The Right to Counsel in Paternity Proceedings

by Paula Roberts and John Ott

I. Introduction

As the Supreme Court has noted, both the child and the defendant in a paternity action have a "compelling interest" in the accuracy of the outcome.[1] The putative father faces the imposition of a substantial financial burden upon him if he is adjudged the child's parent. He may also face criminal prosecution.[2] If he fails to meet his support obligation, he may face further civil or criminal proceedings.[3] The child also has a strong interest in the outcome. The putative father may be a source of income sufficient to keep the child out of poverty. The child's interests in inheriting from the father and establishing eligibility for such programs as social security survivors' benefits are also important. Moreover, an accurate paternity determination will give the child access to family health history information. Of course, equally important to both father and child is the possibility of establishing a meaningful relationship. The mother also has an important stake in the determination. The putative father is a possible source of income to help her raise the child. In many cases, the putative father and his family are also potential sources of emotional support and assistance in performing the sometimes stressful task of being a single parent.

The successful attainment of the economic and noneconomic goals of a paternity determination is most likely to occur when all of the parties, as well as the state, perceive that the proceeding is fair. The state also has a legitimate interest in the proceedings. If the mother and child are receiving public assistance, the state wants to find a father to whom it can shift all or part of that cost. If the family is poor but not yet receiving benefits, the state wants to forestall its obligation to provide public assistance by imposing responsibility upon a putative father. The successful attainment of the state's goals is most likely to occur if the paternity proceeding is simple, swift and inexpensive.

To pursue its economic interests, the state uses its IV-D child support enforcement system.[4] If the mother and child are receiving aid to families with dependent children (AFDC) benefits, the mother is required to cooperate with the state in establishing paternity and securing support, unless she can demonstrate "good cause" for refusing to do so.[5] If the mother and child are not receiving AFDC, the mother may voluntarily use the IV-D system.

If the putative father freely admits paternity, the proceedings are relatively simple. If he doubts that he is the father, the situation can become complex. As many legislators and courts have noted, when the power of the state is arrayed against the denying putative father, he needs the assistance of

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1. Little v. Streater, 452 U.S. 1, 13 (1981).
2. *See, e.g.*, MISS. CODE ANN. § 29-11 (1972), which makes fathering a child out of wedlock for a second time a criminal misdemeanor; VA. CODE § 20-61.1, which combines paternity determinations with actions for criminal nonsupport.
3. *See, e.g.*, WASH. REV. CODE ANN. § 26.20.030 (1981), which makes willful nonsupport a crime and imposes a jail term of up to 20 years; CAL. CIV. CODE § 7012, which makes nonsupport a matter of civil contempt that can lead to jail.
4. 42 U.S.C. §§ 651 *et seq.*
5. 42 U.S.C. § 602(a)(26).

counsel. Certain states require that counsel be appointed if the father is indigent.[6] The proceedings thus appear to be fair and thereby serve the noneconomic goals of the participants as well as the economic goals of both the participants and the state. Not every state has recognized this right. In these other states, there is a need to establish the indigent putative father's right to appointed counsel. This article will focus on litigative approaches to establishing this right when a IV-D agency brings the paternity action.[7]

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II. Federal Due Process

A. Initial History

The sixth amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In *Powell v. Alabama*, the Supreme Court held that this sixth amendment right applied to *state* court proceedings by virtue of the due process clause of the fourteenth amendment.[8] Ten years later, in *Betts v. Brady*, the Court restricted *Powell* to cover only trials for capital offenses.[9] In *Gideon v. Wainwright*, however, the Court specifically overruled *Betts* and extended the right to appointed counsel to indigent defendants accused of noncapital felonies.[10] Later, in *Argersinger v. Hamlin*, the Court extended the right to court-appointed counsel to misdemeanor defendants who faced possible jail terms.[11] *Argersinger* moved in two contradictory directions, however; it expanded the right to appointed counsel since the particular classification of a criminal offense was not the determinant of an indigent defendant's right, but implied that the right was limited to cases in which the defendant faced incarceration.

The Court explicitly affirmed this latter limitation in *Scott v. Illinois*,[12] in which the indigent defendant petitioned the Supreme Court to extend *Argersinger* to defendants who were fined upon conviction of a misdemeanor. The Court refused, stating, "We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[13] During this period, the Court was also grappling with the right to appointed counsel in civil cases.[14] In *In re Gault*, the Court extended its due process rationale to a juvenile who had been committed to an industrial school in what the state characterized as a civil proceeding. Like *Argersinger*, *Gault* could be read either expansively, implying that all civil actions that affect a fundamental interest give rise to an automatic right to appointed counsel,[15] or narrowly, implying that such a right is created only in proceedings that result in a deprivation of individual liberty. In 1981, the Supreme Court resolved this ambiguity quite decisively.

B. The *Lassiter*[16] Decision

In *Lassiter v. Department of Social Services*, the Court considered whether the fourteenth amendment's due process clause always requires states to appoint counsel for indigent parents in civil proceedings to terminate their parental rights. At the outset, it must be emphasized that no party in *Lassiter* faced immediate or collateral imprisonment as a result of the proceedings. Even a potential loss of liberty was never at issue.

In deciding the issue, the five-to-four majority began by revisiting *Gault* and reaffirming that the due process right to appointed counsel could apply in civil as well as criminal cases. At the same time, the Court addressed the ambiguity in *Gault* and stated that the right to counsel was *automatic* only when a defendant faced *incarceration* as a possible result of the proceedings.

> "[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth rights to counsel in criminal cases, which triggers the right to appointed counsel . . . . *In re Gault*, 357 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527. . . .[17]

Since the right was not automatic, the Court resorted to traditional due process analysis in order to determine whether counsel was nonetheless necessary in cases of this type. The Court therefore engaged in a balancing process. On one side of

6. *See, e.g.*, ILL. STAT. ANN. ch. 106 3/4, § 55 (Smith-Hurd Supp. 1981); MONT. ANN. STAT. § 40-6-119 (1979); NEV. REV. STAT. § 126.201 (Supp. 1979). *See also* Kennedy v. Wood, 439 N.E.2d 1367 (Ind. Ct. App. 1982); State *ex rel.* Graves v. Daugherty, 266 S.E.2d 142 (W. Va. 1980). *See* States Addressing a Right to Counsel in Paternity Proceedings, *infra* p. 1180.
7. While some of the arguments in this article are germane if the proceeding involves only the mother and the putative father, courts have been very specific in limiting their holdings to situations in which the state is also involved. *See, e.g.*, State *ex rel.* Cody v. Toner, 8 Ohio St. 3d 22 (1983); Salas v. Cortez, 593 P.2d 226 (Cal. 1979).
8. Powell v. Alabama, 287 U.S. 45, 71 (1932).
9. Betts v. Brady, 316 U.S. 455 (1942).
10. Gideon v. Wainwright, 372 U.S. 335 (1962).
11. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).
12. Scott v. Illinois, 440 U.S. 367 (1979).
13. *Id.* at 373-74.
14. *In re* Gault, 387 U.S. 1 (1967); Gagnon v. Scarpelli, 411 U.S. 778 (1973). *See also* Morrisey v. Brewer, 408 U.S. 471 (1972).
15. The Fifth Circuit, for example, cited *Gault* to support its holding that courts must appoint counsel for indigent parents in parental termination proceedings. Davis v. Page, 640 F.2d 599, 603, 604 (5th Cir. 1981). However, the Supreme Court vacated the Court of Appeals decision, 458 U.S. 1118 (1982), and remanded. On remand, the Fifth Circuit reversed its prior decision, 714 F.2d 512 (5th Cir. 1983).
16. Lassiter v. Department of Social Servs., 452 U.S. 18 (1981).
17. *Id.* at 25.

the scale was the presumption against appointed counsel, since loss of liberty was not an issue. On the other side were the elements of due process enunciated in *Mathews v. Eldridge*.[18] In that case, the Court maintained that, to decide what is required for procedural due process, a court must consider (1) the private interests at stake, (2) the risk that the procedures used will produce a wrong decision, and (3) the government's various interests.[19]

The Justices conceded that the private interests at stake in parental termination proceedings are powerful.

> "[T]he companionship, care, custody, and management of [the parent's] children" is an important issue that "undeniably warrants deference and, absent a powerful countervailing interest, protection." . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one.[20]

Next, the Court considered the state's interests. The state wants to conclude the proceedings as quickly and inexpensively as possible. Appointing counsel for the parents would clearly be at odds with these goals. The Court, however, dismissed such interests as "hardly significant enough to overcome private interests as important as those here."[21] Moreover, the state "shares the parent's interest in an accurate and just decision."[22] Thus, the state may want to appoint counsel since the adversarial system works best when it reflects an equal contest between opposing interests. Indeed, if the state is represented by counsel and the parent is not, "the contest of interests may become unwholesomely unequal."[23] Under this analysis, these two *Eldridge* factors weigh very heavily in favor of appointing counsel.

The majority then considered "the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel."[24] The Department of Social Services had argued that (1) the parent's relationship with the child was far from being abstruse, technical or unfamiliar and was one to which the parent must be uniquely well informed and to which the parent must have given prolonged thought, and (2) the proceedings were very informal, sometimes involving only social workers instead of lawyers.[25]

The majority responded:

> Yet the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand, and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings that some courts have made . . . . Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings . . . .[26]

This analysis of the *Eldridge* factors would lead one to believe that the scales would tip in favor of a due process right to appointed counsel. This is not what happened, however. The presumption against appointed counsel weighed more heavily.[27]

> If, in a given case, the parents' interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors *will not always be so distributed,* and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," *Gagnon v. Scarpelli,* 411 U.S. at 788, 93 S. Ct. at 1762, neither can we say that the Constitution requires the appointment of counsel for indigent parents in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli,* and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review . . . .[28]

Lassiter teaches that the right to appointed counsel does not depend on whether the state calls its proceedings criminal, quasi-criminal or civil. Instead, the critical factor is whether the defendant faces incarceration as a result of the proceedings. If so, there will be an automatic presumption that counsel is required. If not, then the *Eldridge* factors must be developed carefully to demonstrate that, in the particular context, they outweigh the presumption against appointed counsel. Meeting the *Eldridge* test will be difficult.

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18. *Id.* at 27. Mathews v. Eldridge, 424 U.S. 319 (1976), involved the question of whether due process required an evidentiary hearing prior to termination of social security disability benefits.
19. *Eldridge,* 424 U.S. at 335.
20. *Lassiter,* 452 U.S. at 27 (citations and footnote omitted).
21. *Id.* at 28.
22. *Id.* at 27.
23. *Id.* at 28.
24. *Id.*
25. *Id.* at 29.
26. *Id.* at 30 (citations omitted).
27. It is possible to argue that the weighing process was skewed by the particular facts in this case. In his concurrence with the Court's five-to-four decision, Chief Justice Burger noted:
    > Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might have been dismissed as a "candidate" for dismissal as improvidently granted . . . . However, I am content to join the narrow holding of the Court, leaving the appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.

    Id. at 34-35.

    Perhaps the majority's understanding of the particular facts of this case—a convicted murderer who, in the three years that had elapsed between termination proceedings and the time the state had initially taken custody of the child, had apparently made little effort to contact her son—unduly influenced its opinion.
28. *Id.* at 31-32 (emphasis added).

C. The *Little* Decision

In light of the decision in *Lassiter*, it is important to examine the ruling in *Little v. Streater*, which was decided on the same day as *Lassiter*. *Little* involved the question of an indigent putative father's right to a prepaid blood test in a paternity proceeding.[29] At the time of the suit, defendant was in prison, and the mother and child were receiving AFDC benefits. The action was brought by the state through the IV-D agency. Defendant was given the assistance of counsel but, under Connecticut law,[30] blood tests could not be performed unless defendant paid for them.

In finding a right to prepaid blood tests, a unanimous Supreme Court first cited its holding in *Boddie v. Connecticut* [31] for the proposition that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[32] Since the state had indeed forced the parties to bring the paternity issue into court, the Court held that what constituted a "meaningful opportunity to be heard" must be determined under the *Eldridge* test.[33]

Before applying *Eldridge*, however, the Court painstakingly discussed the nature of paternity proceedings. It noted that, while Connecticut called these proceedings "civil," they were, in fact, "quasi-criminal" since "if a putative father is 'found guilty, the court shall order him to stand charged with the support and maintenance of such child'; and his *subsequent failure to comply* with the court's support order *is punishable by imprisonment* under Conn. Gen. Stat. §§ 46b-171, 46b-215, and 53-304 (1981)...."[34] The Court found that it was important that, while the immediate effect of a paternity finding was not incarceration, imprisonment could ultimately occur. Thus, the Court has noted that paternity determinations are different from proceedings to terminate parental rights, because paternity proceedings involve a potential loss of liberty.

The Court emphasized this distinction again in its *Eldridge* analysis. The Justices first discussed the putative father's interests.

> The private interests here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and *liberty interest threatened by the possible sanctions of noncompliance*, at issue is the creation of a parent-child relationship.... Just as the termination of such bonds demands procedural fairness, *see Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), *so too does their imposition*....[35]

Thus, the putative father's interest in avoiding the imposition of family obligations paralleled Ms. Lassiter's in avoiding the termination of such interests. His interests weighed *more* heavily, however, because paternity proceedings *possibly* implicate a liberty interest.

The Court then turned to the state's interest. Connecticut's interest in *Little* were essentially the same as North Carolina's interest in *Lassiter*.

> The State admittedly has a legitimate interest in the welfare of a child born out of wedlock who is receiving public assistance, as well as in securing support for the child from those legally responsible. In addition, it shares the interest of the child and the defendant in an accurate and just determination of paternity.... Nevertheless, the State also has financial concerns; it wishes to have the paternity actions in which it is involved proceed as economically as possible and, hence, seeks to avoid the expense of blood grouping tests.[36]

The Court cited *Lassiter* in dismissing the pecuniary interests as "hardly significant" when compared to the private interests at stake.[37]

Finally, the Court analyzed the risk of error absent the requested tests and found it to be substantial.[38] The Court was particularly persuaded by a number of articles on the critical importance of blood tests,[39] including Harry D. Krause's study.[40] Krause's research revealed, *inter alia*, that

> it is not uncommon for 95% of the paternity disputes to result in findings of parentage.... Yet, in a study based on 1,000 cases, 39.6% of the accused men were conclusively shown by blood tests not to be the fathers. Of equal significance is another study in which 18% of a group of accused men who acknowledged paternity were proven by blood tests not to be the fathers of the children they acknowledged.[41]

Little teaches two points of significance. First, the fact that incarceration is a possible consequence of a paternity proceeding weighs heavily in an *Eldridge* balancing. Indeed, Justice Blackmum, joined by Justices Brennan and Marshall in

29. A fuller discussion of the right to a state-paid blood test will be the subject of the next article in this series.
30. CONN. GEN. STAT. § 446b-168 (1981).
31. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).
32. *Little*, 452 U.S. at 5-6.
33. *Id.* at 6. There had been some question as to the continued viability of *Boddie* in light of Ortwein v. Schwab, 410 U.S. 656 (1973) and United States v. Kras, 409 U.S. 434 (1973). In *Little*, the Court reaffirms *Boddie* in cases in which the issues are constitutionally significant and the parties have no choice of an alternate forum. *Little*, 452 U.S. at 16 n.12. This is certainly the case in paternity proceedings brought by the state. *Id.*

    It is significant that *Boddie* is not cited in *Lassiter*. This distinction should be raised in subsequent litigation that seeks to distinguish *Lassiter* and apply *Little's* more helpful analysis.
34. *Little*, 452 U.S. at 10 (emphasis added).
35. *Id.* at 13 (emphasis added).
36. *Id.* at 14.
37. *Id.* at 16.
38. *Id.* at 14. In *Lassiter*, the Court had also been cited to significant evidence that appointing counsel in termination and neglect cases affected the outcome. *Lassiter*, 452 U.S. at 46 n.15. The Court chose largely to ignore this evidence, however. *Id.* at 29 n.5. Part of the problem may have been that, even with counsel, few of the parents actually prevailed. Thus, while counsel had an impact, the impact in terms of ultimate outcome was limited.
39. *Little*, 452 U.S. at 7-8.
40. H.D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 14 (1971).
41. *Kennedy*, 439 N.E.2d at 1372 (citations omitted).

his *Lassiter* dissent,[42] specifically stated:

> Finally, I deem it not a little ironic that the Court on this very day *grants*, on due process grounds, an indigent putative father's claim for state-paid blood tests in the interest of according him a meaningful opportunity to disprove his paternity, *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627, but in the present case *rejects*, on due process grounds, an indigent mother's claim for state-paid legal assistance when the state seeks to take her own child away from her in a termination proceeding.... I can attribute the distinction the Court draws only to a presumed difference between what it views as the "civil" and the "quasi-criminal," *Little v. Streater*, 452 U.S. at 10, 101 S. Ct. at 2207.[43]

Second, *Little* teaches that the ability to demonstrate that the right sought would affect the outcome is critical. Advocates must be prepared to argue and to demonstrate how the presence of counsel would *always* have a significant impact in a paternity proceeding. The discussion below analyzes how to develop this argument.

D. Summary

Using the *Lassiter-Little* line of analysis, argument for a federal due process right to counsel in paternity adjudications would proceed as follows.

- The right to appointed counsel can be found in any context; whether the state calls its procedure civil, criminal or quasi-criminal is not determinative.
- A state's paternity process must be examined. If the proceeding could lead directly to incarceration, there is a right to counsel under *Lassiter*. If incarceration is not a direct consequence, but a possible outcome, then an *Eldridge* balancing test must be undertaken.

Little teaches that the possibility of incarceration in a subsequent proceeding arising out of a paternity determination weighs very heavily in assessing the first prong of the *Eldridge* test and in overcoming the presumption against counsel. Thus, if an adjudicated father could be jailed in a subsequent civil or criminal nonsupport or contempt proceeding, the presumption against appointing counsel should be overcome. This is particularly so if the initial proceeding is res judicata on the issue of paternity itself.[44] *Little* is also helpful in meeting the second prong of the *Eldridge* test. It indicates the Supreme Court's sensitivity to the difficulties of proper paternity determinations. How to develop this point, in conjunction with other Court pronouncements on paternity, will also be discussed below.

Little and *Lassiter* both teach that the third prong of the *Eldridge* test is negligible in the paternity context. The state's financial and procedural interests, while legitimate, "are hardly significant enough to overcome private interests as important as those here."[45]

... if an adjudicated father could be jailed in a subsequent civil or criminal nonsupport or contempt proceeding, the presumption against appointing counsel should be overcome.

III. State Due Process

Indigent putative fathers can seek to establish a state constitutional right to counsel instead of, or in addition to, the federal due process claim. Since state courts often hold that their state constitutions afford more due process protection than the federal Constitution, attorneys representing putative fathers may find that they have a less onerous burden to meet under a state due process theory.[46] Indeed, prior to *Lassiter*, this approach was very successful. Several state courts applied the *Eldridge* factors in interpreting the meaning of their state due process clauses and found that the appointment of counsel was required.[47] Other state courts engaged in even less rigorous analysis in finding a state due process right to counsel.[48] Subsequent to *Lassiter*, this approach has not been as successful, however. While one state supreme court has found a right to appointed counsel in paternity proceedings under a state due process theory, four courts have gone in the other direction.[49] In

42. Justice Stevens also dissented, going much further than the other dissenting Justices. He argued that the private family interests at stake in this case at least equaled the interests of an indigent defendant in a criminal case. He would therefore have found a due process right to appointed counsel without initiating the *Eldridge* balancing test. *Lassiter*, 452 U.S. at 59-60 (Stevens, J., dissenting).
43. *Id.* at 58 (emphasis in original).
44. *See infra* p. 1175.
45. *Little*, 452 U.S. at 16. *See also Lassiter*, 452 U.S. at 27.
46. Attorneys may also want to explore other state claims. Some states have held that counsel must be provided by the courts in paternity cases in furtherance of the courts' general supervisory power to ensure the fair administration of justice. *See* Hepfel v. Bashaw, 279 N.W.2d 342 (Minn. 1979); M. v. S., 404 A.2d 653 (N.J. Super. Ct. 1979).

    Equal protection challenges under both the federal and state constitutions have also been attempted, although none has yet succeeded. State *ex rel.* Hamilton v. Snodgrass, 325 N.W.2d 740 (Iowa 1982); Department of Health & Rehabilitative Servs. v. Heffler, 382 So.2d 301 (Fla. 1980); Nordgren v. Mitchell, 716 F.2d 1335 (10th Cir. 1983).
47. State *ex rel.* Graves v. Daugherty, 266 S.E.2d 142 (W. Va. 1980); *Salas*, 593 P.2d at 230; Reynolds v. Kimmons, 569 P.2d 799 (Alaska 1977).
48. *See* Madeline G. v. David R., 407 N.Y.S.2d 414 (Fam. Ct. 1979); Artibee v. Cheboygan Circuit Ct., 243 N.W.2d 248 (Mich. 1976).
49. *See* State *ex rel.* Cody v. Toner, 8 Ohio St. 3d 22 (1983) (finding both a federal and a state due process right to appointed counsel). *But see* Wake County *ex rel.* Carrington v. Townes, 293 S.E.2d 95 (N.C. 1982) (no automatic right under either federal or state constitution); State Adult & Family Servs. Div. v. Stoutt, 644 P.2d 1132 (Or. Ct. App. 1982) (no automatic right under either federal or state constitution); State *ex rel.* Hamilton v. Snodgrass, 325 N.W.2d 740 (Iowa 1982) (no automatic right under either federal or state constitution).

each of the unsuccessful cases, the courts used *Lassiter* as the basis of analyzing both the state and federal claims. Because this is likely to be the pattern, the next section of this article will discuss ways of meeting *Lassiter* whether federal or state due process claims are being pursued.

IV. Litigation of Claims

A. Overcoming or Weakening the *Lassiter* Presumption

Ideally, advocates want to show a direct connection between the paternity proceeding and incarceration in order to overcome *Lassiter*. If this is not possible, sufficient connection to weaken the *Lassiter* presumption against appointing counsel must be shown.[50] There are several kinds of state statutes that raise the incarceration connection. For example, some states require the putative father to post bond before trial or after judgment.[51] Failure to do so results in incarceration.[52] Since an indigent would generally be unable to post bond, the connection is clear. Moreover, most states have statutes governing criminal and/or civil contempt if a putative father does not meet his obligations. If a criminal contempt action is brought, lengthy imprisonment is likely.[53] Even in a civil contempt action, a jail term is possible.[54]

Consequently, an advocate could focus on the paternity issue and whether a finding in the paternity proceeding is res judicata on the issue of paternity in subsequent proceedings. If the subsequent proceeding is one for civil contempt, then the answer is usually "yes."[55] If the subsequent proceeding is one for criminal contempt, some jurisdictions also treat the civil determination as res judicata. Montana statutes, for example, provide that a paternity finding is determinative "for all purposes."[56] Many other jurisdictions use similar or identical statutory language.[57] Other jurisdictions, while finding that a civil determination of paternity would not be res judicata in subsequent criminal nonsupport proceedings, hold that such a finding could be introduced as evidence in such proceedings.[58] The impact such evidence would have on criminal proceedings is obvious. Thus, an advocate could argue that the paternity determination itself establishes a critical element in any subsequent contempt proceeding. Because the subsequent proceedings can lead to incarceration, counsel must be appointed at the initial stage.

Advocates might also focus on the financial obligation imposed in the paternity action and whether in the absence of counsel one can be sure the father's financial situation will be sufficiently explored and a reasonable obligation imposed. If an unreasonable obligation is imposed, the father will be unable to meet the payments and will subsequently find himself jailed for criminal or civil contempt. This is not an insubstantial possibility. One commentator has noted that

> in *Young v. Whitworth*, [522 F. Supp. 759 (S.D. Ohio 1981)], an unemployed and unrepresented parent was ordered to jail for failure to obey an order to pay $75 per week to be applied both to child support and the arrearage on back support. In *McNabb v. Osmundson*, [315 N.W.2d 9 (Iowa 1982)], the indigent parent, earning $35 to $40 weekly, was suffering from epilepsy and a drinking problem, owed debts totaling $316.40, and owned no property or a motor vehicle. Nevertheless, the court's order required that he purge himself of contempt by paying $480 and making weekly payments of $50, of which $30 was to be applied to current installments of child support and $20 to the arrearage.[59]

Thus, a judgment of paternity rendered without the assistance of counsel for the defendant can result almost immediately in incarceration if the defendant cannot afford the imposed support payment.

The above analysis convinced the court in *Corra v. Coll*[60] that, under *Lassiter*, indigent putative fathers had a presumptive constitutional right to appointed counsel. The court believed that the potential loss of liberty faced by indigent putative fathers in subsequent contempt proceedings was enough to overcome the *Lassiter* presumption and to make appointment of counsel in the initial paternity determination mandatory.[61]

Unfortunately, this analysis did not convince the one federal court that has considered the issue. In *Nordgren v. Mitchell*,[62] the Tenth Circuit examined the claims of indigent inmates at Utah State Prison who were defendants in paternity actions. The inmates sought a declaratory judgment ordering the state to appoint counsel for them in proceedings brought by the state IV-D agency. Attorneys for the State Department of Social Services prosecuted the cases. The inmates, on the other hand, were unable to obtain legal services. Moreover, the state conceded that the Utah State Prison law library did not contain the legal material necessary for Nordgren and the other plaintiffs to prepare an adequate defense.[63] Thus, not only did plaintiffs have to face the state with all of its resources and expertise, they had to face it wholly unprepared.

While conceding that the *Eldridge* factors weighed heavily on the side of appointing counsel,[64] the Tenth Circuit ultimately ruled for defendants because the *Lassiter* presumption against appointing counsel weighed too heavily. The court flatly stated, "[a] man who loses a paternity action does not as a *direct* consequence face an immediate loss of physical liberty."[65]

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50. As noted above, *Little* itself supports an argument that, if there is any possible subsequent proceeding in which loss of liberty is a potential outcome, that is sufficient. *Little*, 452 U.S. at 10, 13.
51. *See, e.g.*, ILL. ANN. STAT. ch. 106 3/4 § 55 (Smith-Hurd Supp. 1981).
52. *See, e.g.*, CAL. CIV. CODE § 7012.
53. *See, e.g.*, WASH. REV. CODE ANN. § 26.20.030 (Supp. 1981).
54. *See, e.g., Salas*, 593 P.2d at 230; *Snodgrass*, 325 N.W.2d at 742.
55. *Salas*, 593 P.2d at 230; *Snodgrass*, 325 N.W.2d at 742.
56. MONT. CODE ANN. § 40-6-116 (1979).
57. Note, *The Nature of Paternity Actions*, 19 J. FAM. L. 475, 479 n.17 (1980-81).
58. *See, e.g., Kennedy*, 439 N.E.2d at 1370; *Salas*, 593 P.2d at 231; *Reynolds*, 569 P.2d at 802.
59. Mascolo, *Procedural Due Process and the Right to Appointed Counsel in Civil Contempt Proceedings*, 5 W. NEW ENG. L. REV. 601, 619 (1983).
60. Corra v. Coll, 451 A.2d 480 (Pa. Super. Ct. 1982).
61. *Id.* at 485.
62. *Nordgren*, 716 F.2d at 1335.
63. *Id.* at 1336.
64. *Id.* at 1339.
65. *Id.* (emphasis added).

Three factors make this case unique.[66] Plaintiffs were already in prison, which is a condition that the Supreme Court has held diminishes litigants' liberty interests. In *Lassiter*, for example, the Court asserted that "as a litigant's interest in personal liberty diminishes so does his right to appointed counsel."[67] In addition, Utah's paternity proceedings are somewhat unique because subsequent contempt proceedings can *only* be criminal, defendants have the right to counsel in those proceedings,[68] and, in the 10th Circuit, the judgment in the civil proceeding would not be binding under doctrines of res judicata or collateral estoppel. Thus, the connection between the civil proceeding and the possibility of incarceration is remote.[69] Defendants in paternity proceedings always have the opportunity to relitigate the issue of paternity with the assistance of counsel.

Moreover, the court noted that under Utah law "it is improbable that an indigent would be prosecuted for criminal nonsupport of his child because inability to pay would be a defense to the charge."[70] This may be true in Utah, but it is not true in all states, particularly in regard to accrued arrearages.[71]

It is hoped that advocates will be able to use *Corra* as precedent and to distinguish *Nordgren* based on a legal analysis of the situation in their own jurisdictions.

66. A fourth factor, not germane to this discussion, should also be mentioned because it is important to attorneys attempting to distinguish *Nordgren*. Under Utah law, a judge is required to order blood tests in paternity proceedings, and the state must pay for such tests for indigent defendants. *Id.* at 1335. This obviates the need for counsel to assert defendant's right to those tests. In most states, blood tests are not automatically provided; one of the parties must request them. For the importance of this factor, *see infra* 1177.
67. *Lassiter,* 452 U.S. at 26. *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).
68. Most states do require that counsel be appointed in contempt proceedings to enforce payment of the obligation, because threat of imprisonment is immediate. *See, e.g.,* Tetro v. Tetro, 86 Wash. 2d 252, 544 P.2d 17 (1975) (civil contempt); Otton v. Zaborac, 525 P.2d 537 (Alaska 1974) (civil contempt); McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982) (civil or criminal contempt). *See also* Cobb v. Green, 574 F. Supp. 256 (W.D. Mich. 1982) (civil contempt); Mastin v. Fellerhoff, 526 F. Supp. 969 (S.D. Ohio 1981) (civil contempt); Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) (civil or criminal contempt).

    But see Andrews v. Walton, 428 So. 2d 663 (Fla. 1983) (no right in civil contempt); State *ex rel.* Department of Human Servs. v. Rale, 642 P.2d 1099 (N.M. 1983) (no right in civil contempt); Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980) (no right in civil contempt).
69. United States v. Beery, 678 F.2d 856, 858 n.10 (10th Cir. 1982). As noted in the text, *supra* p. 1175, this is the case in very few jurisdictions.
70. *Nordgren,* 716 F.2d at 1339.
71. *See, e.g.,* McNabb v. Osmundson, 315 N.W.2d 9, 15 (Iowa 1982). *See also Ex parte* Rohleder, 424 S.W.2d 891 (Tex. 1967). It should also be noted that there have been a plethora of cases involving the right to counsel for indigent parents in contempt proceedings in the last few years. *See* cases cited *supra* note 19. These cases arose only because states *did* prosecute indigent fathers for nonsupport.

B. Developing the *Eldridge* Balance

1. Private Interests

a. Putative Father's Interests

The *Little* Court identified three interests of the putative father affected by an adverse adjudication in a paternity proceeding: a liberty interest, a familial interest and a pecuniary interest.[72] To document the putative father's familial interests, most of the courts recently considering this issue have found it sufficient to cite *Little* for the proposition that

> at issue is the creation of a parent-child relationship. The Court frequently has stressed the importance of familial bonds, whether or not legitimated by marriage, and afforded them constitutional protection . . . . Just as the termination of such bonds demands procedural fairness . . . so too does their imposition . . . .[73]

The *Little* Court also discussed the father's pecuniary interests.[74] Later courts have detailed these interests.

> [The adjudicated father] may be obligated to provide support and education for the child which may extend beyond the child's majority. Garnishment of wages can follow a failure to pay support. The debt is not dischargeable in bankruptcy court even if the support is assigned to the State. 42 U.S.C. § 656(b). Additionally, it is enforceable against moneys held by the federal government. 42 U.S.C. § 659. The support order is enforceable in other states through interstate assistance statutes. 42 U.S.C. §§ 651-55 . . . . Similarly, the adjudicated father's estate can be burdened by the child's claims to inheritance, worker's compensation benefits and insurance benefits . . . .[75]

These interests of the putative father, which are at stake in a paternity proceeding, are indeed "compelling."[76]

b. Child's Interests

Equally compelling, but only perfunctorily mentioned by the *Little* Court, are the interests of the child in these proceedings. The California Supreme Court has been far more explicit.

> Appointment of counsel will not only advance substan-

72. Section IV.A. discusses the importance of the liberty interest.
73. *Little,* 452 U.S. at 13 (citations omitted). *See Toner,* 8 Ohio St. 3d at 22; *Corra,* 451 A.2d at 485; *Kennedy,* 439 N.E.2d at 1370; *Stoutt,* 644 P.2d at 1134; *Nordgren,* 716 F.2d at 1337. Boddie v. Connecticut, 401 U.S. 371 (1971) may also be helpful here. *Boddie* has been cited for the proposition that "the right to establish and realign family relationships has a unique status among civil cases," and thus requires great concern for due process. Note, *supra* note 57, at 501.
74. *Little,* 452 U.S. at 10.
75. *Kennedy,* 439 N.E.2d at 1370. *See also Corra,* 451 A.2d at 486. These same interests were also detailed pre-*Little* in *Salas,* 593 P.2d at 230.
76. *Little,* 452 U.S. at 13.

> tial state interests, it should serve the child's interests as well. The child, to a large extent forgotten in such proceedings, has been termed the "principal plaintiff" in a paternity action. In a sense, it is the child's identity that is litigated in a proceeding to determine parentage. Any determination that a particular individual is a child's biological father may have profound sociological and psychological ramifications. Further, the child's rights of support and inheritance against the father are at issue as well as his or her future obligation to support the father. "If the child is to have anything, it must have a *right* to have his paternity ascertained in a fair and efficient manner." It is in the child's interest not only to have it adjudicated that *some* man is his or her father and thus liable for support, but to have some assurance that the correct person has been identified. When the state initiates paternity proceedings, whether on behalf of the mother . . . or on the child . . . , the state owes it to the child to ensure that an accurate determination of parentage will be made.[77]

To establish the private interests at stake in paternity proceedings most powerfully then, advocates should detail the interests of both the father and the child.

2. State's Interests

The state has contradictory interests in a paternity proceeding. On the one hand, the state is interested in keeping down the cost of the proceedings. Virtually every court that has considered this issue, even those that have ultimately rejected defendant's due process claim, has accepted the *Little* Court's conclusion that the state's pecuniary interest " 'is hardly significant enough to overcome private interests as important as those here.' "[78] On the other hand, the state "shares the interest of the child and the defendant in an accurate and just determination of paternity."[79] The *Corra* court developed this argument further.

> We have already concluded that the presence of counsel at the paternity proceeding helps insure the correctness of a paternity adjudication. Thus, not only the defendant's interest but also the state's interest is best served by a hearing at which a defendant is represented by an attorney. It is furthermore clear that the state's future administrative burdens would be lessened since a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations. Accordingly, while the state will incur the added expense of providing indigents with court-appointed counsel, this expense is outweighed by the salutary aspects of having counsel present at the paternity proceeding.[80]

Courts, then, have concluded that the composite of the state's interests supports appointing counsel for indigent defendants in paternity proceedings.

77. *Salas*, 593 P.2d at 234 (citations omitted).
78. *Little*, 452 U.S. at 16. *See also Toner*, 8 Ohio St. 3d at 24; *Corra*, 451 A.2d at 488; *Nordgren*, 716 F.2d at 1339; *Kennedy*, 439 N.E.2d at 1371. *But see Snodgrass*, 325 N.W.2d at 743.
79. *Little*, 452 U.S. at 14.
80. *Corra*, 451 A.2d at 487-88. *See also Salas*, 593 P.2d at 233-34; *Nordgren*, 716 F.2d at 1339.

3. Risk of Error

The most difficult part of the *Eldridge* analysis to overcome is establishing that there is always a risk of error unless counsel is provided. One approach is to tie the ability to secure a blood test to the right to counsel. One court has insisted

> [a]n indigent defendant's right to a free blood grouping test may be rendered meaningless without counsel to advise him of the right to demand such a test, to explain its significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence . . . . Thus the risk of an erroneous adjudication of parentage is great in a paternity suit when the indigent defendant has no counsel to advise him of his right to a blood group test . . . .[81]

Other courts have held that, because defendant has the right to a state-paid blood test, appointed counsel is not critical. Thus, it would be wise for advocates to develop arguments beyond mere assistance in securing and interpreting blood tests as the basis for a right to appointed counsel. Fortunately, the *Little* decision gives some assistance here. The Court recognized two factors in paternity proceedings that make it important to have counsel to establish defendant's case and refute the state's, *i.e.*, "the usual absence of witnesses [and] the self-interest coloring the testimony of the litigants."[82] One court has noted that these problems are particularly acute if the state is the entity bringing the suit on behalf of an AFDC mother. This court concluded:

> Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child. If paternity is to be determined in an adversary proceeding at the behest of the state, surely the interests of all concerned demand that the defendant be able to defend fully and fairly. He cannot do so when his indigency prevents him from obtaining counsel.[83]

Indeed, several courts looking at the situation have concluded that, even with a blood test, an attorney is necessary "to conduct vigorous cross-examination of the State's key witness and to assist the defendant through the paternity hearing."[84] Moreover, the Supreme Court itself has recognized the limited utility of blood tests and the need for counsel in the paternity

81. *Kennedy*, 439 N.E.2d at 1372 (citations and footnotes omitted). *But see Snodgrass*, 325 N.W.2d at 743; *Nordgren*, 716 F.2d at 1337; Johnson v. Henry, 38 Conn. Supp. 718, 461 A.2d 1001 (1983). These cases all cite *Little* and argue that, because defendant has the right to a blood test, appointed counsel is *not* so critical. On this point, these decisions are wrong. How to establish the importance of counsel *because* blood tests are involved will be discussed in the next article in this series.
82. *Little*, 452 U.S. at 14.
83. *Salas*, 593 P.2d at 232. *See also Daugherty*, 266 S.E.2d at 146.
84. *Kennedy*, 439 N.E.2d at 1372. *See also Hepfel v. Bashaw*, 279 N.W.2d 342, 347-48 (Minn. 1979); *Toner*, 8 Ohio St. 3d at 24; *Corra*, 451 A.2d at 486; *Reynolds*, 569 P.2d at 802-03; *Artibee*, 243 N.W.2d at 249.

process. In upholding an equal protection challenge to Texas's statute of limitations for paternity suits, the Court noted:

> Thus the fact that a certain male is not excluded by these tests does not prove that he is the child's natural father, only that he is a member of a limited class of possible fathers.... The proper evidentiary weight to be given to these techniques is still a matter of academic dispute. See, *e.g.*, Jaffe, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: Response to Terasaki*, 17 J. Fam. L. 457 (1979). Whatever evidentiary rule the courts of a particular State choose to follow, if the blood test evidence does not exclude a certain male, he must thereafter turn to more conventional forms of proof—evidence of lack of access to the mother, his own testimony, the testimony of others—to prove that, although not excluded by the blood test, he is not in fact the child's father.[85]

This, obviously, is when the need for counsel arises. Because of the evolving technology of blood tests and the questions regarding their evidentiary significance, as well as the need to resort to more traditional forms of proof if the blood tests do not exculpate the defendant, contested paternity proceedings are more consistently complex than parental termination proceedings.[86] Counsel is essential. This argument is enhanced by recent changes in federal law. Under the Child Support Enforcement Amendments of 1984, states will be required to change their existing laws and allow paternity actions to be brought by or on behalf of a child up to age 18.[87] Thus, claims that could not previously be brought because of a shorter statute of limitations will now be prosecuted. These cases may present just the kind of "stale and fraudulent" claims that states have traditionally argued are prevented by short statutes of limitations.[88] At the very least, the fact that cases can be brought 10 or 15 years after a child's birth argues for the need for counsel to cross-examine witnesses on the accuracy of their memories, develop testimony by other witnesses, and ensure that blood tests are provided.

In developing these points, *Gagnon v. Scarpelli*[89] may also be helpful to advocates. *Gagnon* considered the right to appointed counsel in a probation revocation proceeding. Such a proceeding is civil, but does entail a potential loss of liberty.[90] Finding that such a right must be determined on a case-by-case basis, the Supreme Court noted that, since such a hearing was informal, the rules of procedure and evidence do not apply, the state is not usually represented by counsel, and the review body itself is quasi-judicial with broad discretionary powers.[91] Thus, the proceeding is distinctly different from a trial. The *Lassiter* Court also considered these factors in upholding a case-by-case approach.[92]

The paternity proceeding, of course, is a trial. The state is represented by counsel, the rules of evidence and procedure do apply, and the finder of fact is a judge. All of these factors weigh in the direction of a universal obligation such as that imposed under *Gideon* and *Argersinger*. Emphasis on the state's role is particularly appropriate in this analysis. "Although in the past a paternity suit was a private affair between a mother and the man she named as the father of her child, in recent years the state has assumed a greater role in bringing suits to determine parentage."[93] It is this state involvement in paternity proceedings[94] that dramatically increases the risk of error when an indigent defendant does not have the assistance of counsel, since the contest of interests becomes "unwholesomely unequal."[95]

. . . the fact that cases can be brought 10 to 15 years after a child's birth argues for the need for counsel to cross-examine witnesses on the accuracy of their memories, develop testimony by other witnesses, and ensure that blood tests are provided.

Salas v. Cortez offers a stark illustration of how "unwholesomely unequal" these contests can become. California initiated paternity suits against two indigent defendants. Both men attempted unsuccessfully to obtain counsel. Neither man understood the intricacies of the proceedings; one defendant could barely understand English. Without the advice of counsel, neither man knew how to respond to the district attorney's discovery requests or knew how to request the help of experts to perform blood tests. The Superior Court found paternity in both cases. The court's judgment was based upon "facts" the court deemed admitted because the defendants did not contradict them, and the mothers' testimony, which was not subjected to cross-examination. The defendants became fathers by default.[96]

85. Mills v. Halbluetzel, 456 U.S. 91, 96 n.4 (1982).
86. *See also* Gomez v. Perez, 409 U.S. 535, 538 (1973) (paternity proceedings present lurking problems with respect to proof that cannot be lightly brushed aside). It is noteworthy that none of the state courts holding against a right to counsel have discussed the Supreme Court's cautions in *Mills* and *Gomez* on the limited utility of blood tests and the putative father's need to rely on conventional forms of proof.
87. To be codified at 42 U.S.C. § 666(a)(5).
88. *Mills*, 456 U.S. at 91; Pickett v. Brown, 103 S. Ct. 2199, 2208 (U.S. 1983). See also *Gomez*, 409 U.S. at 535.
89. *Gagnon*, 411 U.S. at 778.
90. *Id.* at 782.
91. *Id.* at 787-89.
92. *Lassiter*, 452 U.S. at 31-32.
93. *Salas*, 593 P.2d at 231.
94. *See* introduction on how the state becomes involved in AFDC cases. In addition, when Congress established the IV-D program, it created strong incentives for states to implement aggressive programs to determine the paternity of children of unmarried welfare recipients. The federal government reimbursed 75 percent of the program's administrative expenses, 42 U.S.C. §§ 654, 655; paid states a bonus for support collected for AFDC families, 42 U.S.C. § 658; and allowed the state to keep a pro rata share of the support collected, 42 U.S.C. § 657(b). As will be discussed in a later article, some of these provisions have been changed by the Child Support Enforcement Amendments of 1984.
95. *Lassiter*, 452 U.S. at 28. *See Toner*, 8 Ohio St. 3d at 24; *Corra*, 451 A.2d at 487; *Kennedy*, 439 N.E.2d at 1371-72.
96. *Salas*, 593 P.2d t 232.

The California Supreme Court harshly condemned such a result.

> A judgment rendered in this manner is not only unfair, it is unreliable. Recognizing the complexity of these proceedings and the importance of their outcome to the state, the mother and the child, the Legislature has afforded the mother and the child the assistance of counsel in prosecuting their claim. However, by intervening heavily on behalf of one side in what has traditionally been a private dispute, the state has skewed the outcome of the case. The chances that the significant consequences of fatherhood will be imposed on an innocent man obviously increase dramatically if, because he is unable to afford counsel, the defendant offers no defense. They increase still further if counsel for the plaintiff is a specialist in prosecuting such claims.... Unless the rights of indigent paternity defendants are protected, courts risk finding not the right man, but simply the poorest man to be the father of a child.[97]

97. *Id.* (citations and footnote omitted). Additional facts in the case underscore the Justices' prediction that, without lawyers representing both parties in a paternity proceeding, courts will find "simply the poorest man to be the father of a child." Prior to filing suit against one of the named plaintiffs, the district attorney had represented the mother in a paternity suit involving the same child against another man. That man secured counsel, and the Superior Court denied the district attorney's request for temporary support for lack of evidence. The district attorney then filed suit against the defendant in *Salas*, alleging that he was the father. *Id.* at 232 n.8.

Thus, courts can be persuaded that the position of the indigent putative father is such that there is a substantial likelihood of a wrong decision being reached. This is particularly true when the proceeding is being brought by the state, when an experienced attorney represents the state, and when the defendant is illiterate, uneducated or not proficient in English. Since this aspect of the *Eldridge* test is the one most difficult to argue, as well as the one most dependent on a judge's subjective judgment, it is very important that any affirmative litigation in this area be brought on behalf of clients like those in *Salas* who can show that appointment of counsel could affect the outcome of the proceedings.

V. Conclusion

While establishing an indigent putative father's right to counsel is difficult, it is by no means impossible. A carefully structured and fully developed argument should be successful. Advocates may want to pay particular attention to the possibility of bringing these actions in state courts and using state, as well as federal, due process theories. Because in many states a putative father's right to a state-paid blood test may be a critical factor in developing this argument, the next article in this series will examine that issue and suggest ways to implement that right as well. The next article will also discuss the right to counsel and blood tests if the state uses quasi-judicial or administrative processes for determining paternity.

States Addressing the Right to Counsel in Paternity Proceedings

State	Right	Source of Right
Alaska	Yes	*Reynolds v. Kimmons*, 569 P.2d 789 (Alaska 1977).
California	Yes	*Salas v. Cortez*, 593 P.2d 226 (Cal. 1979).
Colorado	Possible	Colo. Rev. Stat. § 319-6-120 (1973).
Connecticut	No*	*Johnson v. Henry*, 461 A.2d 1001 (Conn. Super. Ct. 1983) (dicta).
Florida	No	*Department of Health & Rehabilitative Servs. v. Heffler*, 382 So. 2d 301 (Fla. 1981).
Hawaii	Possible	Hawaii Rev. Stat. § 584-19 (1976).
Illinois	Yes	Ill. Ann. Stat. ch. 106 3/4, § 55 (Smith-Hurd 1980).
Indiana	Yes*	*Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982).
Iowa	No	*State ex rel. Hamilton v. Snodgrass*, 325 N.W.2d 740 (Iowa 1982).
Michigan	Yes*	*Artibee v. Cheboygan Circuit Ct.*, 243 N.W.2d 248 (Mich. 1976).
Minnesota	Yes	Minn. Stat. § 257-69 (West Supp. 1980).
Montana	Yes	Mont. Code Ann. § 40-6-119 (1979).
Nevada	Yes	Nev. Rev. Stat. § 126.201 (Supp. 1979).
New Jersey	Yes*	*M. v. S.*, 404 A.2d 653 (N.J. Super. Ct. 1979).
New York	Yes*	*Madeline G. v. David R.*, 467 N.Y.S.2d 271 (Fam. Ct. 1979).
North Carolina	No	*Wake County ex rel. Carrington v. Townes*, 293 S.E.2d 95 (N.C. 1982).
North Dakota	Yes	N.D. Cent. Code § 14-17-18 (Supp. 1977).
Ohio	Yes	*State ex rel. Cody v. Toner*, 8 Ohio St. 3d 22 (1983).
Oregon	No*	*State Adult & Family Servs. Div. v. Stoutt*, 644 P.2d 1132 (Or. Ct. App. 1982).
Pennsylvania	Yes*	*Corra v. Coll*, 451 A.2d 480 (Pa. Super. Ct. 1982).
Washington	No	*State v. Walker*, 553 P.2d 1093 (Wash. 197).
West Virginia	Yes	*State ex rel. Graves v. Daugherty*, 266 S.E.2d 142 (W. Va. 1980).
Wyoming	Yes	Wyo. Stat. § 14-2-116 (1977).

*Decision not by highest court in state.

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