The State of New Hampshire

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No. 2011-0647

IN RE C.M. AND A.M.

ON INTERLOCUTORY TRANSFER

BRIEF OF AMICUS CURIAE, THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL (NCCRC)

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PRELIMINARY STATEMENTS

Amicus hereby incorporates by reference the following preliminary statements in the Parents' Brief in Support of Interlocutory Transfer: the Question Presented and the Statement of the Case and Facts.

STATEMENT OF INTEREST OF *AMICUS*

Formed in January 2004, the National Coalition for a Civil Right to Counsel (NCCRC) is an unincorporated association that seeks to advance the recognition of a right to counsel in civil cases involving fundamental interests and basic human needs, such as shelter, safety, sustenance, health, and child custody. NCCRC is comprised of over 220 participants from 35 states, including civil legal services attorneys, supporters from public interest law firms, and members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others.

NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel, including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates on a unanimous vote) that urges federal, state and territorial governments to recognize a right to counsel in certain civil cases.[1] By promoting such a civil right to counsel, NCCRC works tirelessly to try to close the "justice gap" in the United States that has grown to the point where less than 20 percent of the legal needs of poor people are addressed.[2] Among its body of work is research into potential support for a civil right to counsel in the constitutions of each of the fifty states (and the District of Columbia), and a comparative analysis thereof.

NCCRC has an interest in this case because the right to parent is fundamental in law and is, to parents themselves, as precious as life itself. The indigent parents that many NCCRC

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[1] American Bar Association Resolution 112A (Aug. 2006), *available at* http://www2.americanbar.org/sdl/Documents/2006_AM_112A.pdf.

[2] Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

participants represent frequently lack the educational background or knowledge to be able to present their cases themselves before the trial court in any meaningful or effective way. Consequently, parents and their interests must be protected through the presence of counsel. In recognition of this, the great majority of states currently provide a statutory right to appointed counsel for indigent parents in dependency matters, while some states have also found a constitutional right to counsel.

NCCRC is concerned that the decision of the New Hampshire legislature to repeal the statutory right to counsel in dependency proceedings threatens to put the state's finances above protection of the fundamental rights of parents, and consequently NCCRC has an interest in helping to seek recognition of the constitutional right to counsel in New Hampshire dependency proceedings.

SUMMARY OF ARGUMENT

There is significant consensus in the United States that dependency matters implicate the fundamental rights of parents and that parents involved in such proceedings are therefore in critical need of appointed counsel. As a result, a significant majority of the states provide an absolute and unqualified right to counsel in dependency proceedings. Some courts have also rejected the case-by-case appointment approach for other types of civil cases involving fundamental rights.

While the importance of the fundamental interest at stake is reason enough to explain the nationwide consensus on the right to counsel in dependency proceedings, there are other compelling reasons to eschew a case-by-case approach in cases involving fundamental rights in order to ensure due process and fundamental fairness. For instance, a case-by-case approach can lead to the use of appointment criteria that are either difficult to apply correctly or vary from court to court, leading to an untenable situation where a litigant's access to justice depends on where in the state the litigant lives.

Additionally, parents lacking counsel cannot adequately present the case's merits and complexities to a judge in support of their request for appointment of counsel. And in order to ensure that the dependency proceeding comports with due process not just at the beginning but throughout, a trial court denying counsel at the outset will have to continually monitor the progression of the case to ensure that the case complexity or other factors do not develop that later necessitate the appointment of counsel.

Finally, the case-by-case approach creates serious problems for dependency proceedings when some inevitable erroneous denials of counsel are appealed. Because such errors are structural and require automatic reversal of the dependency adjudication, the case-by-case

approach will be responsible for significant delays that are contrary to the legislative concern for rapid resolution of dependency matters and that will harm both the children and parents involved in the proceedings. At the same time, some incorrect denials of counsel will never be appealed due to the inability of unrepresented litigants to prosecute the appeal fully or properly, an unacceptable risk given the fundamental right at stake.

For all of these reasons, *amicus* urges this court to not be an outlier but rather join the consensus of states that have protected the fundamental rights of parents by providing a categorical right to counsel in dependency matters.

ARGUMENT

I. The Vast Majority of States Have Rejected a Case-by-Case Approach for Dependency Cases, Even After *Lassiter.*

In *Lassiter v Durham Co. Dep't of Soc. Servs.,* 452 U.S. 18 (1981), while the U.S. Supreme Court adopted a case-by-case approach to the appointment of counsel in termination of parental rights proceedings under the federal constitution, it conceded that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well." *Id*. at 33-34. It also pointed out that "[a] number of courts have held that indigent parents have a right to appointed counsel in child dependency or neglect hearings …" *Id*. at 30 n.6.

This nationwide consensus on a categorical right to counsel in dependency proceedings has come into even clearer focus since *Lassiter* was decided in 1981. More than three-quarters of states (thirty seven in all) currently provide a clear and unequivocal statutory or rule-based right to appointed counsel in dependency proceedings,[3] while courts in seven of those states have

[3] Ala. Code § 12-15-305(b); AK R CINA Rule 12; A.R.S. § 8-221(B); A.C.A. § 9-27-316(h); C.R.S. § 19-3-202; Conn. Gen. Stat. § 46b-135(b); De. R. Fam. Ct. RCP 206, De. R. Fam. Ct. RCP 207 (where DFS is a party), *Hughes v. Division of Family Services*, 836 A.2d 498, 509 (Del. Supr. 2003) ("In 2002, the Family Court Civil Procedure Rules were amended to provide for mandatory appointment of an attorney in the case of an indigent party if so requested by that party ... Consequently, it should be unnecessary to conduct a harmless error analysis in future cases because the Family Court will routinely be appointing counsel to represent an indigent parent in a dependency and neglect proceeding"); D.C. Code § 16-2304(b)(1), D.C. SCR-Neglect & Abuse Rule 42(a); Fla. Stat. § 39.013(1); O.C.G.A. § 15-11-6; Id. R. Juv. Rule 37(d); 705 ILCS 405/1-5(1); Ind. Code § 31-34-4-6; Iowa Code § 232.89(1); Kan. Stat. Ann. § 38-2205(b); La. Ch.C. Art. 608; 22 M.R.S. § 4005(2); Md. Code Ann., Cts. & Jud. Proc., § 3-813; M.G.L.A. 119 § 29; MCR 3.915(B), MCL 712A.17c(4); Mt. St. § 41-3-425; Ne. Stat. § 43-279.01; N.J. Stat. 9:6-8.43; N.M. Children's Ct. Rule 10-314, N.M. Stat. § 32A-4-10(B); N.Y. Fam. Ct. § 262(a)(iv); N.C. Gen. Stat. § 7B-602(a), N.C. Gen. Stat. Ann. § 7A-451(a)(12); OH ST § 2151.352, OH ST JUV P. Rule 4; OK ST T. 10A § 1-4-306(A)(1)(a); 42 Pa CSA § 6337; RI Gen. Laws § 14-1-31 (absolute statutory right to counsel in Title 14 dependency proceedings), R.I. Gen. Laws § 40-11-14 (absolute statutory right to counsel in Title 40 dependency proceedings; "court may, in its discretion" language only applies to court choosing between PD and private counsel appointments, not whether to appoint at all); S.C. Code Ann. § 63-7-1620(3); S.D. Codified Laws § 26-7A-31; Tenn. Code Ann. § 37-1-126(a)(2)(B), Tn. Sup. Ct. Rule 13(d)(2)(B); U.C.A. 1953 § 78A-6-1111(1)(a); VT R FAM P Rule 2(c) and Vt. Office of Defender General, *A Guide for Parents in Chins Cases: What To Expect From Your Lawyer* (2001), *available at* http://www.vermontjudiciary.org/GTC/Family/SharedDocuments/CHINS%20Web%20Booklet%207_2011.pdf (once court is involved in a family proceeding, "A hearing will be held. You are entitled to a lawyer."); Wa. St. §

found an absolute constitutional right to counsel to exist as well[4] (with some of those decisions coming down after *Lassiter* was issued).[5] Five additional states provide a statutory right to counsel either in most dependency proceedings or in most phases of all dependency proceedings.[6]

Notably, this consensus around a categorical right to counsel in dependency has developed notwithstanding the fact that *Lassiter* provided an excuse for states to provide fewer rights. The Supreme Court has frequently recognized the propriety of states being more protective than the federal constitution with respect to individual rights. *See e.g. Lassiter*, 452 U.S. at 33 ("[a] wise public policy … may require that higher standards be adopted than those minimally tolerable under the [federal] Constitution"); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("a state court is entirely free to read its own State's constitution more

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13.34.090(2) (absolute statutory right to counsel for dependency), Wa. St. § 13.32A.160(1)(b) (absolute statutory right to counsel specifically related to out-of-home placements); W. Va. Code § 49-6-2(a), W. Va. Code, § 29-21-2(2); Wyo. Stat. § 14-3-422.

[4] *In re Pima County Juvenile Action J-64016*, 619 P.2d 1073, 1075 (Ariz. App. 1980) (finding constitutional right to counsel in dependency, and relying on *Arizona State Department of Public Welfare v. Barlow*, 296 P.2d 298 (Ariz. 1956)); *S.B. v. Dep't of Child. & Fam.*, 851 So. 2d 689, 692 (Fla. 2003) (finding constitutional right to counsel in dependency if proceeding could lead to criminal charges); *Danforth v State Dept*, 303 A.2d 794 (Me. 1973) (finding constitutional right to counsel in dependency proceedings); *In re Ella B.,* 285 N.E.2d 288 (N.Y. 1972) (relying on both state and federal constitutional grounds to find constitutional right to counsel); *In re Evan F.*, 815 N.Y.S.2d 697 (N.Y. App. Div. 2006) (relying on *Ella B*); *Matter of FKC*, 609 P.2d 774 (Okla. 1980) (finding constitutional right to counsel in dependency based on prior holding in *In re Chad S.*, 580 P.2d 983, 984-985 (Okla. 1978)); *In re Welfare of Myricks*, 533 P.2d 841 (Wash. 1975) (finding constitutional right to counsel in dependency); *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1974) (finding constitutional right to counsel in dependency); *Matter of Lindsey C.*, 473 S.E.2d 110 (W.Va. 1995) (reaffirming *Lemaster* at least with respect to TPR and probably for abuse/neglect as well).

[5] See *S.B.* (Florida Supreme Court), *Evan F* (New York Appellate Division), and *Lindsey C* (Supreme Court of West Virginia), all *supra* at note 4.

[6] Cal. Wel. & Inst. Code §§ 317(a)(1) (discretionary) & 317(b) (required if state seeks out-of-home placement); Ky. Stat. § 620.100(1)(b) (absolute statutory right to counsel triggered after temporary removal hearing, if court determines that further proceedings are required); N.D. Cent. Code § 27-20-26(1) (absolute statutory right to counsel except at the "informal adjustment" phase); Tex. Fam. Code §§ 107.021(a) (discretionary) & 107.013(c) (appointment required in dependency proceedings where state seeks to install managing conservator); Va. Code Ann. § 16.1-266(D) (absolute statutory right to counsel for adjudicatory/transfer hearing, but not for dispositional hearing).

broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.")[7]

"A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed …" *Powell v. Alabama*, 287 U.S. 45, 73 (1932). The national and growing consensus concerning the categorical right to counsel in dependency cases similarly compels the conclusion that such a right is both required and appropriate and that New Hampshire should join the overwhelming consensus rather than being an outlier.

II. As with Dependency, Some Courts Have Declined to Use the Case-by-Case Approach For Other Types of Cases Implicating Fundamental Rights.

Long before *Lassiter*, the Supreme Court held the right to counsel in criminal cases should be determined on a case-by-case basis. *Betts v. Brady*, 316 U.S. 455 (1941). By the time the Court revisited the question 22 years later in *Gideon v. Wainwright*, 372 U.S. 335 (1963), "a succession of cases had steadily eroded the old [*Betts v. Brady*] rule and proved it unworkable." *Miranda v. Arizona*, 384 U.S. 436, 532 (1986) (White, J., dissenting). Indeed, *Betts* "had repeatedly resulted in messy and friction-generating factual inquiries into every case."[8] As a consequence, even before *Gideon* was heard, the Court had already "beg[u]n to carve out certain

[7] The Supreme Court's recent decision in *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011) (where opponent in civil contempt is private party unrepresented by counsel, no right to counsel in civil contempt except possibly for "unusually complex" cases) does nothing to change this equation. Not only is *Turner* very narrow in scope (declining to address whether there is a categorical right to counsel in civil contempt cases where the opponent is either the state or represented by counsel), but also it leaves unchanged the Court's recognition that states have the power to provide broader rights. And in fact, prior to *Turner*, there had long been a consensus that indigent defendants are entitled to appointment of counsel in contempt proceedings. *See* Marjorie Caner, *Right to Appointment of Counsel in Contempt Proceedings*, 32 A.L.R.5th 31 (2011) (listing numerous state court decisions finding right to counsel); Ala. Code § 15-12-20; CT R. Super. Ct. Fam. § 25-63(a); Ky. Stat. § 31.100(4)(c) (defining serious crime to include "Any legal action which could result in the detainment of a defendant"); Ky. Stat. § 31.110(1) (providing right to counsel to those accused of "serious crime"); MD Rule 15-206(e)(2); Minn. Gen. R. Prac. 357.03; NJ R. Ch. Div. Fam. Pt. R. 5:3-4(a); N.Y. Fam. Ct. § 262(a)(vi); N.C. Gen. Stat. § 7A-451(a)(1); OH ST § 2705.031(C)(2); OK ST DIST CTS Rule 29; W. Va. Code, § 29-21-2(2).

[8] Kevin Shaughnessy, *Lassiter v. Department of Social Services: A New Interesting Balancing Test for Indigent Civil Litigants*, 32 Cath. U. L. Rev. 261, 282 (1982).

exceptions to the *Betts* case-by-case approach."[9] Notably, 22 states joined an amicus brief urging the Court to abandon the case-by-case approach, arguing that "the rule has been, and is being, inconsistently and confusingly applied, and the appellate decisions are contradictory and almost invariably marked with sharp dissents."[10] The Court found that its *Betts* ruling had led to "a continuing source of controversy and litigation in both state and federal courts." 372 U.S. at 338. As a result, it held that indigent defendants charged with felonies have a categorical right to counsel, completely abandoning the *Betts v. Brady* case-by-case approach. *Id.*

Some state courts have rejected the *Lassiter* case-by-case approach for certain civil cases involving fundamental rights, such as adoption, termination of parental rights (TPR), paternity, and contempt. *See e.g. Matter of K.L.J.*, 813 P.2d 276, 282 n.6 (Alaska 1991) (for nonconsensual adoption cases, "we reject the case-by-case approach set out by the Supreme Court in *Lassiter*. Rather, our view comports more with the dissent … we agree with Justice Blackmun's … caution about reviewability of case-by-case decision making"); *State v. Pultz*, 556 N.W.2d 708, 714 (Wis. 1996) (rejecting case-by-case approach for civil contempt); *Lavertue v. Niman*, 493 A.2d 213, 218-19 (Conn. 1985) (rejecting case-by-case approach for paternity); *Corra v. Coll*, 451 A.2d 480, 487 (Pa. Super. Ct. 1982) (in termination cases, "we do not believe that fundamental fairness may be maintained by determining whether an indigent is entitled to appointed counsel on a case-by-case basis … as the *Lassiter* Court held ...")

The nationwide reaction to *Lassiter* with respect to termination of parental rights cases is one telling rejection of the case-by-case approach where parental rights are at issue. Not only do

[9] *Id*. at 266 (explaining that after *Betts* but before *Gideon*, "[t]he Court found a per se right to counsel where the defendant was illiterate, mentally handicapped, or a minor, and where the statute or legal question involved was extremely complex.")

[10] Amicus Brief, State Government Amici Curiae, *Gideon v. Wainwright,* 1962 WL 75209 at *3 (U.S. 1962)

all but six states now provide an absolute right to counsel,[11] but twelve of the seventeen states that did not provide a right prior to *Lassiter* chose to provide a categorical right after *Lassiter*,[12] while at least eleven jurisdictions that had found a categorical constitutional right to counsel prior to *Lassiter* re-grounded their holding in their state constitutions subsequent to *Lassiter*.[13]

Additionally, a few courts have used a case-by-case approach for a certain type of civil case only to later abandon it (much as the Supreme Court did in moving from *Betts* to *Gideon*). For example, in *Sword v. Sword*, 249 N.W.2d 88, 93 (Mich. 1976), the Michigan Supreme Court held the right to counsel in civil contempt proceedings "does not rise to the level of a guaranteed constitutional right." Instead, courts could appoint counsel only if "special circumstances" existed. *Id.* at 93. Only fourteen years later, and despite the intervening *Lassiter* decision, the court abandoned the case-by-case approach in *Mead v. Bachlor*, 460 N.W.2d 493 (Mich. 1990)

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[11] Rosalie Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter,* 14 Touro L. Rev. 247, 260-63 (1997).

[12] *Id*.

[13] *K.P.B. v. D.C.A.*, 685 So.2d 750, 752 (Ala. Civ. App. 1996) (construing *Ex Parte Shuttleworth*, 410 So.2d 896 (Ala. 1981) to require counsel in TPR cases under state constitution); *In Interest of E.H.*, 609 So.2d 1289, 1290 (Fla. 1992) (reaffirming *In re D.B.*, 385 So.2d 83 (Fla. 1980)); *State in Interest of Johnson*, 465 So.2d 134, 138 (La. Ct. App. 1985) (reaffirming *State In Interest of Howard*, 382 So.2d 194 (La. Ct. App. 1980)); *Petitions to Dispense with Consent to Adoption*, 90 N.E.2d 1207, 1213 n.6 (Mass. App. 1986) (relying upon *Department of Pub. Welfare v. J. K. B.,* 393 N.E.2d 406 (Mass. 1979)); *New Jersey Div. of Youth and Family Services v. B.R.*, 929 A.2d 1034, 1036 (N.J. 2007) (reaffirming *Crist v. N.J. Div. of Youth & Fam. Servs.*, 320 A.2d 203 (N.J. 1974)); *In re Evan F.*, 29 A.D.3d 905, 906; 815 N.Y.S.2d 697 (2006) (reaffirming *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972)); *In re Johnson*, 1982 WL 8498 at *3 (Ohio App. 1982) (unpublished) (relying upon *State, ex rel. Heller, v. Miller*, 99 N.E.2d 66 (Ohio 1980), and commenting that *Heller* relied upon Art. I, § 1 of the Ohio Constitution as well as Fourteenth Amendment, and therefore "its impact … is not diminished, if it might otherwise be thought to be, by the recent decision of the United States Supreme Court in *Lassiter*"); *In re A.S.A.*, 852 P.2d 127 (Mont. 1993) (finding state constitutional right, and quoting approvingly from *Lassiter* dissent); *In re D.D.F.*, 801 P.2d 703, 706 (Okla. 1990) (reaffirming *In re Chad S.,* 580 P.2d 983, 985 (Okla.1978), and holding that "although the federal constitution does not require that counsel be appointed in all termination proceedings, we believe that the rights at issue are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution, Art. 2, § 7"); *King v. King*, 174 P.3d 659, 662 n.3 (Wash. 2007) (indicating court might still agree with *In re Luscier*, 524 P.2d 906 (Wash. 1974), which had found right to counsel prior to *Lassiter*); *In re Welfare of J.M.,* 125 P.3d 245 (Wash. App. 2005) (relying upon *Luscier*); *Matter of Lindsey C.,* 473 S.E.2d 110 (W. Va. 1995) (reaffirming *State ex rel. LeMaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1974) and adding that *Lassiter* did not "relieve[] this State of compliance with one or more of these protections which have been recognized in West Virginia as constitutionally mandated", because right grounded in Art. III, § 10 of West Virginia Constitution).

and created a categorical right to counsel in civil contempt cases. See also *McBride v. McBride*, 431 S.E.2d 14 (N.C. 1993) (overruling *Jolly v. Wright*, 265 S.E.2d 135 (N.C. 1980), which had declared case-by-case approach to right to counsel in civil contempt proceedings, and adopting instead a categorical right to counsel).[14]

III. A Case-By-Case Approach Threatens to Create Inconsistent, Erroneous, or Unachievable Appointment Standards.

Courts using a case-by-case approach must "develop pretrial procedures and standards in order to determine properly the need for counsel. There is no guarantee that these standards will produce equitable decisions in every case."[15] In fact, it is likely that courts in different parts of the state, faced with nebulous tests such as "fundamental fairness" or "risk of error," will develop different standards and thus come to different conclusions regarding appointment of counsel for cases that are substantially similar. As the *Gideon* state government *amici* pointed out, "Obviously there can be no semblance of uniformity in the conduct of such proceedings, for the very matter which will shock the conscience of one judge will fail to penetrate the repose of another."[16] The *Gideon amici* gave the example of three sets of cases where "each set []

[14] It is true that both *Mead v. Bachlor* (Michigan) and *McBride v. McBride* (North Carolina) were based on interpretations of the federal constitution that were called into question by the U.S. Supreme Court's decision in *Turner v. Rogers*. However, neither decision falls squarely under *Turner*, given that *Turner* expressly declined to address if there is a right to counsel in civil contempt cases where the opponent is either the state or represented by counsel. *Turner*, 131 S.Ct. at 2520. In Michigan, there exists a "Friend of the Court" judicial office that can petition for civil contempt on behalf of the parent entitled to child support, and such office had in fact petitioned for contempt in *Mead*. 460 N.W.2d at 495. Moreover, where the Friend of the Court is not an attorney, a trial court has the power to appoint counsel to represent the Friend of the Court. MCL 552.522. As to North Carolina, while the history in *McBride* is less clear as to who in that case petitioned for contempt, the case that *McBride* overturned (*Jolly v. Wright*) involved a petition by the state. *Jolly*, 265 S.E.2d at 137. Additionally, the change of direction in both *Mead* and *McBride* from a case-by-case to a categorical approach was not based solely on an interpretation of evolving federal jurisprudence, but also on a reevaluation of the complexity of the civil contempt proceedings in each state. *Mead*, 460 N.W.2d at 497; *McBride*, 431 S.E.2d at 17.

[15] Shaughnessy, 32 Cath. U. L. Rev. at 283.

[16] Amicus Brief, State Government Amici Curiae, *Gideon v. Wainwright,* 1962 WL 75209 at *18 (U.S. 1962).

contained within itself substantially similar fact situations, [but] the right to appointed counsel was denied in the first case of each pair, [and] upheld in the second-clearly a consequence of the vague standard of 'denial of fundamental fairness' which *Betts* has advanced."[17]

Some courts in the state may also deny counsel due to applying incorrect appointment standards. An examination of the struggles of some courts to implement standards fitting the *Lassiter* methodology reveals this danger. *Lassiter* specified that, for civil cases raising a Fourteenth Amendment right to counsel claim, the trial court is to weigh the three elements of *Mathews v. Eldridge*, 424 U.S. 319 (1976) against the presumption that a litigant only has a right to counsel when physical liberty is imperiled. *Lassiter*, 452 U.S. at 26-27. Despite the Court's outlining of the proper test to use in each case, many courts since *Lassiter* have mistakenly declared there is *never* a Fourteenth Amendment right to counsel in *any* civil proceedings.[18] Others have errantly treated the *presumption* as a *bar*,[19] and have thus "in some cases [used the presumption] as the entire analysis."[20] Still others have failed to even engage in a *Lassiter* analysis at all,[21] pointing only to the lack of a statutory right to counsel in the jurisdiction.[22]

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[17] Id. at *19-20.

[18] *See e.g. Goodin v. Department of Human Services, State of Miss.*, 772 So.2d 1051, 1055 (Miss. 2000) ("[T]his Court has held that the right[] to appointed counsel [does] not apply in civil proceedings."); *Schwarz v. Duncan*, 2000 WL 33250572 at *1 (Utah App. 2000) (unpublished) (per curiam) ("The appellant also is incorrect in her assertion that she was entitled to court-appointed counsel, as there is no right to counsel in a civil case"); *Chong v. Anderson*, 251 P.3d 47 (Hawai'i App. 2011) ("Anderson does not have a right to effective assistance of counsel because there is no right to counsel in a civil case."); *In re Villarreal*, 304 B.R. 882, 886 (8th Cir. BAP 2004) ("A debtor has no right to counsel in a bankruptcy proceeding.")

[19] *See e.g. Goodin*, 772 So.2d at 1055 (Mississippi Supreme Court notes that "[t]he United States Supreme Court has ruled ...that counsel should be appointed *only* in cases in which, if the unrepresented party loses, he 'may be deprived of his physical liberty'" (emphasis added)); *Ferrell v. Countryman*, 398 B.R. 857, 866 (E.D. Tex. 2009) ("The right to counsel only exists in favor of an indigent whose physical liberty is at stake" (citation omitted)).

[20] Clare Pastore, *Life After Lassiter: An Overview of State-Court Right-to-Counsel Decisions*, 40 Clearinghouse Rev. J. of Poverty L. and Pol'y 186, 187 (2006).

[21] William Wesley Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 Loy. U. Chi. L.J. 195, 202 (1996).

Some appellate courts have even concluded that a trial court's failure to appoint counsel for a litigant is conclusively validated after the fact by the trial court's final ruling against that litigant on the merits, ignoring the fact that such merits ruling was caused by the lack of counsel.[23]

Finally, some trial courts may be reluctant to appoint counsel for financial or other reasons, which can lead to varying use of overly rigorous appointment standards. This danger is seen in the eight states that authorize civil court judges via statute to appoint counsel in any civil case.[24] The high courts in some of these eight states explicitly set a high bar even when the statute does not do so. *See e.g. Gibson v. Tolbert,* 102 S.W.3d 710, 713 (Tex. 2003) (requiring exceptional circumstances," which court defined as "rare and unusual.")[25] While the high courts and legislatures of most of the other states have left the trial courts free to devise flexible appointment criteria, the trial courts in these states are likely setting high bars themselves, given that *amicus*'s organizational members in those states report that counsel is very rarely

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[22] See e.g. *Rhine v. Deaton*, 2009 WL 1866256 (June 25, 2009) (seeking certiorari in U.S. Supreme Court to review Texas trial court's failure to apply *Lassiter* and trial court's statement that the absence of statutory authorization to appoint deprived trial court of all appointment authority).

[23] In *Smith v. Indiana Dept. of Correction*, 878 N.E.2d 540 (Ind. App. 2007) (unpublished), the trial court declined to appoint counsel for an indigent prisoner (Smith) in a case involving prisoner discipline and torts claims. The appointment statute in question provided trial judges discretion to appoint counsel in any type of civil case, and required the trial judge to prospectively predict the merits of the case in deciding whether to appoint. On appeal, after first affirming the substantive ruling in favor of the Department of Corrections (DOC), the court concluded that since it had already ruled in favor of DOC on the merits, "Smith was unlikely to, and indeed did not, prevail on his claims. Under these circumstances, the trial court was *required* to deny Smith's request for appointment of counsel." However, the appellate court, by looking to the outcome that occurred *without* counsel, failed to examine what evidence the litigant might have brought out or what trial errors might have been avoided if there *had* been counsel. And by bootstrapping a review of the denial of counsel to the actual outcome of the case, the appellate court essentially obviated the purpose of appellate review, since a litigant denied counsel who subsequently prevails in his case would never appeal.

[24] 735 ILCS 5/5-105(g); Ind. Code § 34-10-1-2; Ky. Stat. § 453.190(1); Mo. Stat. § 514.040(1); N.Y. C.P.L.R. § 1102(a); Tenn. Code Ann. § 23-2-101; Tex. Govt. Code § 24.016 (district court) and Tex. Govt. Code § 26.049 (county court); Va. Code Ann. § 17.1-606.

[25] The court added that "while several courts of appeals have considered whether exceptional circumstances existed in a particular case, none, until this case, have concluded that exceptional circumstances, in fact, existed. Rather, they have uniformly determined that the particular cases before them were not exceptional." *Id*. at 713.

appointed.[26] Given the budgetary pressures that caused the repeal of the statutory right to counsel in New Hampshire, the risk seems high that New Hampshire trial judges will feel pressure to limit the circumstances under which they find discretionary appointment necessary.

The end result of all of these standards issues is that parents in one county or court may have a greater likelihood of receiving counsel in dependency matters than those in another for reasons unrelated to the nature of their cases, causing in essence "justice by geography." Reacting to this concern, the Wisconsin Supreme Court rejected the case-by-case approach in favor of a categorical right to counsel in contempt proceedings and stated its desire to ensure that "procedural norms are devised to ensure that justice may be done in every case." *Pultz*, 556 N.W.2d at 715 (citing Justice Blackmun's dissent in *Lassiter*).

The risk that a parent's right to counsel in dependency proceedings might hinge on where he or she happens to live in the state is particularly objectionable in light of the extremely important interest at stake in dependency cases. The U.S. Supreme Court has distinguished cases involving "state controls or intrusions on family relationships" from the "mine run" of other types of civil cases, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996), and noted that care of one's children is a right "far more precious ... than property rights." *May v. Anderson,* 345 U.S. 528, 533 (1953). And this Court has made clear that "[t]he role of the parents in the life of the family has attained the status of a fundamental human right and liberty." *Stanley D. v. Deborah D.*, 124 N.H. 138, 142 (1983) (citation omitted). *See also State v. Robert H.*, 118 N.H. 713, 715 (1978) ("the loss of one's children can be viewed as a sanction more severe than imprisonment.")

[26] This impression is substantiated by the dearth of reported case law under these statutes despite their advanced age.

IV. Unrepresented Parents in Dependency Cases Cannot Know and Present to a Judge the Facts and Legal Theories Requiring Development by Appointed Counsel, and Judges Are Burdened With Continually Monitoring the Proceedings to Ensure the Need for Appointed Counsel Has Not Developed.

In his *Lassiter* dissent, Justice Blackmun expanded upon the difficulty and inefficiency of compelling a court weighing the right to counsel to "determine *in advance* what difference legal representation might make," as it requires the judge to "examine the State's documentary and testimonial evidence *well before the hearing* so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent's case." 452 U.S. at 51 n.19 (Blackmun, J., dissenting) (emphasis added). The difficulty of this prognostication greatly increases the chance that a judge will make a mistake:

> It will not always be possible for the trial court to predict accurately, in advance of the proceedings, what facts will be disputed, the character of cross-examination, or the testimony of various witnesses. These factors increase the possibility that appointment of counsel will be denied erroneously by the trial court.[27]

Courts in some states weighing the right to counsel in various civil contexts have agreed with these assessments, particularly where fundamental rights are at stake. In *Lavertue*, *supra*, the Connecticut Supreme Court, in finding an absolute right to counsel in paternity cases, pointed out that

> It is often difficult to assess the complexities which might arise in a given paternity trial before that trial is held. Thus, a case-by-case approach would necessarily require an after-the-fact evaluation of the record to determine whether appointed counsel could have affected the result reached in a paternity proceeding … We decline to follow such an approach. (citation omitted)

493 A.2d at 219. *See also In re "A" Children*, 193 P.3d 1228, 1260 (Hawai'i App. 2008) (court found right to counsel in instant case and so did not need to reach issue of categorical right to counsel, but agreed with Justice Blackmun's explanation of the difficulties of assessing the need

[27] Shaughnessy, 32 Cath. U. L. Rev. at 283.

for counsel prior to trial and commented that "[w]e express grave concerns ... about the case-by-case approach adopted in *Lassiter* for determining the right to counsel"); *King v. King*, 174 P.3d 659, 666 n.11 (Wash. 2007) (declining to find categorical right in private divorce cases, but noting that case-by-case approach "would be unwieldy, time-consuming, and costly. The proceeding might itself require appointment of counsel to present the parent's case.")

Prior to *Lassiter*, the U.S. Supreme Court acknowledged this paradox of needing a lawyer to effectively make one's case for appointment of counsel. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court weighed the argument that "under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered only by a lawyer." The Court agreed that "there is some force in this argument," and justified its decision to take a case-by-case approach in parole revocation proceedings on two grounds. The first was "critical differences between criminal trials and probation or parole revocation hearings," such as the fact that a parole revocation proceeding is not an "adversary proceeding" and the state is represented by a parole officer instead of a prosecutor. *Id*. at 788-89. The second was that parolees only had a "limited due process right" by virtue of their having committed the underlying crime. Neither of these differences identified in *Gagnon* is present for dependency proceedings in most states, including New Hampshire: such proceedings are certainly adversarial, typically feature a state representative that is an experienced attorney, and put fundamental rights at risk (not only the right to parent, but also a liberty interest threatened by possible future criminal charges stemming from the dependency) that are not limited as was the liberty interest at stake in *Gagnon*.

Because "[t]he trial judge, who is now required to decide in advance when there will be 'fundamental fairness,' can never be sure when, during the trial, the need for counsel will

arise,"[28] a case-by-case approach imposes an ongoing and onerous burden on the trial court throughout the proceedings. This is because "there is little in the record upon which the [] court can rely when deciding a motion for appointment of counsel, [so] the order corresponding to that motion should not be thought to have conclusively determined the question for all time."[29] Since significant case complexity or other complicating circumstances may manifest partway into a hearing, the judge is essentially required to maintain constant vigilance as to the possible necessity of counsel in order to ensure basic fairness of the entire court process.

Indeed, this ongoing monitoring burden is the current reality for federal courts considering discretionary appointment pursuant to the federal indigent litigant statute, 28 U.S.C. § 1915(e). *See e.g. Cota v. Anderson*, 2007 WL 3333390 at *3 (D. Utah 2007) (unpublished) ("The Court also revisits sua sponte the issue of appointed counsel … The Court finds that appointment of counsel for Plaintiff is necessary to allow this litigation to proceed"); *Allen v. Wexford Health Sources, Inc.,* Slip Copy, 2011 WL 2463544 at *4 (N.D. Ill. 2011) (denying appointment but noting that "Should the case proceed to a point that assistance of counsel is appropriate, the court may revisit this request"); *Almond v. Wisconsin*, 2008 WL 2726014 at *1 (E.D. Wis. 2008) (unpublished) (denying appointment but noting, "[i]f, as the case proceeds, it appears that the case is more complicated or, for some other reason, Almond lacks the ability to effectively represent himself, I may revisit his request for appointed counsel.")

Even if the trial court comes to realize that counsel is necessary, an appointment partway through the dependency case may not be effective to remedy the due process concerns. This is

[28] Amicus Brief, State Government Amici Curiae, *Gideon v. Wainwright,* 1962 WL 75209 at *3 (U.S. 1962).

[29] Brad Feldman, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 Geo. L.J. 1717, 1727 (Aug. 2011).

because counsel that is appointed will be forced to enter the case well after it may be too late to undo prejudicial acts by the parent or other harm caused by counsel's initial absence.[30]

V. A Case-By-Case Approach Upsets the Expeditious Resolution of Dependency Cases Because The Violation of A Parent's Constitutional Right to Counsel Is Structural Error Requiring Automatic Reversal on Appeal.

This Court has described "structural errors" as "constitutional errors [that] necessarily render a trial fundamentally unfair and require reversal without regard to the evidence in the particular case … A structural defect [] infects '[t]he entire conduct of the trial from beginning to end' … Such fundamental errors are not subject to a harmless error analysis." *State v. Ayer,* 150 N.H. 14, 24 (2003) (citation omitted).

Throughout the development of the United States Supreme Court's harmless/structural error doctrine, one of the few constants has been the Court's repeated holding that a complete denial of counsel for the entire length of criminal proceedings is a structural error requiring the procedural protection of automatic reversal without analysis of whether the error was harmful. *United States v. Cronic,* 466 U.S. 648, 658 (1984) (noting that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel."); *Bell v. Cone*, 535 U.S. 685, 695 (2002) (trial is "presumptively unfair … where the accused is denied the presence of counsel at a critical stage.")

It is beyond dispute that even in a case-by-case regime, at least some parents in dependency cases will be constitutionally entitled to appointed counsel. And because the

[30] While a parent in a dependency case could pursue an immediate interlocutory review at the time of the denial of counsel so as to avoid this problem with delay, there is no guarantee such review will be granted, and even if it is, such a grant will necessitate a halting of the dependency proceedings and prevent a speedy resolution for both the parents and the children at issue, a delay that will only worsen if the trial court is found to have abused its discretion and ordered to begin anew, as discussed *infra*. Moreover, even if the appellate court agrees that counsel is not necessary at that time, the case might still evolve and become more complex later.

erroneous denial of counsel in such cases will be structural error requiring reversal (just as in criminal cases), the case-by-case approach will necessarily result in numerous retrials of dependency cases and consequent delays in case resolution. These delays frustrate the purposes of the dependency statute and inflict serious harm on both parents and children.

A. The Application of the Structural Error Procedural Protection to Dependency Cases Is Required Both Because a Fundamental Right is at Stake and Because It Is Impossible to Ascertain Post-Hoc Whether a Complete Denial of Counsel is Harmful.

While some courts have continued to adhere to a rigid line between criminal and civil cases in determining what procedures to apply, many others have extended some types of procedural protections from criminal cases to some types of family law cases,[31] and have stated that the propriety of such protections is less dependent on the "civil" or "criminal" labels on a proceeding than on what is at stake.[32] As one court applying structural error analysis to dependency proceedings put it, "[t]he bottom line in both criminal and dependency proceedings is that both defendants and parents face the deprivation of a fundamental constitutional right via adjudicatory processes." *Judith P. v. Superior Court,* 126 Cal.Rptr.2d 14, 30 (Cal. App. 2002).

[31] *See e.g. Santosky v. Kramer*, 455 U.S. 745, 764 (1982) (elevating standard of proof for TPR cases from "preponderance of the evidence" to "clear and convincing" by drawing an analogy to criminal cases, where such heightened proof requirements are "a prime instrument for reducing the risk of convictions resting on factual error"); *Matter of Termination of Parental Rights of James W.H.*, 849 P.2d 1079, 1082 (N.M. App. 1993) (noting that "majority rule" is to apply exact same "ineffective assistance" test from the criminal context to civil context, rather than lesser standard).

[32] For example, provision of appointed counsel is itself a type of procedural protection, and courts have repeatedly disdained the civil/criminal distinction in finding a right to counsel. *See e.g. Rutherford v. Rutherford*, 464 A.2d 228, 235 (Md. 1983) ("As repeatedly pointed out in criminal and civil cases, it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of counsel for indigents."); *Mead v. Bachlor,* 460 N.W.2d 493, 501 (Mich. 1990) (reversing own precedent that had found no right to counsel in civil contempt, noting national trend towards focusing on the interest at stake, and commenting that "to the extent that *Sword* turned on the civil-criminal dichotomy, it might now be regarded as an anomaly"); *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 250 (Mich. 1976) ("many procedural safeguards attendant to criminal trials have been made applicable to [civil] paternity proceedings"); *McBride v. McBride*, 431 S.E.2d 14, 15 (N.C. 1993) ("The Court in *Lassiter* emphasized that, in determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent's personal liberty rather than on the 'civil' or 'criminal' label placed on the proceeding.")[32]

While specific justifications are sometimes advanced for providing fewer procedural protections for family law cases than criminal proceedings, these justifications do not apply to an appellate review standard such as the structural error test:

> First, the need for informal procedures, which has served as the justification for denying fully adversarial trials in hearings to determine parents' rights, lends no support for choosing the harmless error standard for *Lassiter* error. The need for a non-adversarial atmosphere does not exist on appeal as it might in proceedings pitting the parents against their children at trial; the selection between per se reversal and a harmless error standard is irrelevant to the quality of the future relationship among parents and children. Second, the need for special procedural protections for children in the hearing does not exist. Third, as commentators have demonstrated, the harmless error standard requires more judicial resources than a per se rule and thus does not promote judicial economy. Further, the state's interest in fiscal responsibility is intimately related with its interest in accurate fact finding. This interrelationship between the state's fiscal responsibility and its interest in accurate fact finding arises because if the absence of counsel at the dependency or parental severance trial robs the trial court of critical data which might have led the court to continue the family relationship, the state will be needlessly forced to expend tens of thousands of dollars caring for the child in foster or institutional care until the age of majority."[33]

In this vein, a number of courts have viewed the complete denial of counsel in termination of parental rights proceedings as structural error requiring reversal on appeal.[34] While amicus found no structural error case law in the dependency context, the same conclusion

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[33] William Wesley Patton, *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 Whittier L. Rev. 537, 545-46 (1991).

[34] *See e.g. Matter of Adoption of K.A.S.*, 499 N.W.2d 558, 567 (N.D. 1993) ("[It is] an axiom in criminal cases that counsel enables an accused to procure a fair trial … and the formality of these termination and adoption proceedings, along with their substantial threat to a fundamental interest of the parent, is not so different from those in a criminal case"; court skeptical that denial of counsel in TPR case "can ever be 'harmless,' under any standard"); *In re Torrance P., Jr.*, 724 N.W.2d 623 (Wis. 2006) ("[t]he statutory right to the assistance of counsel in a termination of parental rights proceeding is, according to the Wisconsin legislature, essential to a fair proceeding … [T]he fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings has been placed in doubt when the statutory right to counsel is denied a parent"); *In re J.M.B.*, 676 S.E.2d 9, 12 (Ga. App. 2009) (reversing own precedent to find that "the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process"); *In re S.S.*, 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (in TPR case, parent deprived of counsel for half of proceedings; "the actual or constructive denial of assistance of counsel altogether is *legally presumed to result in prejudice* …When a defendant is deprived of counsel, it is inappropriate to apply either the prejudice requirement or the harmless error analysis …"). *See also Matter of Williams v. Bentley***,** 809 N.Y.S.2d 205 (N.Y. A.D. 2006) ("The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position").

is appropriate because not only are fundamental rights undeniably at stake in dependency cases just as in criminal cases or termination of parental rights proceedings, *see Stanley D.*, *supra,* but also the concerns motivating the use of structural error in those other contexts are equally present in dependency.

The U.S. Supreme Court has said that a complete deprivation of counsel is considered a "structural error" because it "def[ies] analysis by 'harmless-error' standards." *Arizona v. Fulminante,* 499 U.S. 279, 309 (1991). In *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006), the Court found that the improper disqualification of *particular* counsel (a lesser deprivation than complete deprivation) was also a structural error defying analysis. Justice Scalia explained such a deprivation was distinct from ineffective assistance of counsel, because for the latter:

> [w]e can assess how those mistakes affected the outcome. To determine the effect of wrongful denial of choice of counsel, however, we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel - in matters ranging from questions asked on voir dire and cross-examination to such intangibles as argument style and relationship with the prosecutors. We would have to speculate upon what matters the rejected counsel would have handled differently - or indeed, would have handled the same but with the benefit of a more jury-pleasing courtroom style or a longstanding relationship of trust with the prosecutors. And then we would have to speculate upon what effect those different choices or different intangibles might have had. The difficulties of conducting the two assessments of prejudice are not remotely comparable.

To attempt harmless error analysis in this scenario, Justice Scalia concluded, was to engage in "a speculative inquiry into what might have occurred in an alternate universe." *Id*. at 150.

Justice Scalia's reasoning applies with greater force when counsel is absent altogether: it is impossible to determine what an attorney might have been able to discover or argue had an attorney been involved from the earliest stages. Nor would this determination be any easier simply because a case is civil: the same questions arise about how to determine what might have occurred in the "alternate universe" where counsel would have been present. As the Michigan

Court of Appeals put it with respect to a parent being absent in a termination of parental rights case (although her attorney was present), the court is "not in a position to know whether in fact any prejudice resulted." *Matter of Render*, 377 N.W.2d 421, 424 (Mich. App. 1985) (citation omitted). Justice Blackmun elaborated upon this in his *Lassiter* dissent:

> The [majority opinion in *Lassiter*] assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered unfair disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court's inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting pro se is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented.

Lassiter, 452 U.S. at 50-51 (Blackmun, J., dissenting).

In short, since the trial record relied upon by the appellate court for "harmless error" review is biased and incomplete (due to it being developed without the benefit of counsel representing the parent's interest), there is virtually no chance that the record will reveal *any* merits of the parent's case that might have led to a different outcome. Even if a parent is fortunate enough to secure counsel for the appeal, such counsel will be limited to arguing whatever skeletal evidence was in the trial court record, and will not be able to adduce new evidence. This situation creates an unavoidable Catch-22: only in situations where a parent has been appointed counsel and thus "afforded an opportunity of developing a record upon which his rights may be intelligently and certainly determined", *Atkins v. Moore*, 218 F.2d 637, 638 (5th Cir. 1955) (per curiam) (capital case), can the record have been adequately developed and the

risk of error be accurately assessed. Even some courts that have applied a harmless error analysis have acknowledged this dilemma.[35]

For these reasons, the structural error test must be utilized, and denials of appointed counsel at trial must be subject to automatic reversal.

B. Because the Structural Error Test Will Require Automatic Reversal of Erroneous Deprivations of Counsel, A Case-By-Case Approach Will Conflict With the Critically Important Goal of Resolving Child Abuse/Neglect Disputes Expeditiously.

Given that trial courts make errors in deciding whether to appoint even in jurisdictions where there is an absolute right to counsel that should require little judicial interpretation,[36] a case-by-case approach to counsel will likely result in significantly more errors that will, pursuant to the structural error test, necessitate automatic reversal of the case and a new trial. Thus, the case-by-case approach effectively causes lengthy delays in resolution of the dependency matter.

However, such delays are manifestly contrary to the legislature's intent and harmful to parents and children alike. This Court has said:

> Given that the purpose of RSA chapter 169–C is "to provide protection to children whose life, health or welfare is endangered and to establish a judicial framework to protect the rights of all parties involved in the adjudication of child abuse or neglect cases," RSA 169–C:2, I (2002), and that it is the district court's final disposition that resolves such significant issues as the placement and legal custody of the child in the first instance, RSA 169–C:19, it is understandable that the legislature intended for the district court to provide a speedy disposition of such cases once it renders a finding of abuse or neglect. Cf. *In re Melissa M.*, 127 N.H. 710, 712, 506 A.2d 324 (1986) (noting that RSA chapter 169–C emphasizes

[35] *See e.g. State ex rel. Adult and Family Services Division v. Stoutt*, 644 P.2d 1132, 1137 (Or. App. 1982) (conceding that "[I]t is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record", but still applying harmless error test in part because *Lassiter* did so); *J.C.N.F. v. Stone County Dept. of Human Services,* 996 So.2d 762, 771 (Miss. 2008) (agreeing that presence of counsel "may have greatly changed the hearing transcript now before this Court", but nonetheless finding result would have been the same).

[36] For a few examples of appellate courts finding that trial courts failed to correctly apply a categorical statutory right to counsel, see *People in Interest of J.B.*, 702 P.2d 753, 754 (Colo. App. 1985) and *B.L.E. v. Elmore,* 723 S.W.2d 917, 918 (Mo. App. 1987).

> avoiding delay in child protection cases). A quick disposition bears great importance at the district court stage of the proceedings to ensure stability and resolution for all parties involved.

In re Cierra L., 161 N.H. 185, 190-91 (2010). A case-by-case approach to appointment of counsel, with its increased instances of new trials, would thus undeniably conflict with the important statutory goals recognized by this court in *Cierra*. It would also cause injury to both the parents and children subject to dependency proceedings in New Hampshire, who will face longer periods of separation and anxiety before receiving a resolution and finality.

Furthermore, if the trial court altogether fails to apply a case-by-case analysis (as sometimes occurs in other states with a case-by-case approach; see *supra* at page 12-13), this Court will have no record at all to review and will have to remand for a determination as to appointment of counsel, "providing one more procedural hurdle before the affected children realize finality and permanence."[37] Because a denial of counsel then would again be subject to appellate review, the potential for proliferation of such procedural hurdles and attendant delays is great. The Court should not put vulnerable families in New Hampshire at such risk.

VI. Some Erroneous Denials of Appointment of Counsel in a Case-by-Case Approach Will Go Uncorrected Because They Will Not Reach the Appellate Stage.

While appeals of denial of counsel will result in delays in case resolution that will cause harm to parents and children alike, there is a concurrent risk that the reverse will happen and be equally harmful: many justifiable appeals will never come to pass at all. For instance, defendants in a dependency matter who are denied appointed counsel may concede dependency out of a belief that they are incapable of litigating the matter without legal assistance. Federal courts have recognized this risk in the context of civil rights cases. *Robbins v. Maggio*, 750 F.2d

[37] Patton, 27 Loy. U. Chi. L.J. at 202.

405, 412-13 (5th Cir. 1985) (where litigant is denied counsel, "there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of his case, resulting in the loss of vital civil rights claims"); *Caston v. Sears, Roebuck & Co*., 556 F.2d 1305, 1308 (5th Cir. 1977) ("a layman unschooled in the law in an area as complicated as the civil rights field … likely has little hope of successfully prosecuting his case to a final resolution on the merits").

It is also an "untenable assumption" that even if litigants should manage to represent themselves, "they will have the determination and capability to perfect and conduct appeals properly and fully after they lose." *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1310 (9th Cir. 1981). In fact, "Some [appellate] courts refuse to reach the counsel issue because unrepresented litigants fail to request appointment of counsel or otherwise present the issue directly and do not preserve the issue properly for appeal."[38]

In short, even the necessary protection of an automatic reversal on appeal for wrongful denials of appointed counsel cannot wholly rescue the case-by-case scheme, as an appellate procedural protection is only as effective as the cases that reach it. Litigants denied trial counsel may never make it to the appellate stage.

[38] Pastore, 40 Clearinghouse Rev. J. of Poverty L. and Pol'y at 187.

CONCLUSION

As Justice Blackmun noted in his *Lassiter* dissent, the belief that a case-by-case process can somehow work for civil cases "is belied by the Court's experience in the aftermath of *Betts v. Brady*." 452 U.S. at 51 (Blackmun, J., dissenting). Implementing a case-by-case approach to the right to counsel in dependency cases creates an impossible job for trial courts and an unacceptably high likelihood of error when viewed in light of the fundamental rights at stake. Moreover, it runs the risk of being applied unevenly across the state, or not applied at all, as well as interfering with the expeditious and efficient resolution of child welfare matters.

It is for good reason that more than three-quarters of states have declined to make appointment of counsel discretionary in dependency cases, and *amicus* urges this Court to join the nationwide consensus and find a categorical right to counsel for parents in such cases.

DATED this _____ day of November, 2011.

By _____

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CERTIFICATE OF SERVICE

I certify that two copies of this brief have been sent/delivered this day to Jeanne P. Herrick, counsel for Division of Children, Youth And Families; Michael C. Shklar, counsel for the mother; Barbara L. Parker, counsel for father; and Ann F. Larney, counsel for guardian ad litem, CASA of New Hampshire by U.S. First Class Mail and an electronic copy by email.

Amicus waives any oral argument in this matter.

_____
Kysa Crusco

APPENDIX