although counsel will be appointed if a parental request is made.<sup>73</sup> These states require that parents respond to the notification of proceedings to terminate parental rights and request that counsel be appointed for them. If parents fail to request counsel in court or contact the public defender's office as is required in some states, the absence of representation may not be considered to be an error or a denial of the right to counsel.<sup>74</sup> District of Columbia courts have worried that parents may be unaware of their right to request counsel,<sup>75</sup> thus missing the opportunity for appointed counsel, though it is acknowledged that the appointment of counsel is a privilege, rather than a constitutional right.<sup>76</sup> In all these states, the court retains the right, absent a request, to appoint counsel if, according to the court, the interests of justice require the appointment of counsel. In practice, some states may require counsel absent an intelligent waiver.<sup>77</sup>

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<sup>73</sup> GA. CODE ANN. § 15-11-85 (1997). In Georgia, statute and case law require the appointment of counsel for a child involved in a parental rights proceeding. Any termination reached without the appointment of counsel for the child is invalid because counsel may be able to find a way to retain the parent-child relationship. See *In re J.D.O.*, 357 S.E.2d 330, 331 (Ga. Ct. App. 1987).

<sup>74</sup> *In re Ramsey, Minor Children*, 656 N.E.2d 1311, 1312-13 (Ohio Ct. App. 1995).

<sup>75</sup> *Thompson v. Thompson*, 559 A.2d 311 (D.C. 1989).

<sup>76</sup> *In re L.H. & L.H.*, 634 A.2d 1230, 1233 (D.C. 1993).

<sup>77</sup> See *State v. Jamison*, 444 P.2d 15, 17 (Or. 1968) (en banc) (holding that "waiver can not be inferred from a failure to request counsel by a person



Six of the states which failed to guarantee counsel prior to *Lassiter* have enacted the most demanding right to counsel statutes. These states require counsel for parents threatened with the loss of parental rights, absent a knowledgeable waiver of the right to counsel. In Florida, North Carolina, Texas, Vermont, Virginia, and West Virginia, the judge must, at each stage of the proceedings, explain that there is a right to counsel and that counsel will be appointed for those who cannot afford to retain representation. Some of these states provide that the court record must indicate that counsel has been offered and explain why any unrepresented parent was not provided with counsel.<sup>78</sup>

With one exception, the thirty-three states that provided the right to counsel in termination of parental rights proceedings prior to *Lassiter* have continued to refine this right through both statute and case law. According to the current statutes, ten states require the appointment of counsel for indigent parents threatened with the termination of parental rights, absent an intelligent waiver. (See Table II.) Twenty-two of the remaining states and the District of Columbia require that counsel be appointed if an indigent parent requests counsel and meets local standards for indigence. Although the petitioner's brief in *Lassiter* indicated that Mississippi provided for a right to counsel, the section of the Mississippi Code<sup>79</sup> to which the *Lassiter* brief refers was repealed in 1979, two years before the *Lassiter* decision. Current

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who, insofar as the record reveals, [did] not know of her right to court-appointed counsel.").

<sup>78</sup> *In re R.W. v. Dep't of Health & Rehabilitation Servs.*, 429 So.2d 711 (Fla. Dist. Ct. App. 1983). The Fifth District Court of Appeals of Florida held that merely informing a parent that she had a right to counsel and directing her to a legal aid office, "while withholding court appointment and failing to establish a knowing waiver of record, did not pass constitutional muster." *Id.* at 712.

<sup>79</sup> MISS. CODE ANN. § 43-21-17 (1972). The status of counsel for indigent parents facing termination of parental rights in 1981 is unclear, despite the indication in the petitioner's brief in *Lassiter* that legal representation was available. See Appendix B, *infra*.

Mississippi practice leaves the appointment of counsel to the discretion of the presiding judge.<sup>80</sup>

In *Lassiter*, the Supreme Court provided for discretionary standards for determining the right to counsel in termination of parental rights proceedings. As a result, trial judges in the seventeen states that failed to guarantee the right to counsel in 1981 were required, at a minimum, to evaluate the need for counsel on a case by case basis. Since that time, twelve of these states have enacted a broad variety of statutes that require the provision of counsel for indigent parents in every termination proceeding or at the request of the parents involved. Thirty-two of the thirty-three states that provided the right to counsel in termination of parental rights proceeding prior to *Lassiter* have continued to provide for the appointment of counsel through both statute and case law. The fear of the curtailment of rights following *Lassiter* has not been validated.

## OTHER BARRIERS TO DUE PROCESS

Despite statutes that guarantee the right to counsel, due process depends upon the implementation of the right to counsel laws and related statutes in the trial level courts in communities across the nation. A review of state codes exposes practices that may jeopardize parental rights. Indigence levels vary from state to state. Most statutes leave the declaration of indigence to the trial level courts and legal definitions of financial "hardship" are diverse.<sup>81</sup>

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<sup>80</sup> Court and legal agency personnel indicate that counsel is rarely appointed. Parents must either represent themselves or find an alternate means of obtaining counsel. Telephone Interviews with Mississippi court personnel (July 1996).

<sup>81</sup> See ARK. CODE ANN. §9-27-316 (b) (1)(Michie 1995). The text states in pertinent part: "The inquiry concerning the ability of the juvenile to retain counsel shall include a consideration of the juvenile's financial resources and the financial resources of his or her family."; IDAHO CODE 19-854 (1987). The text states in pertinent part: "[I]n determining whether a person is a needy

While some statutes and courts are zealous in requiring that parents be informed of their right to appointed counsel, other states require that the parent be sufficiently knowledgeable on their own to recognize the need to ask for counsel. Parents who lack an awareness of the need for counsel at the trial level may be unaware of the right to appeal a termination decision, if their due process rights have been denied.

The Supreme Court has ruled that parental rights are so fundamental that government agencies must prove by "clear and convincing evidence" that parental rights should be terminated.<sup>82</sup> The Court was dissatisfied with a New York ruling that a preponderance standard was sufficiently fair.<sup>83</sup> The actual meaning of "clear and convincing evidence" is left to state courts to interpret.<sup>84</sup>

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person and in determining the extent of his inability to pay, the court concerned may consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents." *Id.*; ME. REV. STAT. ANN. tit. 22, § 4005.2 (West 1992). The text states in pertinent part: "Parents and custodians are entitled to legal counsel in child protection proceedings . . . . The court, if it finds them indigent, shall appoint and pay the reasonable costs and expenses of their legal counsel." *Id.*

<sup>82</sup> See *Santosky v. Kramer*, 455 U.S. 745, 765 (1982). Following *Santosky*, states such as Idaho revised their statutes to require a "clear and convincing" level of proof. See IDAHO CODE § 16-2009 (1995).

<sup>83</sup> *Santosky*, 455 U.S. at 764-65. The Indian Child Welfare Act of 1987 sets higher standards for termination procedures involving Indian children or children of one Indian parent. 25 U.S.C. §1901 (1994). Before parental rights can be terminated, the ICWA requires proof beyond a reasonable doubt "that the continued custody of the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f). In addition, parents of an Indian child or an Indian custodian must be provided with counsel when faced with termination of parental rights if they are unable to afford legal representation. 25 U.S.C. §1912(b). In an effort to keep Indian children with Indian families, tribal representatives must also be informed and involved whenever termination of parental rights procedures are brought against the parents of an Indian child. 25 U.S.C. §1912(a).

<sup>84</sup> See *M.L.B. v. S.L.J.*, 117 S.Ct. 555, 572 (1996) (holding that the lower court was required to prove mother's unfitness in parental termination proceedings by "clear and convincing" evidence); see also *In re Selathia Nicole F.*, 1997 WL 668365, at \*1 (1st Dep't Oct. 28, 1997) (noting that a

Inadequate counsel may present another barrier. Even in criminal cases, the Supreme Court and Congress have “refus[ed] to impose performance standards,” erecting “herculean obstacles to claims of ineffective assistance of counsel.”<sup>85</sup> Generally, the parent claiming inadequacy must prove that the attorney’s incompetence denied the parent a fair trial, or that the attorney’s action was more than a harmless error.<sup>86</sup>

Even where the appointment of counsel is mandated, there may be nonexistent or limited provisions for paying those lawyers who represent indigent clients. State courts have held that payment of appointed counsel need not be guaranteed or required for due process.<sup>87</sup> Lack of remuneration may limit the number of attorneys willing to accept parental rights case, or their enthusiasm for those cases they do undertake.

Finally, in some states, the right to counsel originates only with procedures to terminate parental rights, even though dependency proceedings may set the stage for terminating parental rights.<sup>88</sup> In addition, the right to counsel may differ

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finding of permanent neglect was supported by “clear and convincing” evidence in parental rights’ termination proceedings).

<sup>85</sup> Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 518 (1986). See also *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>86</sup> 1 THOMAS JACOBS, *TERMINATION OF PARENTAL RIGHTS IN CHILDREN AND THE LAW: RIGHTS & OBLIGATIONS*, 74-75 (1995); *In re Geist*, 796 P.2d 1193, 1204 (Or. 1990); *In re Brodbeck*, 647 N.E.2d 240, 246 (Ohio Ct. App. 1994). Even in states which provide for a right to counsel, courts may invoke *Lassiter’s* denial of a right to counsel as justification for upholding a lower court termination when remanding for rehearing does not seem appropriate. See *State in ex rel. Driscoll*, 410 So.2d 255 (La. Ct. App. 1982).

<sup>87</sup> *New Jersey Div. of Youth & Family Servs. v. D.C.*, 571 A.2d 1295 (Ill. App. Ct. 1990). Courts have also held that statutorily defined fee schedules for attorneys do not deprive attorneys of time or property and cannot be overridden by the presiding judge, since taking such cases is voluntary. See *Human Resources Dep’t v. Paulson*, 622 S.W.2d 508 (Ky. Ct. App. 1981). Cases accepted by lawyers in order to maintain positive relationships with the presiding judge may stretch the definition of voluntary.

<sup>88</sup> *In re Guardianship of A.P.*, 644 So.2d 169 (Fla. Dist. Ct. App. 1994); *In re W.B.*, 213 Ill. App. 3d. 274, 571 N.E. 2d 1120 (1991). See also Judith Wolff & William Grimm, *Representing Parents in Termination of Parental*

depending upon whether parental rights are threatened by a state or a private party, such as a step-parent. Statutes and/or case law, in some states, prohibit the appointment of counsel for indigent parents when a private party initiates action to terminate parental rights.<sup>89</sup> In other states, the courts have indicated that the protection of the parent-child relationship requires providing counsel for indigent parents, regardless of whether a private party or the state has initiated proceedings to terminate parental rights.<sup>90</sup>

The termination of parental rights makes parents "legal nonentities,"<sup>91</sup> regardless of who initiates the termination proceedings. "The right to conceive and raise one's own children is essential and fundamental," requiring special substantive and procedural protection.<sup>92</sup>

## WHOSE RIGHTS AND INTERESTS SHOULD PREVAIL?

The importance of parents' rights varies according to state statutes. The legally inexperienced parent may not understand the ramifications of these differences. Under the English common law doctrine of *parens patriae*, "children were considered to be the chattels owned by their parents, who had the right to do more or less what they wanted to do with them."<sup>93</sup>

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*Rights Proceedings*, 23 CLEARINGHOUSE REV. 849, 850 (1989); Smith, *supra* note 15, at 1147.

<sup>89</sup> In most states, counsel is only appointed for litigation between the state and an indigent parent. *In re Curtis S.*, 25 Cal. App.687, 30 Cal. Rptr. 2d 739, 741 (Cal. Ct. App. 1994); *Rosewell v. Hanrahan*, 523 N.E.2d 10, 12 (Ill. Ct. App. 1988); *Baird v. Harris*, 778 S.W.2d 147, 148 (Tex. Ct. App. 1989).

<sup>90</sup> *In re Guardianship of Daley*, 123 Misc.2d 139, 473 N.Y.S. 2d 114 (Sur. Ct. Bronx County 1984).

<sup>91</sup> MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 155 (1994).

<sup>92</sup> John E. Theuman, Annotation, *Constitutional Principles Applicable to Award or Modification of Custody of Child -- Supreme Court Cases*, 80 L. Ed.2d 886, 888 (1986) (citing AM. JUR. 2d *Constitutional Law* §568).

<sup>93</sup> Kramer, *supra* note 24, at 3.

The courts were reluctant to *interfere* in private family matters.<sup>94</sup> As the concept of *parens patriae* declined, the states became increasingly paternalistic, assuming the responsibility to protect those who could not protect themselves.<sup>95</sup> Termination statutes “protected, weighed, and balanced” four interests: the concern of parents and children in perpetuating the family relationship; the interest of the parent in the integrity of the family unit; the interest of the child in a stable, caring environment; and the state’s interest in protecting the child.<sup>96</sup> These statutes are often “strictly construed in favor of the parent and the preservation of the parent-child relationship.”<sup>97</sup> “The state’s first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home.”<sup>98</sup> Statutes frequently require proof that a family reunion is unlikely,<sup>99</sup> and state courts often insist upon an evaluation of all possible alternatives before terminating parental rights.<sup>100</sup>

Whose interests should prevail when the child can receive “better treatment elsewhere?”<sup>101</sup> While the state has a compelling interest in preventing harm, does the state have the same interest in ensuring that the child gets the “best” treatment possible? Can the state determine what the “best” is?<sup>102</sup> These queries reflect

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<sup>94</sup> See generally Becky Klemt, Comment, *Family Law - Wyoming's New Termination of Parental Rights Statute*, 17 LAND & WATER L. REV. 621 (1982).

<sup>95</sup> Kramer, *supra* note 24, at 4.

<sup>96</sup> *Id.* at 4-5.

<sup>97</sup> Jacobs, *supra* note 86, at 1.

<sup>98</sup> N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 1995).

<sup>99</sup> ALA. CODE § 12-15-65 (1995). This statute states in pertinent part: If the court enters an order removing a child from his or her home or continuing a child in a placement outside of his or her home pursuant to this title, the order shall contain as specific findings, if warranted by the evidence . . . [t]hat reasonable efforts have been made or will be made to reunite the child and his or her family have failed.

*Id.*

<sup>100</sup> *In re Brand*, 479 So.2d 66, 68 (Ala. Civ. App. 1985).

<sup>101</sup> Note, *supra* note 58, at 472.

<sup>102</sup> *Id.*

the conflict between the competing doctrines of "parents' rights" and "the best interests of the child."<sup>103</sup>

Although the state codes recognize the importance of meeting the needs of children, statutes also acknowledge the fundamental right of a parent to raise their own children. Interpreting such legislation can be difficult.<sup>104</sup> The Alaska Supreme Court held that while the best interests of the child were relevant, the state must show parental conduct "sufficient to justify termination."<sup>105</sup> Similarly, Colorado statutes and courts indicate that while the best interests of the child are paramount, termination is a drastic remedy, impinging upon a parent's fundamental liberty interests.<sup>106</sup> In contrast, the Maine Supreme Judicial Court justified the preponderance of evidence standard, declared unconstitutional by the Supreme Court in *Santosky*,<sup>107</sup> by suggesting that while a higher standard might cut the risk of error in curtailing parental rights, the higher standard could leave a child in a dangerous home situation.<sup>108</sup>

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<sup>103</sup> See generally Beth Frances Murphy, Comment, *Termination of Parental Rights*, 21 WAKE FOREST L. REV. 431 (1986).

<sup>104</sup> See 705 ILL. COMP. STAT. ANN. 405/1-2 (West 1992). The Illinois Juvenile Court Act of 1987, for example, reflects this conflict. The legislature indicated that preserving and strengthening family ties is a major goal of the act, while indicating that "[t]he parents' rights to the custody of their child shall not prevail when the court determines that it is contrary to the best interests of the child." *Id.* at 405/ 1-2 (3) (c).

<sup>105</sup> *Nada A. v. State*, 660 P.2d 436 (Alaska 1983).

<sup>106</sup> COL. REV. STAT. ANN. §19-1-102 (West 1995). The text of the statute states in pertinent part:

The general assembly declares that the purpose of this title are: (a) to secure for each child . . . such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society . . . (c) To remove a child from the custody of his parents only when his welfare and safety or the protection of the public would otherwise be endangered . . .

*Id.* See also *In re J.B.*, 702 P.2d 753, 755 (Col. Ct. App. 1985) (reversing judgment terminating parent's right's when mother had no opportunity to argue, through counsel, the continued need for out of home placement).

<sup>107</sup> *Santosky v. Kramer*, 455 U.S. 745, 768 (1982).

<sup>108</sup> *State v. White*, 460 A.2d 1017, 1025 (Me. 1983).

If the parental rights doctrine predominates, the state must prove the unfitness of the parents at the required level of proof before intervening.<sup>109</sup> Unless there is evidence to the contrary, the assumption is that children should be with their biological parents.<sup>110</sup> In the "best interests" approach, the state or a prospective parent may not have to prove parental unfitness,<sup>111</sup> since this standard focuses on the psychological, physical, and emotional needs of the child.<sup>112</sup> Some statutes clearly focus on the rights of parents, maintaining that financial limitations should not jeopardize the parental status.<sup>113</sup> The courts have held that parental rights cannot be terminated because an opposing party can provide a more comfortable or affluent environment.<sup>114</sup>

Generally, "a parent's right to custody of a biological child will not be disturbed in favor of a non-parent unless the

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<sup>109</sup> Sidney L. Moller, *Family Law—Termination of Parental Rights: Establishing Standards for the Wyoming Law*, 16 LAND & WATER REV. 295, 300 (1981). "A biological parent is entitled to custody of the child unless he is affirmatively shown to be unfit. *Id.*

<sup>110</sup> Michael B. Thompson, *Child-Custody Disputes Between Parents and Non-Parents: A Plea for the Abrogation of the Parental-Right Doctrine in South Dakota*, 34 S.D. L. REV. 534, 539 (1989) (stating that the South Dakota courts have fashioned a presumption that unless the parent is unfit, the best interests of the child will be enhanced by recognizing and maintaining the parent's right to custody).

<sup>111</sup> Statkus, *supra* note 109, at 300.

<sup>112</sup> Thompson, *supra* note 110, at 537.

<sup>113</sup> 23 PA. CONS. STAT. ANN. § 2511 (b) (West 1995). This statute provides that "[t]he rights of a parent shall not be terminated solely on the basis of environmental factors such as inadequate housing, furnishings, income, clothing and medical care if found to be beyond the control of the parent." *Id.*

<sup>114</sup> When determining "best interests" of the child, the foster parent and biological parent should not be compared. The primary consideration should be fitness of the parent. *See, e.g., In re Michael B.*, 80 N.Y.2d 299, 308, 604 N.E.2d 122, 127, 590 N.Y.S.2d 60, 65 (1992); *In re Baby Girl B.*, 618 A.2d 1 (Conn. 1992) (granting a natural mother's motion to open a judgment where the lower court terminated her rights because the pre-adoptive parents appeared to be more suitable than the natural mother); *In re Juvenile Appeal*, 420 A.2d 875, 882 (Conn. 1979) (stating that a child should be placed only when the needs of the child plainly demonstrate necessity; financial resources are not an overriding factor).



parent is first proved to be unfit or to have forfeited the right to custody."<sup>115</sup> Grounds upon which unfitness can be proven vary from state to state, but codes generally list such grounds as neglect, abandonment, physical and sexual abuse, harm, no foreseeable ability to become a capable parent, incarceration for the period when child needs parenting, and inability "to discharge responsibilities to child."<sup>116</sup> The parents' right to raise their own children is not absolute when the best interests of the child require state intervention due to "misconduct, neglect, immorality, abandonment, or dereliction of duty of such proportions that termination is in the child's best interests."<sup>117</sup> Although the state must prove that there are grounds for declaring that a parent is unfit, the presence of such grounds does not mandate termination of parental rights.<sup>118</sup>

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<sup>115</sup> Thompson, *supra* note 110, at 536. See also *In re Guardianship of J.E.D.*, 524 A.2d 1255, 1261-62 (N.J. Super. Ct. App. Div. 1987).

<sup>116</sup> N.H. REV. STAT. ANN § 170-C:5 (1994). The text of this statute states in pertinent part:

Grounds for termination of parental rights may be granted when one or more of the following conditions exist: The parent has abandoned the child, . . . they have substantially and continuously neglected to provide the child with necessary subsistence, education or other care necessary for his mental, emotional , or physical health or have substantially and continuously neglected to pay for such subsistence, education or other care . . . [t]he parent knowingly or willfully caused severe sexual, physical, emotional, or mental abuse of the child.

*Id.*

<sup>117</sup> Kramer, *supra* note 24, at 7. See *In re Carlita B.*, 408 S.E.2d 365, 381-84 (W. Va. 1991). In *Carlita B.*, the court affirmed termination of parental rights, noting that despite efforts to help the mother deal with her own erratic outbursts and despite several improvement plans, the mother did not appear capable of taking adequate care of Carlita. *Id.* at 384.

<sup>118</sup> N.C. GEN. STAT. § 7A-289.31(b) (1995). This statute states in pertinent part:

Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

*Id.*

Most state codes suggest that the state has a responsibility to demonstrate that an effort has been made to help parents improve their parenting, although the Maryland legislature has directed that the court cannot take into consideration the probability that the parent-child relationship would improve the prognosis for rehabilitation of the parent.<sup>119</sup> Improvement in parenting must be effected "within a reasonable period of time" in order to release children who would otherwise languish in temporary homes beyond the age when they might be expected to find permanent families.<sup>120</sup> As Justice Stewart recognized in *Lassiter*, termination and custody proceedings must be completed as quickly as possible in order to promote the availability for adoption and permanency.<sup>121</sup> The termination statute ostensibly furthers the state's policy of providing abused and neglected children with a "permanent plan of care at the earliest possible age,"<sup>122</sup> so that the child may obtain "custody, care, and

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*See also In re Tyson*, 333 S.E.2d 554 (N.C. Ct. Ct. App. 1985).

<sup>119</sup> MD. CODE ANN., FAM. LAW § 5-313(c)(5)(iv) (1995). This statute states in pertinent part:

In determining whether it is in the best interest of the child to terminate a natural parent's rights. . . the court shall consider . . . the effort the natural parent has made to adjust the natural parent's circumstances, conduct . . . to make it in the best interest of the child to be returned to the natural parent's home . . . but, the court may not consider whether the maintenance of the parent-child relationship may serve as an inducement for the natural parent's rehabilitation.

*Id.*

<sup>120</sup> VT. STAT. ANN. tit. 33, § 5526 (1995); W.V. CODE § 49-6-2b (1995). In addition, since October 31, 1983, the federal government has required that states make a reasonable effort to avoid placement or reunite families as a condition for providing funding for foster care. 42 U.S.C. § 671(a)(15) (1994).

<sup>121</sup> *Lassiter*, 452 U.S. at 32.

<sup>122</sup> N.C. GEN. STAT. § 7A-289.22(2) (1995). This statute states in pertinent part:

It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all

discipline as nearly as possible equivalent to that which should have been given by his or her parents.”<sup>123</sup> Despite these noble goals, there is a recognition that termination of parental rights may not lead to a permanent family and the stability idealized in the literature and statutes.<sup>124</sup> For the child who never secures an enduring relationship with adoptive parents, in particular, the termination of parental rights and the loss of even minimal contact with birth parents can be harmful.<sup>125</sup>

A comprehension of the state statutes determining parental rights requires an understanding of the law not generally available to parents without a legal education. Further, counsel may be necessary to integrate these statutes and the local processes for implementing them.

## STATE RESPONSE TO *LASSITER*

During the middle of the twentieth century, the United States Supreme Court adopted a more activist, rights-based philosophy, pressing reluctant states to join their peers in promoting higher standards of due process and equal rights protection.<sup>126</sup> In *Lassiter*, the Supreme Court declined to require

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children from the unnecessary severance of a relationship with biological or legal parents.

*Id.*

<sup>123</sup> R.I. GEN. LAWS § 14-1-2(3) (1994). This statute states in pertinent part: “When a child is removed from his or her own family, to secure for him or her custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents.” *Id.*

<sup>124</sup> Gary R. Govert, *Termination of Parental Rights: Putting Love in Its Place*, 63 N.C. L. REV. 1177, 1182 (1985).

<sup>125</sup> Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425, 453 (1983).

<sup>126</sup> LAWRENCE BAUM, *THE SUPREME COURT 195-98* (4th ed. 1992). Throughout this period, the Court induced the states to expand rights, mandating integrated schools, *see* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and broadening the use of the exclusionary rule, *see* *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Mapp*, the Court held that any evidence improperly obtained may not be presented in the courtroom. *Id.* at 657-58.

the expansion of the right to counsel, despite diverging state and lower court decisions.<sup>127</sup>

The holding and *dicta* in *Lassiter* have been referred to in a wide variety of situations, including cases which demonstrate the importance of parenting,<sup>128</sup> the ambiguity and/or importance of due process,<sup>129</sup> and the right to counsel only when loss of liberty is threatened.<sup>130</sup> Although *Lassiter* has been cited to support statutes or judicial decisions, more frequently the prestige and authority of the Supreme Court and its opinions have been utilized to justify existing state requirements and customs, even when the issues themselves have little to do with the substantive concerns in *Lassiter*.<sup>131</sup>

Despite advocate fears, state legislatures and courts have not followed the lead of the Supreme Court. State legislatures have continued to expand the statutory right to counsel in involuntary termination of parental rights proceedings. These courts appear to recognize that as family situations have become increasingly complex, the need for expert counsel has increased. Adults, who could previously be ignored by the courts, have

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<sup>127</sup> Miller, *supra* note 16, at 185.

<sup>128</sup> Care & Protection of Frank, 567 N.E.2d 214, 218 (Mass. 1991) (stating that removal of children is a "substantial deprivation.").

<sup>129</sup> *In re A.S.A.*, 852 P.2d 127, 129 (Mont. 1993).

<sup>130</sup> Fitzpatrick v. Hoehn, 746 S.W.2d 652 (Mo. App. 1988); State v. Cook, 481 A. 2d 823 (N.H. 1984).

<sup>131</sup> See, e.g., Anderson v. Jacobs, 428 N.E.2d 419 (Ohio 1981) (concerning court payment of paternity test for an indigent defendant); Archuleta v. Goldman, 761 P.2d 425 (N.M. Ct. App. 1987); Bexard Co. Sheriff's Civil Serv. Comm'n v. Davis, 802 S.W.2d 659 (Tex. 1990) (concerning a prison inmate's suit claiming authorities' indifference to medical needs); Orr v. Knowles, 337 N.W. 2d 699 (Neb. 1983) (concerning termination of pregnancy); Roanoke Chowan Regional Housing Auth. v. Vaughan, 344 S.E.2d 578 (N.C. Ct. App. 1986). (concerning landlord-tenant dispute). See also Sheedy v. Merrimack County Superior Court, 509 A.2d 144 (N.H. 1986). The New Hampshire Supreme Court denied the right to counsel to a debtor in jeopardy of incarceration for contempt, suggesting that the presumption in *Lassiter* that an indigent subject to incarceration was entitled to counsel was *dicta*, rather than a holding. *Id.* at 148.

become increasingly important to children.<sup>132</sup> For many children, step-parents, grand-parents, and foster parents have become the psychological parents: the adults “who on a continuing day-to-day bases, through interaction, companionship, interplay, and mutuality” fulfill the child’s physical and psychological needs.<sup>133</sup> Although the statutes reflect society’s desire for perfect parents,<sup>134</sup> laws and judges have been and will be forced to deal with an increasing variety of family relationships.

As noted previously, in the seventeen states where there was no statutory right to counsel prior to *Lassiter*, state codes now indicate a variety of provisions for counsel for indigent parents involved in involuntary termination of parental rights proceedings. In most of these states, the rights of indigent parents have been strengthened since 1981.<sup>135</sup> In the thirty-three states which had previously provided for parental right to counsel, only one state currently utilizes the minimal case-by-case criteria outlined in *Lassiter*.<sup>136</sup>

## CONCLUSIONS

In court battles, “the rights of the child, the parents and society stand to be abridged. Advocates for each set of rights

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<sup>132</sup> Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premises of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 962 (1984). By 1984, over 40 states had created statutory exceptions to the common law that had previously applied to the relationships between children and their grandparents. *Id.* at 934.

<sup>133</sup> Thompson, *supra* note 110, at 562.

<sup>134</sup> Robert L. Hayman, Jr., *Presumption of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1203 (1990).

<sup>135</sup> The North Carolina legislature enacted a statute providing for the parental right to counsel in termination proceedings in 1981, the same year that the Supreme Court denied the existence of a constitutional right to counsel in Abby Lassiter’s action against the North Carolina Department of Social Services. See N.C. GEN. STAT. § 7A-289.23 (1995).

<sup>136</sup> It is unclear whether the Mississippi code ever recognized a statutory right to counsel for parents threatened with termination of parental rights. See *supra* notes 79, 80.

prevent this abridgement by presenting the strongest possible case to the court.”<sup>137</sup> Legal representation helps to equalize the battle between indigent parents and the resources, expertise, and experience of government agencies.

The true test of the right to counsel exists in the thousands of trial courts across the United States. Counsel in termination of parental rights proceedings may be offered in states where there is no statutory guarantee.<sup>138</sup> When there is no constitutional or statutory right to counsel, however, the appointment of counsel is a privilege that can be terminated when funds are limited or priorities are altered, leaving parents who need counsel in a precarious position.

Prior to *Lassiter*, state courts and legislatures expanded the right to counsel in termination proceedings in anticipation of a Supreme Court decision that would proclaim a constitutional right to counsel. The Supreme Court’s holding in *Lassiter* appeared to jeopardize any expansion of the right to counsel in civil proceedings and raised the fear that future cases would further restrict rights.

In contrast, this study demonstrates that the state courts and legislatures have become increasingly sensitive to the right to counsel. State courts have refused to follow the Supreme Court when the Court’s holdings conflict with state interpretation of due process standards or local concepts of fundamental fairness. The response of the state courts to *Lassiter* suggests that these courts can provide a receptive venue for rights conscious litigants.

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<sup>137</sup> Sandra Anderson Garcia & Robert Batey, *The Roles of Counsel for the Parent in Child Dependency Proceedings*, 22 GA. L. REV. 1079, 1101 (1988).

<sup>138</sup> Telephone Interview with Debra Ratterman Baker, American Bar Association Center on Children and the Law (January 30, 1996). According to Ms. Baker’s experience, indigent parents have been accorded counsel for termination proceedings throughout the United States. *Id.* In some states, however, indigent parents have had difficulty obtaining appointed representation in earlier stages that may lead to termination. *Id.*

**TABLE I:**

**THE CURRENT STATUS OF RIGHT TO  
COUNSEL STATUTES FOR PARENTS  
THREATENED WITH TERMINATION OF  
PARENTAL RIGHTS IN THE STATES THAT  
OFFERED NO GUARANTEE OF COUNSEL  
PRIOR TO *LASSITER***

|   |
|---|
| <p align="center"><b><u>CASE BY CASE DETERMINATION</u></b></p> <p align="center">Delaware<br/>Hawaii<br/>South Carolina<br/>Tennessee<br/>Wyoming</p>                             |
| <p align="center"><b><u>COUNSEL REQUIRED</u></b></p> <p align="center">Florida<br/>North Carolina<br/>Texas<br/>Vermont<br/>Virginia<br/>West Virginia</p>                        |
| <p align="center"><b><u>COUNSEL REQUIRED<br/>ONLY IF REQUESTED</u></b></p> <p align="center">Arkansas<br/>Georgia<br/>New Mexico<br/>Oregon<br/>Pennsylvania<br/>South Dakota</p> |

**TABLE II:**

**THE CURRENT STATUS OF RIGHT TO COUNSEL  
STATUTES FOR PARENTS THREATENED WITH  
TERMINATION OF PARENTAL RIGHTS IN THE STATES  
THAT OFFERED COUNSEL PRIOR TO *LASSITER***

| <u>CASE - BY - CASE<br/>DETERMINATION</u> | <u>COUNSEL REQUIRED<br/>ONLY IF REQUESTED</u> |
|---|---|
| Mississippi                               | Alabama                                       |
|   | Colorado                                      |
|   | Connecticut                                   |
|   | District of Columbia                          |
| <u>COUNSEL REQUIRED</u>                   | Idaho   |
| Alaska                                    | Illinois                                      |
| Arizona                                   | Iowa  |
| California                                | Kansas  |
| Indiana                                   | Kentucky                                      |
| Maryland                                  | Louisiana                                     |
| Massachusetts                             | Maine   |
| Minnesota                                 | Michigan                                      |
| New York                                  | Missouri                                      |
| Washington                                | Montana                                       |
| Wisconsin                                 | Nebraska                                      |
|   | Nevada  |
|   | New Hampshire                                 |
|   | New Jersey                                    |
|   | North Dakota                                  |
|   | Ohio  |
|   | Oklahoma                                      |
|   | Rhode Island                                  |
|   | Utah  |



**TABLE III: STATUTORY AUTHORITIES  
FOR PARENTAL RIGHT TO COUNSEL IN  
TERMINATION OF PARENTAL RIGHTS  
PROCEEDINGS**

|                      |   |
|----------------------|---|
| <b>Alabama</b>       | ALA. CODE § 12-15-63 (1995).  |
| <b>Alaska</b>        | CINA Rule 12 (1995).  |
| <b>Arizona</b>       | ARIZ. REV. STAT. ANN. § 8-225 (1995).   |
| <b>Arkansas</b>      | ARK. CODE ANN. § 9-27-316(f)(1)<br>(Michie 1995).   |
| <b>California</b>    | CAL. WELF. & INST. CODE<br>§ 336.26(f)(2)(West 1996). Failure of<br>parent to appear in response to notice of<br>hearing may relieve the court of the<br>responsibility to appoint counsel. <i>In re</i><br><i>Angela R.</i> , 260 Cal. Rptr. 612, 212; Cal.<br>App. 3d 257 (1989). |
| <b>Colorado</b>      | COLO. REV. STAT. ANN. § 19-1-1012<br>(West 1997).   |
| <b>Connecticut</b>   | CONN. GEN. STAT. ANN. § 46b-135<br>(West 1995).   |
| <b>Delaware</b>      | DEL. CODE ANN. tit. 13, § 1111 (1993).  |
| <b>Dist. of Col.</b> | D.C. CODE ANN. § 16-2304 (1996).  |

- Florida** FLA. STAT. ANN. § 39.465 (1)(a)  
(West 1996). *See also* FL. R. JUV. PROC.  
§8.515.
- Georgia** GA. CODE ANN. § 15-11-85  
(Harrison 1994).
- Hawaii** HAW. REV. STAT. § 571-62 (1993).
- Idaho** IDAHO CODE § 16-2009 (1995).
- Illinois** 705 ILL. COMP. STAT. ANN. § 405/1-5(1)  
(West 1997).  
JUV. CT. ACT of 1987, P.A. 85-601  
(Smith-Hurd 1996).
- Indiana** IND. CODE ANN. § 31-6-5-3 (Michie 1996).
- Iowa** IOWA CODE ANN. § 232.113 (West 1996).
- Kansas** KAN. STAT. ANN. §§ 38-1533, 1582 (d)  
(1995).  
If a parent named in a termination petition  
fails to appear in court, the court must  
appoint counsel.
- Kentucky** KY. REV. STAT. ANN. § 625.080(3)  
(Banks-Baldwin 1995). An indigent parent  
has a right to counsel if counsel is  
requested and if counsel appears to be  
“reasonably necessary in the interests of  
justice.” *Id.*
- Louisiana** LA. CHILDREN’S CODE ANN. § 1016  
(West 1995).

- Maine** ME. REV. STAT. ANN. tit. 22, § 4005.2 (West 1995). While the statute appears to require counsel if requested, the Maine courts have generally held that counsel is required unless intelligently waived. *See* *Danforth v. Dep't of Health & Welfare*, 303 A.2d 794, 796 (Me.1973).
- Maryland** MD. CODE ANN., FAM. LAW §5-323 (1995)
- Mass.** MASS. GEN. LAWS ANN. ch. 119, § 29 (West 1996)  
The Massachusetts Supreme Court has held, based on *Lassiter*, that counsel is only mandatory when the deprivation of counsel results in "fundamental unfairness," even when personal liberty is in jeopardy. *Commonwealth v. Conceicao*, 446 N.E.2d 383, 388 (Mass. 1983).
- Michigan** MICH. CT. R. § 5.915(B) (West 1996).
- Minnesota** MINN. R. JUV. PROC. § 40.01 (West 1996).
- Mississippi** MISS. CODE ANN. § 93-15-109 (1996). Specific statute referring to the right to counsel in termination of parental rights proceedings was repealed in 1979. MISS. CODE ANN. § 3-21-17 (1993).
- Missouri** MO. ANN. STAT. § 211.462 (West 1996).
- Montana** MONT. CODE ANN. § 41-3-401(12) (1995).
- Nebraska** NEB. REV. STAT. § 43-279.01 (1993).

- Nevada** NEV. REV. STAT. ANN. § 128.100(2) (Michie 1993).
- New Hamp.** N.H. REV. STAT. ANN. § 170-C:10 (1994).
- New Jersey** N.J. STAT. ANN. § 9:6-8.43 (West 1996).  
Indigent parent threatened with loss of parental rights has a right to counsel and may apply to the public defender's office for such assistance. *Id.*
- New Mexico** N.M. STAT. ANN. § 32A-4-29(F) (Michie 1995).
- New York** N.Y. FAM. CT. ACT §262 (McKinney 1996).
- N. Carolina** N.C. GEN. STAT. § 7A-289.23 (1996).
- N. Dakota** N.D. CENT. CODE § 27-20-45 (1995).
- Ohio** OHIO REV. CODE ANN. §2151.352B (Anderson 1996).
- Oklahoma** OKLA. STAT. ANN. tit. 10, § 7003-3.7 (West 1996).
- Oregon** OR. REV. STAT. § 419B.518 (1995)
- Penn.** 23 PA. CONS. STAT. ANN. § 231(a.1) (West 1996).
- Rh. Island** R.I. GEN. LAWS § 4-1-31 (1994).
- S. Carolina** S.C. CODE ANN. §20-7-1570 (Law. Co-op. 1995).

|                    |  |
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| <b>S. Dakota</b>   | S.D. CODIFIED LAWS ANN. §§ 26-7A-30, 31 (Michie 1992). |
| <b>Tennessee</b>   | TENN. R. JUV. PROC. §39-(f)(2) (1995).                 |
| <b>Texas</b>       | TEX. FAM. CODE ANN. § 107.013 (West 1996).             |
| <b>Utah</b>        | UTAH CODE. ANN. § 78-3a-35(2a) (1995).                 |
| <b>Vermont</b>     | VT. STAT. ANN. tit. 33, § 5519(c) (1995).              |
| <b>Virginia</b>    | VA. CODE ANN. § 16.1-266 (Michie 1995).                |
| <b>Wash.</b>       | WASH. REV. CODE ANN. § 13.34.090(c) (West 1996).       |
| <b>W. Virginia</b> | W.VA. CODE § 49-6-2 (1995).                            |
| <b>Wisconsin</b>   | WIS. STAT. ANN. § 48.23(2) (West 1995).                |
| <b>Wyoming</b>     | WYO. STAT. ANN. § 14-2-318 (Michie 1994).              |