

Constitutional Right to Appointment of Counsel for Children in Juvenile Dependency Cases

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“High quality legal representation is essential to a well-functioning dependency system.”¹
Oregon Task Force on Dependency Representation Report, July 2016

Background

Courts have long recognized children and parents have fundamental liberty interests at stake in dependency and termination of parental rights (TPR) cases.² In recognition of the fundamental rights at issue in cases like these, Oregon has established a right to counsel for children³ and parents⁴ in dependency and TPR cases. By providing counsel for parents and children, Oregon ensures that “salient information is conveyed to the court, parties’ legal rights are protected, and that the wishes of parties are effectively voiced.”⁵

Case law establishes that court-appointed counsel for parents is constitutionally required on a case-by-case basis in both termination of parental rights cases and dependency cases.⁶ Appointed counsel for children in termination of parental rights proceedings is also required on a case-by-case basis.⁷ A strong majority of states mandate that children receive counsel in

¹ Oregon Task Force on Dependency Representation, Final Report (July 2016), https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf.

² *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), *reh’d*, 453 U.S. 927, 102 S.Ct. 889 (1981); *State ex rel Juv. Dept. v. Grannis*, 67 Or.App. 565, 680 P.2d 660 (1984); *F v. C*, 24 Or.App. 601, 547 P.2d 175, *cert. denied*, 429 U.S. 907 (1976).

³ See ORS 419B.195.

⁴ See ORS 419B.205.

⁵ US Department of Health and Human Services Administration on Children, Youth and Families, Information Memorandum ACYF-CB-IM-17-02 (January 17, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

⁶ *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), *reh’d*, 453 U.S. 927, 102 S.Ct. 889 (1981); *State ex rel Juv. Dept. v. Grannis*, 67 Or.App. 565, 680 P.2d 660 (1984).

⁷ *F v. C*, 24 Or.App. 601, 547 P.2d 175, *cert. denied*, 429 U.S. 907 (1976).

dependency cases and several states have found a constitutional right to counsel for these proceedings;⁸ as yet, no Oregon appellate court has addressed the issue of court-appointed counsel for children in dependency cases. In addition to the supporting case law, representation for all parties is judicially efficient, cost effective, improves outcomes, and remains constitutionally defensible.

Rights of Parents

“This Court’s decisions have by now made plain beyond the need for multiple citation that a parent’s desire for and right to “the companionship, care, custody and management of his or her children” is an important interest that “undeniably warrants deference and, absent a powerful countervailing interest, protection.”

Stanley v. Illinois, 405 U.S. 645, 651; 92 S.Ct. 1208, 1212 (1972)

In *Lassiter*, the Supreme Court held that an financially eligible parent is entitled to court-appointed counsel on a case-by-case basis.⁹ Next, the Court applied the three pronged balancing test for analyzing procedural due process first set out in *Mathews v. Eldridge*, weighing “the private interest that will be affected,” “the risk of an erroneous deprivation” of the private individual’s interest “through the procedures used” and the benefits of adding procedural requirements, and the government’s interest which includes “fiscal and administrative burdens.”¹⁰

The Court had no difficulty in acknowledging that the parent’s interest in the accuracy of the decision whether to terminate parental rights was a “commanding one”¹¹, and that the

⁸ A Child’s Right to Counsel (2019), <http://caichildlaw.org/Misc/RTC4.pdf>; *See, e.g., In the Interest of D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980); *Reist v. Bay Cty. Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (Mich. 1976); *Danforth v. State Dep’t of Health & Welfare*, 303 A.2d 794 (1973). Appointment of counsel for parents is also required in some states by statute. *See, e.g.,* Ariz. Rev. Stat. Ann. § 8-2215 (B); 705 Ill. Comp. Stat. Ann. § 405/1-5(1) (2009); Cal. Welf. & Inst. Code § 317 (mandatory for out of home placements); Va. Code § 16.1-266(DC) (mandatory if the parental rights and responsibilities could be lost); Wis. Stat. Ann. § 48.23(2).

⁹ *Lassiter*, 452 U.S. at 26, 27.

¹⁰ *Mathews v. Eldridge*, 424 U.S. 319, 355, 96 S.Ct. 893 (1976).

¹¹ *Lassiter*, 452 U.S. at 27.

government shared this interest in accuracy because of its “urgent interest” in the welfare of the child.¹² Moreover, although the state has a legitimate interest in cost-savings and judicial economy, it is hardly significant enough to overcome the private interests at stake.¹³

The “risk of erroneous deprivation” was the most variable element of the test. Whether that risk was “insupportably high” is to be determined by “the complexity of the proceeding and the incapacity of the uncounseled parent.”¹⁴

Thus, the Court concluded that because the interest would array differently in different cases, the decision about counsel should be left to the trial court to decide on a case by case basis. The Court also indicated that states who provide this right to counsel statutorily are “enlightened and wise,” and encouraged states to liberally construe the factors, erring on the side of protecting the rights of children and parents in these cases where there is a significant government interference in the lives of families as “wise public policy.”¹⁵

Rights of Children

A. Generally

Federal law recognizes that children have significant liberty interests at stake during child welfare proceedings. In order to receive funding under the Child Abuse Prevention and Treatment Act (CAPTA) state grant, the governor of each state must provide an assurance that, in every child abuse or neglect case that comes before the court, the child must have an advocate to represent the child in the judicial proceeding.¹⁶ In its 2018 Information Memo regarding legal representation in juvenile dependency cases, the U.S. Department of Health and Human Services

¹² *Id.*

¹³ *Id.* at 28.

¹⁴ *Id.* at 31.

¹⁵ *Id.* at 33–34.

¹⁶ 42 U.S.C. 5106a (b)(2)(B)(xiii).

Children’s Bureau strongly encouraged jurisdictions to provide legal representation to *all* children at *all* stages of child welfare proceedings.¹⁷

Oregon’s statutes also recognize that children are individuals with legal rights.¹⁸ As parties to juvenile court proceedings, children maintain procedural due process rights to ensure that their interests—as an independent party separate from the state or DHS¹⁹—are heard and protected. They also maintain substantive rights including the right to safety and freedom from abuse and neglect, the right to permanency, the right to access records, the right to placement with relatives and siblings, and the right to visitation and contact with parents and family.²⁰

B. The Child’s Liberty Interest

Although *Lassiter* dealt with adults and termination cases, its analysis would be applied by an appellate court in Oregon to the issue of a child’s right in a dependency case.²¹ In fact, it was the analysis used by the Court of Appeals in *State ex rel Juv. Dept. v. Grannis*, which held indigent parents have the right to appointed counsel in dependency cases on a case-by-case basis.²²

At the very least, the application of the *Lassiter* and *Grannis* analysis to children’s right to counsel yields a similar result: counsel is required on a case-by-case basis, depending on the three-part *Mathews* test.²³ On each of the elements of the analysis, an argument can be made that

¹⁷ US Department of Health and Human Services Administration on Children, Youth and Families, Information Memorandum ACYF-CB-IM-17-02 (January 17, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

¹⁸ See ORS 419B.090.

¹⁹ See ORS 419B.875.

²⁰ Oregon State Bar, *Juvenile Law: Dependency* (2017).

²¹ It was also the same analysis used by the US District Court to analyze the right to counsel for children in Georgia. The US District Court for the Northern District of Georgia, Atlanta Division, applying the same analysis used in *Lassiter* (the three-part federal test enunciated in *Mathews v. Eldridge*, 424 US 319 (1976)) found a right to counsel for children in all juvenile dependency cases under the due process of clause of the Georgia Constitution. *In re Kenny A*, 356 F. Supp. 2d 1353 (2005).

²² *State ex rel Juv. Dept. v. Grannis*, 67 Or.App. 565, 680 P.2d 660 (1984).

²³ *Mathews*, 424 U.S. at 321.

counsel for children is more compelling than that for parents, it is conceivable that counsel might be required in all cases.

The *Lassiter* presumption against the right to counsel in every case arose because of a distinction the Supreme Court drew between an acknowledged liberty interest in “the companionship, care, custody and management of his or children” and one which implicates “personal freedom,” “personal liberty” or “physical liberty” (used interchangeably by the Court).²⁴ A parent facing a termination case does not risk interference with his or her personal freedom. The same cannot be said for children.

For children, an adjudication of dependency implicates both associational rights²⁵ (as it does for the parent) *and*, arguably, physical liberty. As a result of the juvenile court’s finding that a child is within its jurisdiction, they may be removed from home and separated, not only from parents, but from extended family, siblings, neighborhood, community members, and school. The child may be placed in a shelter (some of which are housed in juvenile detention facilities)²⁶ a foster home, or a residential facility (many of which house both dependent and delinquent children and some of which are refurbished juvenile detention centers).²⁷ Neither the fact that the proceeding is “civil” nor that the placement is “in the child’s best interest” is dispositive of the issue of a liberty interest.

In *Lassiter*, the Supreme Court stated that “it is the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in

²⁴ *Lassiter*, 452 U.S. at 25–27.

²⁵ The rights of parent and child to each other’s companionship are reciprocal. *Franz v. U.S.*, 707 F.2d 582, 595 (1983) citing *Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212 (1972); *Duchesne v. Sugarman*, 566 F.2d at 825 (1977).

²⁶ Hillary Borrud, *Oregon Sends Hundreds of Foster Kids to Former Jails, Institutions, Not Families*, Oregon Live (March 2019), <https://www.oregonlive.com/politics/2019/03/oregon-sends-hundreds-of-foster-kids-to-former-jails-institutions-not-families.html>.

²⁷ *Id.*

criminal cases, that triggers the right to appointed counsel.”²⁸ While the Supreme Court has not yet decided whether a child has a personal liberty interest implicated by the transfer of custody from his or her parent to the state,²⁹ under the substantive component of the Due Process clause a personal liberty interest is at stake in analogous circumstances. In *Parham v. J.R.*, the Supreme Court held that a child possesses a protectible and “substantial liberty interest in not being confined unnecessarily for medical treatment” but found the Georgia procedures provided sufficient protection for children involuntarily hospitalized.³⁰ Later, in *Youngberg v. Romero*, the Supreme Court held that a person involuntarily committed to a state institution for the mentally retarded had a constitutionally protected liberty interest in personal safety.³¹ Finally, in *DeShaney v. Winnebago Cty. Dept. of Social Services*, the Supreme Court held that while the state has no duty to protect a person not in state custody from actions by third parties, “the State’s affirmative act of restraining an individual’s freedom to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty,” constitutes a “deprivation of liberty” that triggers due process protection.³² The Court went on to suggest that this personal liberty interest might be implicated if the state removes a child from his parent and places him in a foster home operated by its agents.³³

These cases demonstrate the heightened liberty interest at stake when a child is involved in dependency proceedings. Not only does the child risk loss of the care and companionship of

²⁸ *Lassiter*, 452 U.S. at 25 citing cases involving both juveniles in state custody and mentally ill prisoners facing involuntary transfer to a hospital for treatment. *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254 (1980).

²⁹ The argument that there is no liberty interest derives from the fact that child is always in the “custody” of someone.

³⁰ *Parham v J.R.*, 442 U.S. 584, 600, 99 S.Ct. 2493 (1979).

³¹ *Youngberg v. Romero*, 457 U.S. 307, 315-16, 102 S.Ct. 2452 (1982).

³² *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200, 109 S.Ct. 998 (1989).

³³ “[H]ad the State by the affirmative exercise of its power removed [the child] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.” *DeShaney*, 489 U.S. at 201 n.9 (1989).

his or her parents, but also loss of personal liberty. Thus, a strong argument can be made that the child's right to counsel is analyzed free of any adverse presumption.

C. The Child's Right to Due Process

The landmark Supreme Court case, *In re Gault*, established the right to counsel for juveniles in delinquency proceedings.³⁴ There is support among advocates that this right to counsel for juveniles in delinquency proceedings is analogous to the right to counsel for children in dependency proceedings.³⁵ Similar to juveniles adjudicated delinquent, children in the dependency system may be in state custody until they are 18, or for several years, and are often transferred from one placement to another without much warning, and almost always without express consent. Further, these are children who have entered the system due to no fault of their own. Without an attorney, a child must watch as witnesses and evidence are presented, decisions are made about them, their future is changed, and their liberty interest impacted all without the protections of due process. The reasoning behind appointing an attorney to represent the youth in *Gault* tracks very closely with the reasoning for providing counsel to youth in dependency proceedings.

At the very least, *Gault* affirms the well settled protection children have under the Due Process Clause of the federal and state constitutions.³⁶ Applying the three-part *Mathews* test to the question of whether there is a due process right to counsel for children in dependency proceedings clearly demonstrates that independent representation is constitutionally mandated in most, if not all cases.³⁷

³⁴ *In re Gault*, 387 U.S. 1, 36–37, 87 S.Ct., 1428 (1967).

³⁵ See Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RIGHTS L. J. 663, 694–95 (2006); LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 607–09 (2009).

³⁶ *In re Gault*, 387 U.S. at 4; *Goss v. Lopez*, 419 U.S. 565, 576, 95 S.Ct. 729 (1975).

³⁷ *Mathews v. Eldridge*, 424 U.S. at 355; *Lassiter*, 452 U.S. at 25–27.

The Mathews v. Eldridge Test

1. The Private Interest

As do their parents, children have a commanding interest in accurate decision-making in dependency cases and in avoiding unnecessary state intervention into their relationships. But children also suffer if an erroneous decision is made *not* to interfere with their parents' custody. In other words, a parent suffers if the court makes a mistake and declares a child dependent but is unharmed if the court mistakenly allows the child to remain with the parent. Children are in much more treacherous circumstances. They suffer when the court errs in either direction, whether mistakenly declaring them dependent and removing them from home where they face the turbulence of the foster care system, or mistakenly failing to remove them where they may continue to be subjected to abuse or neglect.

Children made wards of the juvenile court and placed into the custody of the state risk far more than loss of the companionship of their parents. Often children in foster care are separated from their siblings as well.³⁸ They may be placed far from their own neighborhoods and are often required to change schools, sometimes multiple times.³⁹ The school success rate for children in foster care is abysmal.⁴⁰ Foster children whose educational needs are not met have been shown to have higher rates of homelessness, poverty, public assistance, and juvenile and

³⁸ Over 18% of kids in out of home foster care in Oregon are not placed with any of their siblings. 2017 Child Welfare Data Book, Department of Human Services (February 2018), <https://www.oregon.gov/DHS/ABOUTDHS/LegislativeInformation/2017-Child-Welfare-Data-Book.pdf>.

³⁹ Over half the youth in foster care in Oregon are school aged and 40% of those youth have had two or more placements in the year prior- something known to cause possible academic disruption. *Id.* at 16.

⁴⁰ Studies show that students in foster care experience school suspensions and expulsions at higher rates than their peers not in foster care. Children in care generally have lower standardized test scores in reading and math, high levels of grade retention and drop-out rates, and far lower high school and college graduation rates. Child Welfare League of America (summarizing a congressional briefing on Every Student Succeeds Act, October 2018) <https://www.cwla.org/panel-discusses-progress-on-education-and-children-in-foster-care/>.

criminal justice involvement.⁴¹ Children placed in foster care suffer from more mental and physical health problems than children not placed in foster care.⁴² According to a 2016 study published in *Pediatrics*, foster care itself has a negative impact on mental health.⁴³ Not to mention only 10.8% of children in Oregon who enter foster care have exited foster care after three months.⁴⁴ The median length of time a child in Oregon is in foster care is 18.6 months.⁴⁵ In addition there is also emerging research on how adverse experiences like those faced by children in dependency proceedings, can impact a child’s development long term. The Adverse Childhood Experience Study (ACES) conducted in partnership with the Centers for Disease Control and Prevention, found that the more adverse childhood experiences children had, the “more likely that the child would have long term issues as an adult, including substance abuse problems, mental illness, multiple physical illnesses, social and emotional problems and a higher likelihood of dying younger.”⁴⁶

Beyond the immediate possible harms, the nation’s foster care system functions so poorly that class action litigation is a commonly used tool for reform. Approximately 70 lawsuits are pending or have governed child welfare practice in 30 states while another 20 states are subject

⁴¹ See discussion in Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POLICY R. 81, 81–164, (2000).

⁴² Children in foster care were about twice as likely to have a learning disability and three times as likely to have ADD or ADHD. They were also roughly twice as likely to have asthma and speech problems and three times as likely to have hearing problems and vision problems. Differences were even more substantial for other mental health conditions; they were five times as likely to have anxiety, six times as likely to have behavioral problems, and seven times as likely to have depression. Kirstin Turney and Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, PEDIATRICS, November 2016, available at <https://pediatrics.aappublications.org/content/138/5/e20161118>.

⁴³ *Id.*

⁴⁴ 2017 Child Welfare Data Book, Department of Human Services (February 2018), <https://www.oregon.gov/DHS/ABOUTDHS/LegislativeInformation/2017-Child-Welfare-Data-Book.pdf>.

⁴⁵ *Id.* at 14.

⁴⁶ About the CDC-Kaiser ACE Study (updated April 2020), <https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/about.html>; Donald Duquette et al., CHILD WELFARE LAW AND PRACTICE 81 (3d ed. 2016).

to consent decree or court order.⁴⁷ It is not far-fetched to believe that his number will only increase as the pandemic continues. In Oregon, child welfare services are partially governed by a settlement agreement between the Department of Human Services and two advocacy organizations, Youth, Rights & Justice and The Oregon Law Center. Frequent media coverage continues to expose significant concerns for the safety of children in Oregon's child welfare system.⁴⁸

In addition to child advocates, the federal government monitors state child welfare systems. Oregon's system failed a recent federal audit on seven of seven outcome measures: (1) Children are, first and foremost, protected from abuse and neglect, (2) Children are safely maintained in their homes whenever possible and appropriate, (3) Children have permanency and stability in their living situations, (4) The continuity of family relationships and connections is preserved for children, (5) Families have enhanced capacity to provide for their children's needs, (6) Children receive appropriate services to meet their educational needs, and (7) Children receive adequate services to meet their physical and mental health needs.⁴⁹

On the other hand, the harm associated with an erroneous decision to permit a child to remain with an abusive parent is obvious. In Oregon in 2001, there were eight child deaths

⁴⁷ Center for the Study of Social Policy, *For the Welfare of Children: Lessons Learned from Class Action Litigation* (January 2012), <https://cssp.org/wp-content/uploads/2019/01/Lessons-Learned.pdf>.

⁴⁸ See Lauren Dake, *Advocates Say Oregon Foster Child Abandoned, Drugged Out of State*, OREGON PUBLIC BROADCASTING, (April 2019), <https://www.opb.org/news/article/advocates-say-oregon-foster-child-abandoned-drugged-out-of-state/>; Sarah Zimmerman, *Lawsuit: Oregon DHS Failed to Prevent Abuse in Foster Care System*, STATESMAN JOURNAL (April 2019), <https://www.statesmanjournal.com/story/news/politics/2019/04/16/lawsuit-oregon-dhs-failed-prevent-abuse-foster-care-system/3483914002/>; Hillary Borrud, *Oregon Sends Hundreds of Foster Kids to Former Jails, Institutions, Not Families*, OREGON LIVE (March 2019), <https://www.oregonlive.com/politics/2019/03/oregon-sends-hundreds-of-foster-kids-to-former-jails-institutions-not-families.html>.

⁴⁹ U.S. Dept. of Health and Human Services, *Oregon Child & Family Services Review Oregon Final Report* (2006), <https://www.oregon.gov/DHS/CHILDREN/Documents/Oregon%20CFSR%20Round%203%20Final%20Report%202016.pdf>.

resulting from abuse or neglect.⁵⁰ In the year 2018, there were 26.⁵¹ Mothers and fathers make up over 76% of the perpetrators of child abuse and neglect in this state.⁵² During 2018, there were over 7,600 children receiving in home services by the Department of Human Services.⁵³ Exposing children to possibly more abuse and neglect, which can have long term, intergenerational impacts, underscores the legitimate concerns the system should have when deciding a child's placement.⁵⁴

Whether at home or in foster care, Oregon's children have rights independent of their parents that must be recognized and weighed here.⁵⁵ The private interest of these children is tremendous.

2. *The Government's Interest*

The government shares the parents' and children's interest in an accurate decision and has only a relatively weak (especially when weighed against children's rights to an accurate determination) pecuniary interest.⁵⁶ Moreover, any state interest in judicial economy or efficiency is furthered by the appointment of counsel for the child. In many instances, the attorney for the child serves to facilitate negotiated settlements between the entrenched positions

⁵⁰ 2001 Child Welfare Data Book, Department of Human Services (2001) (No longer available online).

⁵¹ 2018 Child Welfare Data Book, Department of Human Services (May 2019), <https://www.oregon.gov/DHS/CHILDREN/CHILD-ABUSE/Documents/2018-Child-Welfare-Data-Book.pdf>.

⁵² *Id.* at 7.

⁵³ *Id.* at 11.

⁵⁴ Long Term Consequences of Child Abuse and Neglect, Children's Bureau (April 2019), https://www.childwelfare.gov/pubpdfs/long_term_consequences.pdf.

⁵⁵ See ORS 419A.002(2); *State v. McMaster*, 259 Or. 291, 486 P.2d 567 (1971).

⁵⁶ "When an agency of the state seeks to remove a child from the custody of parents who say they are qualified to rear the child, both the parents and the state have interest in accurate findings of fact and informed juvenile-court supervision. The state's interest in saving public money does not outweigh society's interest in preserving viable family units and the parent's interest in not being unfairly deprived of control and custody of a child. Protection for a right as fundamental as that of child custody cannot be denied by asserting that counsel in civil litigation has always depended upon the free-enterprise generalization that one usually gets what one pays for. The "civil litigation" generalization overlooks the nature of the rights in question and the relative powers of the antagonists. Despite the informality of the juvenile dependency hearings the parent, untutored in the law, may well have difficulty presenting his or her version of disputed facts, cross-examining witnesses, or working with documentary evidence." *Cleaver v. Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974).

of the state and parent and assists the court in making well informed and speedy decisions. Anyone who has witnessed an unrepresented party in court understands the time loss and procedural delay that can and does occur. Stakeholders, policymakers, and judicial officers in Oregon and elsewhere confirm that counsel for parties in juvenile court proceedings improves the quality of decision-making.⁵⁷

3. *The Risk of Erroneous Deprivation*

While this element of the *Mathews* test was the one with most of the case-by-case variation when applied to adults, for children the risk of error without counsel appears “insupportably high” in all cases.⁵⁸ Because this is self-evident, the argument against counsel for children in every case relies not on their ability to represent themselves but rather on the proposition that their interests are aligned with another party, and that the participating party’s lawyer diminishes the risk to an acceptable level. That was the analysis of the Oregon Court of Appeals in a pre-*Lassiter* case holding that counsel for children was required on a case-by-case basis.⁵⁹ The Court reasoned that independent counsel for the child serves two important purposes: advocacy of the child’s position and ensuring an adequately developed record. The second purpose might be served regardless of the age of the child, while the first would apply

⁵⁷ In its 2016 Final Report, the Governor’s Task Force on Dependency Representation found the benefits of high quality legal representation to include: promotes fairness and due process in the dependency system, protects children and improves outcomes for families, provides important short and long term savings, and ensures lawful decisions about Oregon families are made based on the best possible information. *Supra* n.7. A 1997 survey of Oregon juvenile judges and referees about the usefulness of attorneys in helping them make “good and timely decisions in dependency proceedings” parents’ attorneys and attorneys for the state were thought to be “somewhat to very useful” while children’s attorneys were judged “very useful.” J. Lahti, A. Sherbo, Y. Spofford, and L. Travis, *Juvenile Court Improvement Project: An Assessment of the Oregon State Court Systems Compliance with P.L. 96-272 and Related Laws* (1997). A similar survey was conducted by the Columbia Journal of Law and Social Problems and cited in the *Lassiter* opinion. There, New York Family Court judges who preside over parental termination hearings were queried. Seventy-two percent of them agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing and 66.7% thought it became more difficult to develop the facts. *Lassiter*, 452 U.S. at 29 n.5.

⁵⁸ *Lassiter*, 452 U.S. at 31.

⁵⁹ *F v. C*, 24 Or.App. 601, 547 P.2d 175, *cert. denied*, 429 U.S. 907 (1976).

only to some children. The Court said that independent counsel for the purpose of developing the record depends “upon both the capabilities and diligence employed by those already present and the resources otherwise available to the court in each case.”⁶⁰ However, although their clients’ positions may be aligned with the child, neither the attorney for the parent nor the attorney for the state has the obligation to zealously represent the child’s interest.

The duty of the parent’s attorney, is

[t]o refute the charge of unfitness and to preserve for his client the parent-child relationship threatened by the state. This duty is not modified or diminished in any way by any obligation to protect the “best interests” of the child involved. (Oregon State Bar, Code of Professional Responsibility, Canon 5, 1974).

State ex rel Juv. Dept. v. Wade,
19 Or.App. 314, 322 (1974)

It is perhaps less self-evident but equally true that the state’s attorney cannot and should not be expected to represent the child.⁶¹ Also, a CASA (Court Appointed Special Advocate) should not and cannot represent the child. CASAs are not attorneys,⁶² cannot have confidential conversations,⁶³ and there are continuing concerns about their efficacy.⁶⁴ If achieving

⁶⁰ *Id.* at 609.

⁶¹ Among commentators, the view that counsel for the agency cannot represent the interests of the child is well accepted. See James Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521, 529 (1977–78); Brian Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 CAL. W.L. REV. 16, 31 (1976); James Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 575–76 (1976); D. Bross, *An Introduction to Child Representation in Foundations of Child Advocacy*, 86 FOUND. OF CHILD ADVOCACY (D. Bross and L. Michaels, ed. 1987).

⁶² CASA/GAL Frequently Asked Questions (2018), <https://casakids.net/faq/#:~:text=How%20does%20the%20role%20of,best%20interests%20of%20the%20child>.

⁶³ According to the National CASA Training Curriculum CASA’s may release information to program staff, attorneys, case workers, the court, and “others.” Privacy and Security Training, Texas Casa (1st Ed.) (2015) available at, <http://texascasa.org/wp-content/uploads/2015/10/Privacy-and-Security-Course-Companion.pdf>.

⁶⁴ “Overall, children appointed a CASA have significantly lower odds than children without a CASA of achieving permanency. They have lower odds of being reunified, greater odds of being adopted (if not reunified), and lower odds of being placed in permanent kin guardianship (if not reunified or adopted) than children who are not appointed CASA.” Cynthia Osborne et. al., *The Effect of CASA on Child Welfare Permanency Outcomes*, 1 CHILD MALTREATMENT (2019).

permanency is the goal of a child welfare system, then appointing a CASA can have negative impacts on achieving permanency.⁶⁵ Furthermore, the effectiveness of a CASA can vary widely based on their prior background, and the age and placement type of the children they work with.⁶⁶ The model and level of advocacy CASAs can provide varies by “state, court jurisdiction, local resource availability, and individual volunteer[s].”⁶⁷ The state is charged with the care, supervision, placement and treatment of thousands of children each year and is obligated to allocate resources among all of them. An example of that conflict is found in *In re L*, where the State refused to provide treatment it conceded was the only appropriate one for the child because of budgetary reasons.⁶⁸ The Oregon Court of Appeals in *State ex rel Juv. Dept. v. Cowens*, addressed the issue in the context of an evidentiary issue and held

[w]hen the state files a dependency petition to make the child a ward of the court, it seeks to interfere with the parent-child relationship and therefore to infringe on the child’s interest in that relationship. In that sense, the state’s position is adverse to the child, and evidence presented by the state to establish jurisdiction is offered “against” the child. That conclusion is not altered by the fact that M sought the protection of the State Offices for Services to Children and Families (SOSCF) and apparently believed that the agency was “on her side.” Although a child in a particular case may share an interest with the state in being protected from a sexually abusive home environment, it simply cannot be said that the state represents all of the child’s interests.⁶⁹

Independent counsel is necessary to advocate for the position of a child with decision-making capacity, and to discern, articulate, and advocate for the needs of a younger child.⁷⁰

⁶⁵ *Id.* at 5–8.

⁶⁶ *Id.* at 1.

⁶⁷ *Id.*

⁶⁸ *In re L*, 4 Or.App. 259, 546 P.2d 153, *rev’d* (1976).

⁶⁹ *State ex rel Juv. Dept. v. Cowens*, 143 Or.App. 68, 72, 922 P.2d 1258 (1996).

⁷⁰ The ABA’s 2011 Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings states “the court shall appoint a child’s lawyer for each child who is the subject of a petition in an abuse and neglect proceeding. The appointment of a child’s lawyer must be made as soon as practicable to ensure effective representation of the child and, in any event, before the first hearing.” ABA Model Act Section 3(a). “The appointed

D. *Kenny A. v. Perdue* and Constitutional Right to Counsel by State

In 2005, a United States District Court decided *Kenny A. v. Perdue* determining “children have fundamental liberty interests at stake in deprivation and TPR proceedings . . . includ[ing] a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit.”⁷¹ The Court concluded that children had a due process right to counsel in deprivation proceedings under the state constitution, and that this was in the best interest of not only the child but also the state in their capacity as *parens patriae*.⁷² This protection can only be adequately ensured if children have legal counsel “throughout the

child’s lawyer shall represent the child at all states of the proceedings, unless otherwise discharged by order of court.” ABA Model Act Section 3(e). “When the child is capable of directing the representation by expressing his or her objectives, the child’s lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct.” ABA Model Act Section 7(c). “When a child client has diminished capacity, the child’s lawyer shall make a good faith effort to determine the child’s needs and wishes.” “A substituted judgment determination includes determining what the child would decide if he or she were capable of making an adequately considered decision and representing the child in accordance with that determination. ABA Model Act Section 7(d). The Oregon State Bar’s 2017 Specific Standards for Representation in Juvenile Dependency Cases states “The role of the child-client’s lawyer is to ensure that the child client is afforded due process and other rights and that the child client’s interests are protected. For a child client with full decision-making capacity, the child-client’s lawyer must maintain a normal lawyer-client relationship with the child client, including taking direction from the child client on matters normally within the child client’s control.” OSB Standard 1A. “When it is not reasonably possible to maintain a normal lawyer-client relationship generally or with regard to a particular issue, the child-client’s lawyer should conduct a thorough investigation and then determine what course of action is most consistent with protecting the child client in the particular situation and represent the child client in accordance with that determination. This determination should be based on objective facts and information and not the personal philosophy or opinion of the child-client’s lawyer.” OSB Standard 1C; The National Council of Juvenile and Family Court Judges also believes that a child should have an attorney representing his or her interests in a dependency proceeding, emphasizing that “attorneys and other advocates determine, to a large extent, what information is presented to a judge.” National Council of Juvenile and Family Court Judges, *Improving Court Practice in Child Abuse and Neglect Cases* (Spring 1995); Most modern commentators agree that children who are the subject of legal proceedings benefit from independent representation. Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L. Q. 349 (1993) (“the trend in favor of independent counsel reflects a growing awareness that the state, the courts, and even parents do not adequately represent the child’s interests); Barbara Bennett Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child as Property*, 33 WILLIAM & MARY L. REV. 995 (1992) (“constitutionalizing [the presumption that parents speak for their children] as the parents’ “right” to speak, choose, and live through the child has led to its being too often invoked in situations in which it is, at best, unnecessary or, at worst, oppressive”) (“[t]hese disputes over acknowledging children's independent voices and independent interests indicate the tenacity of the Arisotelian idea, establishing the impossibility of intra family oppression, that parent and child are one, and “there can be no injustice to oneself”).

⁷¹ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

⁷² *Id.* at 1359–61.

course of deprivation and TPR proceedings.”⁷³ Breaking down and weighing the various interests the court goes through the familiar *Mathews* test.

1. *The Private Interest*

The Court determined “Foster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted.”⁷⁴ Further, children in dependency and termination cases have fundamental liberty interest at stake beyond just constraints on their physical liberty.⁷⁵ Thus, the private interest is extraordinarily high.

2. *The Government’s Interest*

In order to protect the government interest, the Court decided, “[S]uch protection can be adequately ensured only if the child is represented by legal counsel throughout the course of deprivation and TPR proceedings.”⁷⁶ “As *parens patriae*,⁷⁷ the government’s overriding interest is to ensure that a child’s safety and well-being are protected.”⁷⁸ Lastly the fundamental interests here “far outweighs any fiscal or administrative burden” that might be imposed by opposing counsel for the child.⁷⁹

⁷³ *Id.* at 1361.

⁷⁴ *Id.* at 1360–61.

⁷⁵ *Id.* at 1360.

⁷⁶ *Id.* at 1361

⁷⁷ “The power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals. For example, under this doctrine a judge may change custody, child support, or other rulings affecting a child’s well-being, regardless of what the parents may have agreed to.” *Parens Patriae* Definition, *Nolo Plain English Law Dictionary* (Online).

⁷⁸ *Kenny A.*, 356 F. Supp. 2d at 1361 citing *Williams v. Crosby*, 118 Ga. 296, 298, 45 S.E. 282 (1903) (“[T]he *parens patriae* must protect the helpless and the innocent”).

⁷⁹ *Id.*

3. *The Risk of Erroneous Deprivation*

The Court found there is a “significant risk” specifically citing “imprecise substantive standards” and concludes that these risks can only be mitigated with the appointment of counsel.⁸⁰

Ultimately the *Kenny* court concluded foster children have both a statutory and a constitutional right to counsel in all deprivation proceedings, including but not limited to termination of parental right proceedings.⁸¹ Several states have now followed suit holding that the due process clause of their state constitution requires the appointment of an attorney for children in cases where the state seeks to remove the child from the custody of their parents, which includes both dependency and termination of parental rights proceedings.⁸²

Statutory Support for the Right to Counsel

Oregon has provided for the right to counsel for both children and parents via statute. For parents, counsel should be provided “whenever the nature of the proceedings and due process so require[s].”⁸³ The factors to be considered by the trial court include: “the duration and degree of invasiveness of the interference with the parent-child relationship that possibly could result from the proceeding; the complexity of the issues and evidence; the nature of allegations and evidence contested by the parent or legal guardian; and the effect the facts found or the disposition in the

⁸⁰ *Id.*

⁸¹ *Id.* at 1360.

⁸² “*Kenny A.* set out a blueprint for establishing a federal constitutional right to counsel for children in dependency proceedings. Other lawsuits have followed *Kenny A.* In Connecticut, children’s attorneys filed suit against the state alleging that systematic inadequate representation by court-appointed counsel violated the rights of the children involved in child protection cases. *Juvenile Matters Trial Lawyers Ass’n v. Judicial Dep’t*, 363 F. Supp. 2d 239 (D. Conn. 2005). Other cases of note include *Matter of T.M.H.*, 613 P.2d 468, 470-471 (Okla. 1980) (“independent counsel must be appointed to represent the children if termination of parental rights is sought”); *Matter of Adoption of K.D.K.*, 940 P.2d 216, 217 (Okla. 1997) (describing *T.M.H.* as a case where “this Court held that a child has a constitutional right to counsel in a A National Report Card on Legal Representation for Abused & Neglected Children proceeding initiated by the state for the termination of parental rights”); and *Roe v. Conn.*, 417 F. Supp. 769, 780 (M. D. Ala. 1976) (children have due process right to counsel in Alabama dependency proceedings under U.S. Constitution).” A Child’s Right to Counsel (2019), <http://caichildlaw.org/Misc/RTC4.pdf>.

⁸³ ORS 419B.205(1).

proceeding may have on later proceedings or events, including but not limited to termination of parental rights or criminal proceedings.”⁸⁴ The child’s right to counsel under the statute is equal to or stronger than the parent’s right. If a child or ward requests counsel, they shall be appointed counsel and the court is responsible for appointing counsel to represent the child when a case is filed under ORS 419B.100 (Jurisdiction).⁸⁵ The trial court is not required to consider any factors beyond determining that the child is financially eligible for appointed counsel.⁸⁶ These statutory protections align with those of several other states who have chosen to protect the rights of their citizens to have counsel in child welfare proceedings.⁸⁷ These states have not only recognized that this is a constitutionally defensible position, but also one with numerous other benefits.

Benefits of Providing Counsel

“Numerous studies and reports point to the importance of competent legal representation for parents, children, and youth in ensuring that salient information is conveyed to the court, parties’ legal rights are protected and that the wishes of parties are effectively voiced.”⁸⁸

In 2015, Governor Kate Brown convened a three-branch Task Force to examine legal representation in the juvenile dependency context.⁸⁹ The final Task Force report emphasized the need for high quality representation: “The ability to obtain access to a skilled advocate is the cornerstone of a fair and just court system. The constitutional and statutory rights of parents and

⁸⁴ ORS 419B.205(1)(a)–(1)(d).

⁸⁵ ORS 419B.195(1).

⁸⁶ *Id.*

⁸⁷ Appointment of counsel for parents is also required in some states by statute. *See, e.g.*, Ariz. Rev. Stat. Ann. § 8-2215 (B) (an additional statute provides for an attorney GAL or CASA for children); 705 Ill. Comp. Stat. Ann. § 405/1-5(1) (2009); Cal. Welf. & Inst. Code § 317 (mandatory for out of home placements); Va. Code § 16.1-266(DC) (mandatory if the parental rights and responsibilities could be lost); Wis. Stat. Ann. § 48.23(2); To see where the right to counsel for children is supported *see*, A Child’s Right to Counsel (2019), <http://caichildlaw.org/Misc/RTC4.pdf>.

⁸⁸ U.S. Dep’t of Health and Human Servs., Children’s Bureau Log No. ACYF-CB-IM-17-02, High Quality Legal Representation for All Parties in Child Welfare Proceedings, Jan 17, 2017.

⁸⁹ S.B. 222, 78th Leg., Reg. Sess. (2015).

children involved in the dependency system must be protected.”⁹⁰ Beyond that, providing children and parents legal counsel for both dependency and termination of parental rights cases increases judicial efficiency, is cost effective, improves outcomes, and is constitutionally defensible.

A. Judicial Efficiency

As the court system continues to experience tremendous backlog due to the ongoing COVID-19 pandemic, it will become paramount that lawyers, judges, and legal professionals are prepared to work together to clear the resulting accumulation of cases when courts are able to return to business as usual. Judicial efficiency will be challenged as the system swells with months of cases that have been put on hold, especially in densely populated counties who have been slower to reopen. As of June 2020, there are 13,018 pending child welfare cases in Oregon—a number slated to grow the longer COVID persists in our communities.⁹¹

The Children’s Bureau at the United States Department of Health and Human Services released an informational memorandum outlining the evidence to support legal representation for children and parents.⁹² Among the evidence are indications that “legal representation contributes to or is associated with increases in party perceptions of fairness; increases in party engagement in case planning, services and court hearings; more personally tailored and specific case plans and services; and expedited permanency.”⁹³ All of these outcomes will allow for a more efficient system as parties return to court and will lessen the challenges the system will already be facing.

⁹⁰ Oregon Task Force on Dependency Representation, Final Report (July 2016), https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf.

⁹¹ Oregon Circuit Courts Juvenile Dependency Statistics (June 8, 2020), <https://app.powerbigov.us/view?r=eyJrIjoieYjYmFkYzktZDM4NC00YzJkLThlM2UtNGYzNmMzY2YxNjMxIiwidCI6IjYxMzNIYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MwY4ZiJ9>.

⁹² U.S. Dep’t of Health and Human Servs., Children’s Bureau Log No. ACYF-CB-IM-17-02, High Quality Legal Representation for All Parties in Child Welfare Proceedings, Jan 17, 2017.

⁹³ *Id.*

Parties who believe a system is fair are “more likely to comply with court orders, return for further hearings, trust the system, and will be less likely to repeat offenses.”⁹⁴ Without counsel, parents and children will be left to navigate a system swirling with complexity and leave them to not only navigate it but to do so alone for what will likely be well over a year.⁹⁵

B. Cost Effective

The impacts of COVID on the state budget are not yet fully known. Decreasing costs will be important, but so too will be retaining policies and practices that are cost effective. For child welfare, reducing the amount of time children spend in care and improving timelines for cases, both of which are accomplished by providing counsel to parents and children, will deliver cost savings at a time where they are critical.⁹⁶ States have studied the financial benefits of appointing counsel in the child welfare setting and have noticed the significant cost-saving benefits representation can have on the state budget.⁹⁷ Having counsel decreased the time it took to achieve permanency, reduced the amount of time children spent in care, and saved money in administrative costs.⁹⁸ There is also evidence that early appointment of an attorney for children

⁹⁴ *Id.* citing Steve Leben & Kevin Burke, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REVIEW, 4–17 (2007); Tom Tyler & Nourit Zimmerman, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORD. URBAN L. J., 473–507 (2010); Tom Tyler, *Procedural Justice and the Courts*, 44 COURT REVIEW, 26–31 (2007); Tom Tyler, *WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE* (New Haven: Yale University Press, 1990).

⁹⁵ In Oregon the median number of days from a filed dependency case to TPR is 485 or 1.33 years and the median number of days from a filed dependency petition to termination or relinquishment is 653 or 1.79 years. Oregon Circuit Courts Juvenile Dependency Statistics (June8, 2020), <https://app.powerbigov.us/view?r=eyJrIjoiYjhhYmFkYzktZDM4NC00YzJkLThlM2UtNGYzNmMzY2YxNjMxIiwidCI6IjYxMzNlYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWEyZiJ9>.

⁹⁶ U.S. Dep’t of Health and Human Servs., Children’s Bureau Log No. ACYF-CB-IM-17-02, High Quality Legal Representation for All Parties in Child Welfare Proceedings, Jan 17, 2017; High quality representation has been associated with better outcomes and shorter times in care for children in dependency cases. *A Child’s Right to Counsel* (2019), <http://caichildlaw.org/Misc/RTC4.pdf>.

⁹⁷ Andrew Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, CHILDREN AND YOUTH (May 21, 208) available at, <https://www.issueab.org/resource/expediting-permanency-legal-representation-for-foster-children-in-palm-beach-county.html>.

⁹⁸ *Id.* 14, 22–25.

could significantly expedite permanency.⁹⁹ Achieving permanency more quickly reduces the overall number of days children spend in care and ultimately saves the state money at a time when the budget is strained.

C. Improves Outcomes

Beyond improving judicial efficiency and being cost effective, providing counsel to parents and children improves outcomes for those families who are child welfare involved. Having counsel increases the amount of visitation and parenting time¹⁰⁰ and “maintaining family contact and regular visitation is the single most important factor in supporting a child’s attachment to his or her parents, siblings and other family members and can lessen both the child’s and the parent’s anxiety about the child being placed in substitute care. Frequent high-quality visits support parental engagement and motivation for change.”¹⁰¹ Also, by achieving permanency at a faster rate, families reach better long-term outcomes.¹⁰²

Conclusion

Dependency cases in Oregon pose high stakes and they create high pressure: decisions made in dependency courtrooms across our state have many short- and long-term consequences for Oregon’s most vulnerable children and families, consequences that can be far reaching.¹⁰³ Both parents and children as parties to their dependency case have significant liberty interests at

⁹⁹ See Duquette et. al., (2016) *Children’s Justice: How to Improve Legal Representation of Children in the Child Welfare System*, ABA Publications; see also Robin Pott, QIC Findings: The Flint MDT Study, in CHILDREN’S JUSTICE (2017).

¹⁰⁰ U.S. Dep’t of Health and Human Servs., Children’s Bureau Log No. ACYF-CB-IM-17-02, High Quality Legal Representation for All Parties in Child Welfare Proceedings, Jan 17, 2017.

¹⁰¹ Oregon Department of Human Services, *DHS Child Welfare Procedure Manual* at 846 (June 9, 2020), https://www.dhs.state.or.us/caf/safety_model/procedure_manual/Oregon-DHS-Child-Welfare-Procedure-Manual.pdf.

¹⁰² Children’s Bureau, Supporting Successful Reunifications (October 2017), at https://www.childwelfare.gov/pubPDFs/supporting_reunification.pdf.

¹⁰³ About the CDC-Kaiser ACE Study (updated April 2020), <https://www.cdc.gov/violenceprevention/childabuseandneglect/cestudy/about.html>.

stake.¹⁰⁴ Independent representation for children is both good public policy and constitutionally mandated in most, if not all cases.¹⁰⁵ There is widespread agreement among judges, stakeholders and juvenile law experts that children require legal representation in child welfare proceedings.¹⁰⁶

¹⁰⁴ ORS 419B.875; *Lassiter v. Dept. of Social Services*, 452 U.S. 18 (1981).

¹⁰⁵ *Lassiter*, 452 U.S. 18 (1981); *State ex rel Juv. Dept. v. Grannis*, 67 Or.App. 565 (1984); *F v. C*, 24 Or.App. 601 (1976).

¹⁰⁶ Oregon Task Force on Dependency Representation, Final Report (July 2016), https://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_TaskForce_Final_Report_072516.pdf.