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# Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings

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# MAKING THE CASE FOR EFFECTIVE ASSISTANCE OF COUNSEL IN INVOLUNTARY TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

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## I. INTRODUCTION

"Termination of parental rights is the 'death penalty' of juvenile law."[1] Terminating a parent's rights effectively severs completely and irrevocably the rights of a parent in his or her natural child.[2] The permanency and completeness of an action to terminate parental rights make it the most severe

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1. Appellant's Initial Brief on the Merits at 3, N.S.H. v. Dep't of Children & Family Servs., 843 So. 2d 898 (Fla. 2003) (No. SC02-261).

2. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

legal intrusion into the sanctity of the family.[3] It constitutes a direct interference by the state into a parent's "essential" right to conceive and raise one's child.[4] Moreover, permanently severing the parent-child relationship has a profound influence on the sociological and psychological well-being of the child involved.[5]

Yet, despite the severe consequences of a termination of parental rights suit, a termination of parental rights proceeding is not a criminal proceeding.[6] For this reason, the absolute constitutional guarantee to court-appointed counsel for indigent criminal defendants[7] is not afforded to indigent parents in termination of parental rights proceedings.[8] Nevertheless, many state courts have broadened the right to counsel on state law grounds, construing similar due process clauses requiring the appointment of counsel in their state constitutions.[9]

In Florida, parents have a statutory right to be represented by counsel in a proceeding dedicated to the termination of parental rights.[10] Given that this right exists, it would naturally follow that a remedy must exist to right violations of this statutory entitlement.[11] Yet, Florida courts have just recently begun to address the specific question of whether the statutory right to appointed counsel in a termination of parental rights proceeding carries an implicit requirement that counsel's assistance be competent and effective. Florida's First District Court of Appeal addressed this precise issue in *L.W. v. Department of Children & Families,*[12] in which it held parents entitled to court-appointed counsel in dependency proceedings are also entitled to com-

3. *See id.* at 759.

4. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This case was the first in which the United States Supreme Court recognized the constitutional right to family relations. *See id.* at 390. In this case the Court struck down a Nebraska law that forbade the teaching of a foreign language to children under the age of fourteen. *See id.* The Court held that the law violated a parent's Fourteenth Amendment right to raise their children. *Id.*

5. *See generally* Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397 (1996).

6. S.B. v. Dep't of Children & Families, 825 So. 2d 1057, 1060 (Fla. 4th Dist. Ct. App. 2002).

7. Gideon v. Wainwright, 372 U.S. 335, 335 (1963).

8. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981).

9. Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L. REV. 247, 251 (1997).

10. FLA. STAT. § 39.013(1) (2002).

11. *In re* Isaac Oghenekevebe, 473 S.E.2d 393, 396 (N.C. Ct. App. 1996) (stating that if section 7A-289.23 of the *North Carolina General Statutes*, guarantees a parent right to counsel in termination of parental rights suit there should be a remedy to cure violations of the statute).

12. 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002).

petent assistance of counsel.[13] The Fourth District Court of Appeal addressed the same issue in *S.B. v Department of Children & Families*,[14] in which it rejected the courts holding in *L.W.*.[15] The issue of competent counsel in dependency proceedings remained in an indeterminate state until July 10, 2003, when the Supreme Court of Florida reviewed the decision in *S.B.*.

This article will discuss the decisions in *L.W.* and *S.B,* as well as the final ruling on the issue by the Supreme Court of Florida. Furthermore, this article will conclude contrary to the Supreme Court of Florida's conclusion in *S.B.*, as it seeks to substantiate the right of indigent parents to effective assistance of counsel in termination of parental rights proceedings in Florida. In order to do that, this paper will begin by briefly discussing the interests at stake in a termination hearing and the rights that are imperiled as a result of those hearings. Next, there will be a brief discussion of the *Florida Statutes* relating to termination of parental rights proceedings. Subsequently, this article will address the evolution of the right to counsel in Florida. Following, there will be a discussion of the holdings and implications of the appellate courts' decisions in *L.W.* and *S.B.* and the Supreme Court of Florida's recent decision pertaining to the issue. Finally, this article will make a case for competent counsel by addressing the United States Supreme Court's decision in *Lassiter v. Department of Social Services*,[16] the implications and shortcomings of that decision, and the Supreme Court of Florida's decision in *S.B.*.

## II. THE INTERESTS AT STAKE IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

A parent's interest in his or her child is a basic right of man,[17] more precious than a property right,[18] warranting deference and protection.[19] Traditionally, the United States Supreme Court has treated issues pertaining to the family with deep respect and integrity, holding the privacy of the family unit sacred.[20] A family has an intrinsic human right to be free from unnecessary

13. *Id.* at 555.
14. 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002).
15. *Id.* at 1061.
16. 452 U.S. 18 (1981).
17. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).
18. May v. Anderson, 345 U.S. 528, 533 (1953).
19. Stanley v. Illinois, 405 U.S. 645, 651 (1972).
20. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (constitutional guarantees of personal privacy extend to family relationships); *see also* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (parent's role in child bearing is "basic in the structure of our society"); Moore v. City

state intrusion.[21] A parent's interest in the care and custody of his or her child is superior to that of the state.[22] Yet, a parent's right to raise his or her child freely is not absolute, as it is subject to limitation by the state.[23]

Even though the institution of family is constitutionally protected, the state has the power, under the "*parens patriae*" doctrine,[24] to interfere in the parent-child relationship.[25] *Parens patriae* is founded on the idea that every child's welfare is the concern of the state.[26] Based on this doctrine, the state cannot only infringe upon a parent's fundamental liberty interest, but can destroy a family's structure by terminating a parent's rights completely and irrevocably.[27]

There is often conflict between the constitutional protection of parental decisions regarding families and the state's legitimate interest in protecting their citizens, especially children. In light of this conflict, and because a fundamental right is involved, state termination statutes should be construed in a light most favorable to the parent.[28] However, parental rights are "sub-

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of East Cleveland, 431 U.S. 494, 503 (1977) (family is "deeply rooted in this Nation's history and tradition").

21. *Moore*, 431 U.S. at 498–500 (finding that unlike the property interests that are also protected by the Fourteenth Amendment, liberty interests in family privacy has its source in intrinsic human rights as they have been understood in American tradition).

22. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding the right of Amish parents to provide private education oriented to their religious beliefs in spite of a Wisconsin law that required minors to attend high school); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding that a law that prohibits instruction of foreign language to children is unconstitutional).

23. *See* Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 216 (1979) [hereinafter *Right to Family Integrity*].

24. "*Parens Patriae*" is Latin for "'parent of his or her country'" and refers traditionally to:

> 1. The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves. . . . 2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit. . . . The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit. -- Also termed *doctrine of parens patriae.*

BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

25. *Id.*

26. *Right to Family Integrity*, *supra* note 23.

27. Santosky v. Kramer, 455 U.S. 745, 759 (1982).

28. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). Under the strict scrutiny test, a state law impinging on a fundamental right must be justified by a compelling state interest and must be drawn narrowly to limit state intrusion to situations where a compelling state interest exists. *Id*; *see also* Roe v. Wade, 410 U.S. 113, 162–64 (1973) (woman's right to have abortion limited only at point during pregnancy where state interest became compelling); *Yoder*, 406 U.S. at 205 (finding the state interest in compulsory education insuf-

ject to an overriding principle that it is the ultimate welfare or best interest of the child that must prevail."[29] Thus, a termination of parental rights statute should be interpreted so that it affords adequate protection to a parent's constitutional rights while allowing severance of parental rights when the child's interest in stability is paramount.[30]

## III. TERMINATION OF PARENTAL RIGHTS IN FLORIDA

Termination of parental rights is the modern statutory legal construct that stems from the common law test that balanced a parent's rights and the role of the state as *parens patriae*.[31] In Florida, termination of parental rights is governed by Chapter 39 of the *Florida Statutes*.[32] Terminating a parent's right involves a two-step process.[33] First, the court must find by clear and convincing evidence that one of the grounds enumerated under section 39.806 of the *Florida Statutes* has been met,[34] and the second step requires a court determination that termination of parental rights would be in the best interest of the child.[35]

Termination of parental rights cases fall under two categories: those in which the court has made a finding of dependency but the parents were provided an opportunity to regain custody through substantial compliance[36] with a case plan,[37] and those situations in which there is no case plan or prospect

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ficiently compelling to justify statute limiting the right to exercise religion and to raise children in a chosen manner). A termination statute was struck down on the ground of vagueness and substantive due process grounds in *Alsager v. District Court of Polk County*, 545 F.2d 1137 (8th Cir. 1976). Again strict scrutiny was applied to a termination statute one year later in *Roe v. Connecticut*, 417 F. Supp. 769 (M.D. Ala. 1976). Again the statute was found to be violative of due process because it did not promote a compelling state interest. *See id.*

29. *In re* J. L. P., 416 So. 2d 1250, 1252 (Fla. 4th Dist. Ct. App. 1982).

30. *See Right to Family Integrity*, *supra* note 23.

31. GILBERT PEREZ, FLORIDA JUVENILE LAW AND PRACTICE § 16.1, at 16-4 (7th ed. 2001).

32. *Id.*

33. *Id.*

34. *Id.* (citing § 39.802(4)(a)).

35. FLA. STAT. §§ 39.810, 39.802(4)(C) (2002); *See* Santosky v. Kramer, 455 U.S. 745 (1982).

36. PEREZ, *supra* note 31, at 16-5. A parent is in "substantial compliance" with a case plan when "the circumstances which caused the creation of the case plan have been significantly remedied to the extent that the well-being and safety of the child will not be endangered upon the child's . . . being returned to the child's parent." § 39.01(68).

37. A case plan is an agreement between all parties involved in the dependency proceeding that sets forth the actions to be taken by the parents, the Florida Department of Children and Families and other professionals with the objective of rehabilitating the family unit. H. Lila Hubert, *In the Best Interests: The Role of the Guardian Ad Litem in Termination of Parental Rights Proceedings*, 49 U. MIAMI L. REV. 531, 546 (1994).

of family reunification.[38] A petition for termination of parental rights is filed without a case plan for reunification if: a parent has voluntarily surrendered the child for adoption, the parents have abandoned the child,[39] a parent's conduct threatens the life, well-being, safety, or physical, mental, or emotional health of the child, the parent is incarcerated;[40] or the parent has engaged in egregious conduct,[41] or had the ability and knowledge to prevent the egregious conduct done to the child.[42] To effectuate a petition for termination of parental rights on this basis, Florida's Department of Children and Families must show that there are no less restrictive means to protect the child.[43]

However, most cases arrive at the termination of parental rights stage following an adjudication of dependency, where "a case plan has been filed, and the child continues to be abused, neglected, or abandoned by the parents."[44] A parent has twelve months from the date that the child was placed into shelter to substantially comply with the case plan.[45] If at the twelve-month judicial review hearing the parents are found not to be within the requisite compliance of the case plan, their parental rights are terminated.[46]

Because of this consequence, which involves the deprivation of certain liberties, the United States Supreme Court has held that due process requires

38. PEREZ, *supra* note 31, at 16-5.

39. Section 39.01(1) of the *Florida Statutes* defines abandonment as "a situation in which the parent . . . while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations." § 39.01(1). A finding of abandonment may be made upon a determination by the court that the parents have only made "marginal efforts that do not evince a settled purpose to assume all parental duties." *Id.*

40. *See* § 39.806(1)(d); L.E. v. Dep't of Children & Family Servs., 783 So. 2d 346 (Fla. 3d Dist. Ct. App. 2001).

41. § 39.806(1)(f). Egregious conduct is defined as "abuse, abandonment, neglect, or any other conduct of the parent: that is deplorable, flagrant, or outrageous by a normal standard of conduct." § 39.806(1)(f)(2).

42. PEREZ, *supra* note 31, at 16-6–16-7. Other circumstances for termination of parental rights without a case plan are: "the parent has subjected the child to aggravated child abuse, sexual battery, or sexual abuse, or chronic abuse; [t]he parent has committed murder, voluntary manslaughter, or felony assault resulting in serious bodily injury to the child or another child, or has aided abetted, attempted, or conspired or solicited to commit any of these acts; [t]he parent has had parental rights to a sibling of the child involuntarily terminated." *Id.*

43. *In re* D.W., 793 So. 2d 39, 40 (Fla. 2d Dist. Ct. App. 2001).

44. PEREZ, *supra* note 31, at 16-7.

45. *Id.* The court can extend the case plan on a finding that the child's situation is "extraordinary" and that the child's best interest will be served in doing so. § 39.703(2). The Department of Children and Families can also terminate parental rights before the expiration of the twelve-month period, if they determine that the parent, while able to do so, has not substantially complied with the case plan. § 39.703(1).

46. PEREZ, *supra* note 31, at 16-7.

states to support their allegations by clear and convincing evidence.[47] The United States Supreme Court arrived at this intermediate burden of proof after finding that the preponderance of evidence standard that is usually required in a civil proceeding, fell short of the demands required to meet due process.[48] This is because a termination of parental rights proceeding does not fit within the usual parameters of either a civil or a criminal case.[49] For this reason, a parental severance proceeding is "best characterized as 'quasi-prosecutorial.'"[50] The adversarial nature of a termination of parental rights proceeding, and the due process rights involved, warrant an absolute right to counsel in Florida.[51]

## IV. THE EVOLUTION OF THE RIGHT TO COUNSEL IN FLORIDA

According to chapter thirty-nine of Florida law pertaining to termination of parental rights, parents have an absolute right to counsel in termination of parental rights proceedings.[52] However, according to the United States Constitution, parents do not have an absolute right to counsel in these suits.[53] Though courts have long recognized a natural parent's due process right of notice and an opportunity to be heard in a proceeding severing a parents rights to custody of their child, the United States Supreme Court has traditionally confined the constitutional right to counsel for indigent litigants to defendants in criminal proceedings.[54] In the case of *In re* Gault, [55] the

47. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

48. *Id.*

49. *Id.* The reason why termination of parental rights proceedings do not fall comfortably within the understood parameters of a civil or criminal proceeding is explained through:

> The United States Supreme Court, in Santosky v. Kramer, 455 U.S. 745, 762 (1982), [in which they] stated that 'the fact- finding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial' because of the following factors:
> The Commissioner of Social Services *charges* the parents with permanent neglect. They are served by *summons*. The factfinding hearing is conducted pursuant to *formal rules of evidence*. The State, the parents, and the child are all represented by counsel . . . the attorneys *submit documentary evidence*, and *call witnesses who are subject to cross-examination* . . .. [T]he judge then determines whether the State has proved the statutory elements [by the proper *burden of proof*]. *Id.* (citations omitted) (emphasis added).

Hubert, *supra* note 37, at 554 n.126.

50. *Id.* at 554.

51. N.S.H. v. Dep't of Children & Families, 843 So. 2d 898, 904 (Fla. 2003) (stating that "the right to counsel [in dependency proceedings] may flow from, and have its origins in, the Sixth Amendment in the criminal context . . . [as well as] concepts of due process under the United States and Florida Constitutions. . . .").

52. § 39.013(1).

53. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

54. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

United States Supreme Court looked as if it was "paving the way for an expanded right to counsel based on the Fourteenth Amendment guarantee of 'procedural due process through a fair hearing.'"[56] However, the United States Supreme Court decided contrary to what both state and federal courts had anticipated,[57] holding in *Lassiter v. Department of Social Services*,[58] that the Due Process Clause of the Fourteenth Amendment does not per se require that counsel be appointed for an indigent parent in a termination of parental rights proceeding.[59] Instead, the decision as to whether the Due Process Clause requires appointed counsel for an indigent parent is left to the trial court and subject to appellate review, in light of the private and government interests at stake, "and the risk that the procedures used will lead to erroneous decisions."[60]

Prior to the *Lassiter* court's holding, that indigent parents did not have an absolute entitlement to court-appointed counsel, Florida case law recognized the right to counsel for indigent parents in parental severance proceedings.[61] In Florida, an indigent parent has an absolute right to be represented by counsel, including the right to a state appointed attorney.[62] The Supreme Court of Florida "has held 'that counsel is necessarily required under the due process clause of the . . . Florida Constitution[], in [dependency] proceedings involving the permanent termination of parental rights to a child, or when the proceedings, because of their nature, may lead to criminal child abuse charges.'"[63] Since October 1, 1998, the legislature has acknowledged that the interests at stake in all dependency proceedings require representation by counsel.[64] The court must advise a parent at every stage of a dependency or

55. 387 U.S. 1 (1967) (holding that a juvenile in a civil proceeding that had a possibility of involuntary commitment was constitutionally entitled to state appointed counsel).

56. Young, *supra* note 9, at 249 (quoting Joel E. Smith, Annotation, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 80 A.L.R. 3d 1141, 1144 (1977)).

57. *Id.* at 251.

58. 452 U.S. 18 (1981).

59. *See id.* at 32.

60. *Id.* at 27.

61. *See* Davis v. Page, 442 F. Supp. 258, 260 (S.D. Fla. 1977); *In re* D.B., 385 So. 2d 83 (Fla. 1980) (holding that the criminal due process requirement of court-appointed counsel at the critical stages of arraignment, preliminary hearing, or custodial interrogation extends as well to all stages of dependency procedure).

62. MICHAEL J. DALE, FLORIDA JUVENILE LAW AND PRACTICE § 10.2, § 10.3, at 10-4 (7th ed. 2001) (citing FLA. STAT § 39.807(1)(a) (1998); FLA. R. JUV. P. 8.515 (1998)) [hereinafter Dale I].

63. L.W. v. Dep't of Children & Family Servs., 812 So. 2d 551, 554 (Fla. 1st Dist. Ct. App. 2002) (citing *D.B.*, 385 So. 2d at 90).

64. § 39.013(1), (9)(a).

parental termination proceeding of his or her right to counsel, and upon a determination of indigence, he or she is entitled to state appointed counsel.[65] If a parent waives the right to counsel in one stage of the dependency proceeding, the offer must be renewed at each subsequent stage of the case.[66]

When parents request an attorney and state that they do not understand the proceedings, the trial court must appoint an attorney to represent the parents.[67] Parents are initially advised of their right to counsel at the shelter hearing and are given reasonable time for which to obtain counsel.[68] The importance of counsel at a dependency hearing is evidenced by Florida law stating that if parents or legal guardians appear at the shelter hearing without counsel, the hearing may be continued for up to seventy-two hours, allowing these parents to consult with their attorney.[69] Furthermore, before parents are permitted to waive their right to counsel, the court must determine that the parent understands the right to counsel and the parent is knowingly waiving that right, intelligently, and of their own volition.[70] The court makes the determination based on "the age, education, and experience of the party [involved], the nature or complexity of the case, and other factors."[71]

Though the right to assistance of counsel is imperative and cannot be relinquished without judicial acknowledgement, Florida, until July of 2003, was irresolute as to whether parents are entitled to competent assistance of counsel in dependency cases.[72]

## V. STATEMENT OF THE CASES

### A. L.W. v. Department of Children & Families

On March 28, 2002, Florida's First District Court of Appeal decided *L.W. v. Department of Children & Families.*[73] In this case, the Department of Children and Families filed a dependency petition alleging that a father had sexually abused his stepdaughter and that the mother neglected to protect

65. § 39.013 (9)(a).
66. J.B. v. Fla. Dep't of Children & Family Servs., 768 So. 2d 1060, 1068 (Fla. 2000).
67. McKenzie v. Dep't of Health Rehabilitative Servs., 663 So. 2d 682, 683 (Fla. 5th Dist. Ct. App. 1995).
68. FLA. STAT. § 39.402(3) (2002).
69. § 39.402(3).
70. § 39.013(9)(c)(1).
71. Dale I, *supra* note 62 § 10.3, at 10-4.
72. *See L.W.*, 812 So. 2d at 552; S.B. v. Dep't of Children & Families, 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002).
73. 812 So. 2d at 551.

her daughter from the abuse.[74] The petition further alleged that the parents' two sons were at risk of prospective abuse because of the father's behavior with his stepdaughter.[75] The parents denied the allegations and were appointed an attorney by the trial court.[76] After a hearing on the matter, the court determined that the allegations were proven by the greater weight of evidence.[77] Subsequently, the trial court held a disposition hearing at which the same attorney represented the parents.[78] The court decided to adhere to the disposition and the children were removed from the parents' home.[79] Thereafter, the mother obtained the services of a different attorney, while the father continued to be represented by the same attorney.[80] After a period of over a year, the mother was still unable to have any contact with her daughter and the father could have no contact with any of his children.[81] In November 2000, both parents retained new counsel and filed writs of habeas corpus to set aside the orders of adjudication and disposition based on ineffective assistance of counsel.[82] The trial court denied the petitions on the basis that, as a matter of law, the remedies requested were not available.[83]

On appeal, the First District Court of Appeal acknowledged that this was the first time a Florida court had addressed the issue of competent counsel as it relates to a dependency proceedings.[84] In this case, the First District Court of Appeal held consistent with the position taken by an overwhelming amount of jurisdictions,[85] that an indigent parent, who has a constitutional right to court-appointed counsel in dependency proceedings, also has a right to competent counsel.[86] The court also determined as a matter of first impression, that the criminal standard announced in *Strickland v. Washington*,[87] applies to juvenile dependency proceedings.[88] This standard would be utilized in determining whether court-appointed counsel was effective, as is necessary to protect the parent's constitutional right to court-appointed counsel

74. *Id.* at 552.
75. *Id.*
76. *Id.*
77. *Id.*
78. *L.W.*, 812 So. 2d at 552.
79. *Id.*
80. *Id.*
81. *Id.* at 553.
82. *Id.*
83. *L.W.*, 812 So. 2d at 554.
84. *Id.*
85. *Id.*
86. *Id.* at 556.
87. 466 U.S. 668 (1984).
88. *L.W.*, 812 So. 2d at 556.

in dependency proceedings.[89] The district court also determined that the appropriate method for challenging the effectiveness of court-appointed counsel is by a petition for writ of habeas corpus.[90] Understanding that their decision held extensive implications, the First District certified to the Supreme Court of Florida the questions as to whether parents who are constitutionally entitled to court-appointed counsel in dependency proceedings are also entitled to competent assistance of counsel; and if so, is the proper procedure by which to raise a claim of incompetent assistance of counsel a petition for habeas corpus.[91]

B. S.B. v. Department of Children & Families

In the meantime, the Fourth District Court of Appeal in Florida was presented with a similar issue in *S.B. v. Department of Children & Families*.[92] In *S.B.*, a mother sought to set aside an order adjudicating her two children dependent.[93] In 1998, the court held an arraignment hearing on the issue of dependency but the mother ("S.B."), who was personally served and had notice of the hearing, failed to appear.[94] At trial the children's fathers, who had completed their case plan and been awarded custody, appeared and gave their consent to the adjudication of dependency.[95] "The court proceeded as if S.B. had consented as well, pursuant to section 39.506(3) of the *Florida Statutes*."[96] S.B. and her appointed counsel were present at the disposition hearing, at which time S.B.'s children were adjudicated dependent.[97] Thereafter, S.B.'s attorney filed a motion to vacate and set aside the finding of consent by default, declaring in the motion that she had sent the judge a letter in lieu of attending to which the judge responded, indicating he could not accept *ex parte* communications.[98] There was no subsequent ruling on S.B.'s motion and she did not appeal her children's adjudication of depend-

89. *Id.*
90. *Id.* at 557.
91. *Id.* at 558.
92. 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002).
93. *Id.* at 1058.
94. *Id.*
95. *Id.*
96. *Id.* (citing that section 39.506(3) of the *Florida Statutes* states, "[f]ailure of a person served with notice to personally appear at the arraignment hearing constitutes the person's consent to a dependency adjudication.").
97. *S.B.*, 825 So. 2d at 1058.
98. *Id.*

ency.[99] S.B. then filed a motion to dismiss and remedy the decision of the trial court based on ineffective assistance of counsel.[100]

The Fourth District held that although S.B. had a right to appointed counsel, her right was not a constitutional right but a statutory one, and that she has no right to challenge her counsel's performance other than filing a malpractice action.[101] The court stated that the Supreme Court of Florida has indicated only two situations in which a parent's right to counsel is a constitutional right.[102] The first circumstance in which a parent has a constitutional right to counsel, under the Due Process Clause of the United States and Florida Constitutions, is in proceedings involving permanent termination of parental rights, and the second is when the proceeding, because of its nature, may lead to criminal charges.[103] In its analysis, the court rejects the First District's holding that a constitutional right to counsel necessarily implies a right to competent counsel.[104] In doing so, the court asserts a dependency proceeding is not a criminal proceeding, and therefore, a criminal defendant's right to counsel and an indigent parent's right to counsel in a termination proceeding are different.[105] That is, competent counsel is not a protection afforded indigent parents under due process considerations.[106]

In addition, the Fourth District Court of Appeal declined to extend the right to counsel, to include the assistance of competent counsel, because if the same relief recognized in post conviction criminal cases were afforded parents, it would serve to further disrupt the lives of the children years after a dependency decision was made.[107] In concluding, the court stated that it does not recognize a right to competent counsel in a dependency proceeding whether the right to counsel is constitutional or statutory and that S.B.'s petition is insufficient and will not be treated as a writ of habeas corpus.[108] Subsequently, the decision was appealed to the Supreme Court of Florida for review.[109]

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99. *Id.*
100. *Id.*
101. *Id.* at 1058.
102. *S.B.*, 825 So. 2d at 1059.
103. *In re* D.B., 385 So. 2d 83, 90 (Fla. 1980).
104. *S.B.*, 825 So. 2d at 1060.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 1061.
109. S.B. v. Dep't of Children & Families, No. SC02-2262, 2003 WL 21543565, at *1 (Fla. July 10, 2003).

### C. *The Supreme Court of Florida Decides*

On July 10, 2003 the Supreme Court of Florida affirmed the Fourth District Court of Appeal's holding in *S.B. v. Department of Children and Families*,[110] which directly conflicts with the First District Court of Appeal's holding in *L.W.*[111] That is that the right to court appointed counsel does not include a conclusive right to "collaterally challenge the effectiveness of counsel."[112] The Supreme Court of Florida contends that dependency proceedings are civil in nature and it reiterates its decision. In the case of *In re* D.B.,[113] the court found that there is only a definitive constitutional right to counsel in dependency proceedings under two circumstances: when the proceedings may result in the permanent termination of parental rights, or when a parent may be charged with criminal child abuse.[114] In all other circumstances the right to counsel is not conclusive, rather the case-by-case approach established in *Potvin v. Keller*[115] must be applied to determine if the right to counsel in that particular dependency case is constitutional, and if not, it is merely a statutory entitlement.[116]

Furthermore, the court distinguishes the litigants in *L.W.* from the litigant in *S.B.*, finding that in *L.W.* the parents faced criminal charges, thus they had a constitutional right to counsel, unlike in *S.B.* where the defendant was not criminally charged, thereby rendering her entitlement to counsel a statutory right.[117] In its holding, the Supreme Court of Florida made the inference that only when there is a constitutional right to counsel[118] in a dependency proceeding is there a right to pursue a collateral proceeding questioning the competence of court-appointed counsel.[119] The Supreme Court of Florida ultimately disapproved of the First District Court of Appeal holding in *L.W.*, to the extent that it conflicts with its holding in *S.B.*.[120]

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110. *Id.*
111. L.W. v. Dep't of Children & Families, 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002).
112. *Id.*; *S.B.*, 2003 WL 21543565, at *1.
113. 385 So. 2d 83 (Fla. 1980).
114. *S.B.*, 2003 WL 21543565, at *2 (citing *In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980)).
115. 313 So. 2d 703 (Fla. 1975) (citing Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) which suggested, that the right to counsel in dependency proceedings would be dependent on the potential length of the parent-child separation, the extent of restriction on parental visitation, the presence or absence of parental consent, the presence or absence of disputed facts, and the complexity of the proceeding).
116. *S.B.*, 2003 WL 21543565, at *3.
117. *Id.* at *3–4.
118. *See D.B.*, 385 So. 2d at 90; *Potvin*, 313 So. 2d at 703.
119. *S.B.*, 2003 WL 21543565, at *5.
120. *Id.* at *5.

## VI. THE ERROR OF THEIR WAYS

In Florida, an indigent defendant in a dependency suit is entitled to competent assistance of counsel only if he qualifies for a constitutional right to counsel under either the *Mathews v. Eldridge*[121] or the *Potvin v. Keller* balancing test. For this reason, the Supreme Court of Florida's handling of *S.B.* is reminiscent of the United States Supreme Court's treatment of *Lassiter*.[122] These two decisions make a parent's right in his or her child determinant on the loss of personal liberty or a judicial prophecy that a proceeding will not end in the severance of the parent-child relationship.[123] These cases are both inconsistent and symbolic of a giant step back in the effort to ensure indigent parents receive fair access to and just results in court proceedings.[124]

The scales of justice in *Lassiter* and *S.B.* appear to have been unbalanced before the first fact was spoken before a judge. In both of the cases the courts began with a presumption that criminal defendants have more of a right to physical liberty then a parent has to his or her "flesh and blood."[125] Moreover, the two cases require the indigent defendants to overcome a haphazard cases-by-case analysis, which has been criticized as an improper method by which to protect fundamental rights.[126] In *Lassiter* v. *Department of Social Services*, the Court left the constitutional appointment of counsel in termination proceedings to be determined by the state courts on a case-by-case basis.[127] Furthermore, the Supreme Court of Florida in *S.B.* determined that only parents who have a constitutional right to counsel have the right to

121. 424 U.S. 319 (1976); *see infra* Section V.A.

122. *Compare S.B.*, 2003 WL 21543565, at *1, *with* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

123. *Id.*

124. *Id.*

125. *See Lassiter*, 452 U.S. at 18; S.B., v. Dep't of Children & Families, 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002); *S.B.*, 2003 WL 21543565, at *1.

126. *Lassiter*, 452 U.S. at 35–36 (Blackmun, J., dissenting) (citing Gideon v. Wainwright, 372 U.S. 335 (1963)). A flexible case-by-case analysis was overruled in *Gideon v. Wainwright*. *Id.* Additionally, in 1998 the Florida Legislature passed section 39.013 of the *Florida Statutes*, because of numerous appeals and inconsistent rulings resulting from the case-by-case analysis. Michael J. Dale, *Juvenile Law: 1994 Survey of Florida Law*, 19 NOVA L. REV. 139, 145 (1994) [hereinafter Dale II].

127. *Lassiter*, 452 U.S. at 31–32.

competent assistance of counsel and with two exceptions,[128] a constitutional right to counsel in Florida is determined on a case-by-case analysis.[129]

### A. *The Problems with the* Lassiter *Case-By-Case Method of Review*

In *Lassiter* v. *Department of Social Services*, a North Carolina Court of Appeal sought to terminate the parental rights of an indigent mother without providing her counsel.[130] In 1975, a North Carolina district court found Abby Gail Lassiter's son to be neglected and removed him from her home, placing him in the state's custody.[131] One year later, Ms. Lassiter was convicted of second-degree murder and sentenced to serve twenty-five to forty years in prison.[132] In 1978, the Department of Social Services initiated a proceeding to terminate Ms. Lassiter's parental rights in her son.[133]

Ms. Lassiter appeared at the termination hearing but was not accompanied by counsel nor was she offered counsel by the court.[134] Without the assistance of counsel, Ms. Lassiter failed to object to hearsay testimony, argued with the state's witness instead of cross examining her, and did not utilize avenues of defense available to her.[135] At the conclusion of the hearing, the court ordered that Ms. Lassiter's parental rights be severed.[136]

On appeal, Ms. Lassiter's counsel argued that the court's failure to appoint counsel at the termination hearing deprived her of the due process rights guaranteed by the Fourteenth Amendment.[137] The North Carolina Court of Appeal denied the claim stating that the invasion of Ms. Lassiter's individual privacy was not sufficient to warrant the appointment of counsel.[138] Subsequently, the Supreme Court of North Carolina denied Ms.

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128. The two exceptions are when the proceedings may result in permanent termination of parental rights, or when a parent may be charged with criminal child abuse. *In re* D.B., 385 So. 2d 83, 90 (Fla. 1980).

129. *S.B.*, 2003 WL 21543565, at *5 n.1. The case-by-case analysis that garners a parent a constitutional right to counsel in Florida is governed by the test adopted in *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975), in which the court stated, "[T]he right to counsel in dependency proceedings would depend on the potential length of parent-child separation, the degree of parental restrictions on visitation, the presence or absence of parental consent, the presence or absence of disputed facts, and the complexity of the proceedings." *Id.*

130. *Lassiter*, 452 U.S. at 22.

131. *Id.* at 20.

132. *Id.* at 40.

133. *Id.* at 20–21.

134. *Id.* at 22.

135. *Lassiter*, 452 U.S. at 53–56.

136. *Id.* at 24.

137. *Id.*

138. *Id.*

Lassiter's petition for review, and the United States Supreme Court granted certiorari.[139]

The United States Supreme Court affirmed the decision of North Carolina Court of Appeal.[140] In this case the Court did not decide the scope of the due process right to counsel, but rather left the decision for a case-by-case determination.[141] Justice Stewart, writing for the majority pursued a two-step analysis of the issue. First, he concluded that the precedents of both criminal and civil due process decisions have established a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[142] The Court balanced this presumption against the factors established in *Mathews v. Eldridge*,[143] the private interest, the state interest, and the risk of error in existing procedures.[144] In weighing those factors against the presumption the majority rejected a per se rule, in favor of a case-by-case analysis stating:

> If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risk of errors were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed 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,' (citation omitted), neither can we say that the Constitution requires the appointment of counsel in every termination of parental rights proceeding.[145]

The case-by-case method of review suffers from several defects. A judicious analysis of this issue is found in Justice Blackmun's dissent in *Lassiter*. In his dissent Justice Blackmun austerely criticizes the majority for resorting to an "ad hoc," "thoroughly discredited," case-by-case analysis.[146] He also points out that the majority uses the same analysis as he does in weighing the three factors listed in *Mathews v. Eldridge*, with both finding

139. *Id.*
140. *Lassiter*, 452 U.S. at 34.
141. *Id.* at 31–32.
142. *Id.* at 26–27.
143. 424 U.S. 319 (1976).
144. *Id.* at 321.
145. *Lassiter*, 452 U.S at 31–32 (1981) (Blackmun, J., dissenting) (quoting Gagnon v. Scarpelli, 411 U.S. 778 (1973)).
146. *Id.* at 35 (Blackmun, J., dissenting). The dissent pointed out that the "ad hoc" case-by-case approach was "thoroughly discredited nearly 20 years [prior] in *Gideon v. Wainwright*." *Id.*

"the private interest weighty, the procedure devised by the state fraught with risk of error, and the countervailing governmental interest insubstantial."[147] Yet, he states the Court refuses to

> follow this balancing process test to its logical conclusion . . . and announces that a defendant parent must await a case-by-case determination of his or her need for counsel. Because the three factors 'will not *always* be so distributed,' . . . the Constitution should not be read to 'requir[e] the appointment of counsel in *every* parental termination proceeding.'[148]

Justice Blackmun further points out that *Mathews* itself rejected such an approach, stating that in the case the Court reasoned that "'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'"[149] He further argues that a case-by-case analysis is inconsistent, cumbersome, intrusive, and ultimately inadequate to protect parents' rights.[150]

In addition, the rationale for a case-by-case analysis is less than influential and rests on dubious precedent.[151] Justice Blackmun points out in his dissent, that the majority ignored precedent by neglecting to note that prior due process analysis had focused on "different decision making *contexts*, not different *litigants* within a given context."[152] The court also neglects to discuss the precedent set forth in *Gideon v. Wainwright,*[153] wherein the Court overturned *Betts v. Brady*,[154] rejecting the flexible case-by-case analysis in favor of an absolute right to counsel in criminal proceedings.[155] The reason behind the rejected "totality of the circumstances" test in *Gideon* is equally applicable to parents in termination of parental rights proceedings: an un-

147. *Id.* at 48–49.
148. *Id.* at 49.
149. *Lassiter*, 452 U.S. at 50 (citing *Mathews*, 424 U.S. at 344).
150. *Id.* at 51.
151. *Id.* at 40.
152. *Id.* at 49; *see Mathews*, 424 U.S. at 344. The *Lassiter* majority's reliance on *Gagnon* to justify case-by-case inquiry is misplaced. *Gagnon's* adoption of a case-by-case analysis for probation revocation proceedings is based on the non-adversarial nature of the proceedings, the rehabilitative focus of the probative system, and the attenuated liberty interest of a convicted probationer. *See Gagnon*, 411 U.S. at 786–89. These rationales do not apply to a parent seeking to preserve their undiminished parental rights in a fully adversarial parental severance proceeding. *See Lassiter,* 452 U.S. at 50 n.18 (Blackmun, J., dissenting); Jeffery M. Mandell, Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REFORM. 554, 558 n.29 (1976).
153. 372 U.S. 335 (1963).
154. 316 U.S. 455 (1942).
155. *Lassiter,* 452 U.S. at 35 (Blackmun, J., dissenting).

skilled, indigent defendant confronted with the formidable legal wherewithal of the state in an adversarial proceeding unable to produce an adequate defense, especially, under indigent circumstances.[156] A case-by-case analysis also requires that the court prior to a hearing, examine the state's evidence to determine what, if any, difference legal representation would make.[157] These are complex questions of fairness that cannot be adequately answered until after trial, if ever.

### B. *Similar Problems with* S.B.

*S.B.* is fraught with similar inconsistencies and misleading notions. In *S.B.* the court draws a distinction between a constitutional right to counsel and a statutory right to counsel.[158] In Florida, a constitutional right to counsel is warranted if a parent is at risk of criminal child abuse charges or in a situation in which a proceeding will permanently terminate a parent's rights in his/her child.[159] All other situations are put to the test, adopted in *Potvin*, which looks at the length of the parent-child separation, the degree of parental restrictions on visitation, the presence or absence of parental consent, the presence of disputed facts, and the complexity of the proceeding.[160]

The case-by-case approach advanced by the Court imperils the interests at stake in the case and the general administration of justice.[161] The Court's holding essentially implies that unless a parent has a constitutional right to counsel, he or she is not entitled to effective counsel.[162] Here again, the court makes a distinction between litigants within the given context and does not look at the decision-making context as a whole.[163] At the inception of a dependency proceeding, the trial judge cannot be assured that, upon the conclusion of the case, the circumstances will not be such that a parent will not have permanently lost his or her rights in the child. Whenever a dependency petition includes a ground for termination according to statute there is ultimately the potential for the permanent termination of parental rights.[164] Furthermore, trial court judges cannot foretell whether criminal charges will result from the facts and evidence brought forth at trial.

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156. *Gideon*, 372 U.S. at 344–45; Powell v. Alabama, 287 U.S. 45, 68–69 (1932).
157. *Lassiter*, 452 U.S. at 50–51 (Blackmun, J., dissenting).
158. S.B. v. Dep't of Children & Families, No. SC02-2262, 2003 WL 21543565, at *1 (Fla. July 10, 2003).
159. *Id.* at *3.
160. *Id; see* Potvin v. Keller, 313 So. 2d 703, 706 (Fla. 1975).
161. *Lassiter*, 425 U.S. at 50 (Blackmun, J., dissenting).
162. *S.B.*, 2003 WL 21543565, at *1.
163. *Compare S.B.*, 2003 WL 21543565, at *1, *with Lassiter*, 452 U.S. at 49.
164. Wofford v. Eid, 671 So. 2d 859 (Fla. 4th Dist. Ct. App. 1996).

Therefore, to determine at the beginning of the case whether a parent has a statutory right to counsel in Florida or a constitutional right is implausible.[165] Moreover, the case-by-case approach adopted in *Potvin*, and promulgated by the Supreme Court's decision in *S.B.*, is impracticable because it requires that a trial judge determine the complexity of a proceeding that has yet to occur. If the court recognizes that the circumstances in each case are different for each litigant it should also recognize that the circumstances, implications, and the nature of the proceedings involved in a termination of parental rights suit will also be varied and cannot be predetermined. Moreover, the process advanced by the Supreme Court of Florida produces inconsistent results and "invites both confusion and appeal."[166]

The court states that *S.B.* had a statutory right to appointed counsel because there was "nothing to suggest [that] the Department was planning to pursue termination of parental rights."[167] However, the end result was that *S.B.*'s stature as parent was terminated. Thus, the court leads one to believe that if the petitioner does not express, at the commencement of the proceeding, that its ultimate goal is to terminate a parent's rights, a parent is not constitutionally entitled to counsel. Even though the consequence might be that a parent's rights in his or her child are completely and irrevocably lost.[168]

Florida's Legislature recognized that providing counsel would be effective and economic, as well as necessary to the protection of a parent's rights in his or her child [169] The legislature also recognized that reliance on a case-by-case approach was both cumbersome and costly.[170] Therefore it recently passed legislation requiring that indigent parents in dependency proceedings be appointed counsel by the state.[171] Prior to the passing of this legislation the appellate courts in Florida were confronted with numerous post verdict challenges to the fairness of particular proceedings, and expended much energy in effect, evaluating the performance of trial court judges.[172] Yet, the

165. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 50 (1981). This can be likened to Justice Blackmun's statement in his dissenting opinion wherein he criticizes the Court for expecting a review of the record to determine whether a defendant proceeding without counsel has suffered an unfair disadvantage. *Id.*

166. Dale II, *supra* note 126, at 145.

167. S.B. v. Dep't of Children & Families, No. SC02-2262, 2003 WL 21543565, at *4 (Fla. July 10, 2003).

168. *Id.*

169. FLA. STAT. §§ 39.408(2), 39.465(1)(a)(4) (1997).

170. *Id.*

171. FLA. STAT. § 39.013(1) (2002).

172. Michael J. Dale, *Juvenile Law Issues in Florida in 1998,* 23 NOVA L. REV. 819, 828–89 (1999) (finding that the legislature provides parents with counsel as a practical matter which should also help ease the appellate docket which had been rife with appeals because

Supreme Court of Florida has rendered the statutory right to counsel ineffective, because a statutory right to counsel does not warrant that a parents' liberty interests be adequately represented by competent or effective assistance of counsel.[173]

## VII. THE NATURE OF A TERMINATION OF PARENTAL PROCEEDING

The Supreme Court in *S.B.* undermines the authority of a statutory right to counsel in Florida by denying an indigent parent competent counsel, because the parent's entitlement does not stem from a constitutional right. Competent counsel is reserved for persons who warrant a constitutional right.[174] This is based on the court's perspective that termination of parental rights proceedings is civil in nature.[175] Because a termination proceeding is civil in nature, a state is not constitutionally required to appoint counsel.[176] The United States Supreme Court has established, and the Supreme Court of Florida has adopted, a presumption that counsel need not be provided in civil cases in which a loss of physical liberty is not at stake.[177] The constitutional appointment of counsel is justified only when the indigent parent can satisfy the *Mathews* or *Potvin* analysis to rebut the presumption that counsel is not ordinarily provided.[178]

Yet, to obtain a constitutional right to counsel is an insurmountable feat. As the court illustrated in *Lassiter*, a fundamental interest in keeping one's child, coupled with the extraordinarily high risk of error in a hearing conducted without counsel, does not necessarily outweigh the government's pecuniary interest in not providing counsel for indigent parents in parental severance suits.[179] Moreover, Florida provides all indigent parents with counsel in dependency proceedings, either through a constitutional or statutory entitlement, but will not guarantee that a parent will not lose his or her child as a result of the incompetence of appointed counsel, if the parent is not a criminal, or if the state had not initially setout to take the children.[180] Yet,

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under the old law, lack of counsel at the dependency stage rendered a termination adjudication invalid).

173. *S.B.*, 2003 WL 21543565 at *1.

174. *See* Gideon v. Wainwright, 372 U.S. 335, 335 (1963); Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 18 (1981).

175. *S.B.*, 2003 WL 21543565, at *4.

176. *See Lassiter*, 452 U.S. at 18; *S.B.*, 2003 WL 21543565, at *1.

177. *See Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); *S.B.*, 2003 WL 21543565, at *4.

178. *See Lassiter*, 452 U.S. at 31; *S.B.*, 2003 WL 21543565, at *3.

179. *Lassiter*, 452 U.S. at 31.

180. *S.B.*, 2003 WL 21543565, at *4.

the loss of liberty, or the perceived loss of liberty, mandates an absolute right to the appointment of competent counsel for those who could not otherwise afford it.[181]

The analyses of appointment of counsel in *Lassiter* and *Gideon* are irreconcilable. *Gideon* fundamentally implies that the appointment of counsel is essential to a fair trial.[182] Though the holding in that case addresses the right to counsel for indigent criminal litigants, it has little to do with the difference between a loss of liberty and the loss of any other fundamental liberty interest.[183] The Court in *Gideon* focuses not on the final result of litigation, but instead the process of litigation involved.[184] *Gideon* analogizes the fundamental right to freedom accorded by the Sixth Amendment's right to counsel, applied to the states through the Fourteenth Amendment with other provisions in the Bill of Rights such as the Fifth Amendment's Takings Clause.[185] This undermines the dubious precedent upon which *Lassiter* lies, namely that the inherent nature of the loss of liberty is the premise behind *Gideon*.[186]

Instead, the premise behind *Gideon* is the notion that a fair trial is not possible without competent counsel on both sides.[187] Because, "reason and reflection require us to recognize that in our adversary system, . . . any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[188] The Court in *Lassiter* fails to delineate a reason why a parent in a termination of parental rights suit is guaranteed a fair trial without counsel, but an indigent criminal defendant does not have the same guarantee.

The majority of the decision in *Gideon* espouses the right to counsel for litigants in all cases.[189] Justice Black buttresses this position by referencing Justice Powell's decision in *Powell v. Alabama*,[190] in which he states:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, gener-

181. *Gideon*, 372 U.S. at 345.
182. *Id.* at 340.
183. *See* Gideon v. Wainright, 372 U.S. 335 (1963).
184. *Id.*; *Lassiter*, 452 U.S. at 18.
185. *Id.* at 341–42.
186. *Lassiter*, 452 U.S at 18.
187. *Gideon*, 372 U.S. at 335.
188. *Id.* at 344.
189. *Id.* at 335.
190. 287 U.S. 45 (1932).

> ally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put upon trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[191]

The concerns of the Court in *Gideon* and *Powell* seem to be: the inability of a defendant to determine if charges against them are legitimate; the inability or difficulty in understanding the law; the lack of knowledge of rules of evidence and procedure; and the inability to put forth a good quality defense.[192] If this is so, then why does the United States Supreme Court preclude indigent parents in termination suits from their constitutional entitlement of appointed counsel according to these same concerns? Does a case, in which the state is prosecuting a parent, where the parent stands to lose his or her child, not involve the same complexities or the potential of confronting the same difficulties?

Besides, it has been said that a criminal trial may be easier to try then a civil trial.[193] There are certain aspects of a criminal trial that are slanted in favor of criminal defendants but are not in favor of litigants in termination of parental rights proceedings.[194] The accused criminal is presumed to be innocent until the state stockpiles evidence in an effort to overcome that innocence beyond a reasonable doubt.[195] Yet, a parent in a termination of parental rights proceeding holds an eviscerated presumption of innocence because the state attorney, with an adept knowledge of the law, is required to establish a lesser burden of proof[196] against an indigent litigant with virtually no

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191. *Id.* at 68–69.

192. *Id.*

193. Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 LOY. L.A. L. REV. 249, 265 (1978).

194. *Id.* In *S.B. v. Dep't of Children & Families*, No. SC02-2262, 2003 WL 21543565, at *4 (Fla. July 10, 2003), the court states that though the procedures and goals of a parental severance proceeding are different then a criminal proceeding, the issues addressed in criminal post conviction hearings are part and parcel of dependency proceeding. However they fail to clarify which procedure these are. *Id.*

195. Johnson & Schwartz, *supra* note 193, at 265.

196. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

legal propensity.[197] Furthermore, personnel of the court have a responsibility to screen the stages of criminal proceedings in order to make sure the innocent go free and the guilty are prosecuted.[198] The prosecutor in a criminal case also has an affirmative duty to reveal any favorable information pertaining to the accused.[199] These same safeguards are not available to litigants in civil proceedings.

The Court in *Lassiter* neglects to take notice of the court's rational in *Gideon*.[200] If the Court had examined the logic behind *Gideon,* it could not assert the presumption that the right to counsel is only necessary when a person's physical liberty interest is at stake. *Gideon* clearly stands for the proposition that under the constitution, there is no difference in the quality of the process based merely on the difference in the sanctions involved.[201] Moreover, the cases relied on in *Lassiter* do not support the presumption that "physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause."[202] The *Lassiter* court blindly applies this presumption, never considering the origin of the presumption or why criminal defendants warrant more due process protection then indigent parents.

## VIII. MAKING THE CASE FOR COMPETENT ASSISTANCE OF COUNSEL

Indigent parents have a right to counsel under Florida's Constitution; therefore a right to competent counsel should naturally follow. Both the United States Supreme Court and the Supreme Court of Florida have declared the right to effective assistance of counsel to be a basic extension of the right to counsel.[203] "While the right to counsel may flow from, and have its origins in, the Sixth Amendment in the criminal context and concepts of due process under the United States and Florida Constitutions in the dependency arena, the goal to be achieved is the participation of counsel acting as competent counsel."[204]

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197. Johnson & Schwartz, *supra* note 193, at 265.
198. *Id.*
199. *Id.*
200. *See* Gideon v. Wainright, 372 U.S. 335, 335 (1963); Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 18 (1981).
201. *Gideon*, 372 U.S. at 335.
202. *Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting); *see* Gagnon v. Scarpelli, 411 U.S. 778, 785–89 (1973); Vitek v. Jones, 445 U.S. 480, 492–94 (1980).
203. *See* Powell v. Alabama, 287 U.S. 45 (1932); N.S.H. v. Dep't of Children & Family Servs., 843 So. 2d 898, 904 (2003).
204. *N.S.H.*, 843 So. 2d at 904.

The state has no interest in providing incompetent advocates or denying parents relief. At first blush, money appears paramount; but society's paramount interest should be in the just determination of a person's rights and privileges. Protecting an indigent parent's right to counsel and competent assistance of counsel is crucial to preserving faith in America's justice system. In a system in which a large percentage of Americans feel as though the legal system is biased against the poor and minorities, and the majority feel that the affluent and corporations have the upper hand, faith in the system is rapidly eroding.[205] In the courts, trust is essential because there "society and institution come together in ways that really define who we would like to think we are as a society—fair, open, and protective of the rights of every individual."[206]

Furthermore, the money required to finance post-trial hearings for ineffective assistance of counsel is slight when compared with the costs of long-term foster care. There are over 500,000 children in foster care in the United States and approximately 34,292 in Florida.[207] Therefore, states have an economic interest in making certain that children are not needlessly separated from their families, since years of foster care will likely be more costly then appellate review of issues regarding incompetent counsel.

Aside from the economic advantage of leaving children in the custody of their parents, when possible, Florida's disposition favors protecting children and their relationship with their natural parents.[208] If a parents' incompetent counsel has an affect on the court's adjudication, the state has a compelling interest in reviewing the case so as not to remove a child needlessly from his or her family. Thus far, the state has yet to be required to prove that there is a safer and healthier environment available for children alleged to be abused and neglected. Especially recently, in light of the crisis the Department of Children and Family Services has faced.[209] Permanently severing parental rights is no guarantee that the child will be placed in more loving or

205. *See* National Conference on Public Trust and Confidence in the Justice System, *National Action Plan: A Guide for State and National Organizations*, *available at* http://www.ncsconline.org/WC/Publications/Res_AmtPTC_NatlActionPlanPub.pdf (last visited July 26, 2003).

206. *Id.* at 9 (quoting Frank A. Bennack, President and Chief Executive Officer of the Hearst Corporation).

207. U.S. Dep't of Health & Human Servs., *Safety, Permanency, Well-being: Child Welfare Outcomes 1999: Annual Report* (2002), *at* http://www.acf.dhhs.gov/programs/cb/publications/cwo99/index.html.

208. *In re* E.H., 609 So. 2d 1289, 1290 (Fla. 1992) (citing Burk v. Dep't of Health & Rehab. Servs., 476 So. 2d 1275 (Fla. 1985)).

209. *See* Timothy Arcaro, *Florida's Foster Care System Fails Its Children*, 25 NOVA L. REV. 641 (2001).

safe surroundings. Therefore, it makes social and economic sense to provide parents with review of their claims of ineffective assistance of counsel.

Furthermore, there is a due process question in permitting the state to appoint counsel without providing a judicial remedy for the counsel's ineffective assistance. If parents are not permitted to appeal adjudication based on the incompetence of court-appointed counsel, they will not be afforded a remedy that befits their loss. An indigent parent in a termination of parental rights suit stands to lose rights in his or her child as a result of an attorney's incompetence. Because a termination of parental rights suit is defined as civil in nature, the usual remedy for one dissatisfied by counsel's performance is to bring a malpractice suit against the attorney.[210] A civil malpractice suit will not accomplish the goal of regaining custody; the only relief a parent may seek is monetary damages.[211]

## IX. CONCLUSION

The extent to which one is deprived is of critical importance in the due process computation, the process to which an individual is entitled is in part determined "by the extent to which he may be 'condemned to suffer grievous loss.'"[212] Is there a loss more grievous then the removal of a child from its parents? According to the Supreme Court of Florida and the United States Supreme Court, the answer is yes. Based on their Constitutional interpretations, a parent losing his or her child is not a significant enough deprivation to warrant the standard of due process protection.

Neither the language of the Constitution of the United States, Florida's State Constitution, nor the society they fashion require that the Constitution be interpreted to deny the poor an entitlement to governmental assistance in exercising their basic rights. A parent, whether indigent or affluent, has a fundamental right to conceive and raise his or her child.[213] The United States Supreme Court has recognized this right in upholding "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child."[214] There is a compelling public interest in encouraging the maintenance and protection of the intact family. Constitutional interpretations should not conclude with the provision of protections for family integrity, but must further compel the government to provide the necessary fortifi-

210. *In re* Ak. V., 747 A.2d 570 (D.C. 2000).
211. *See In re* Azia B., 626 N.W.2d 602, 612 (Neb. Ct. App. 2001).
212. Lassiter v. Dep't of Soc. Servs., 452 U.S 18, 40 (1981) (Blackmun, J., dissenting).
213. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
214. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

cations to parents in preserving their constitutionally protected liberty interest.

While state courts have acknowledged the precedents of the United States Supreme Court, most courts have chosen to operate independently by "interpreting rights more broadly then the United States Supreme Court."[215] For example, contrary to the Court's holding in *Lassiter*, most state courts and legislatures have determined that an indigent parent's right to assistance of counsel in a termination of parental right suit is part and parcel of the fundamental right to family integrity protected by the Constitution.[216] In furtherance of the states' advanced perception of due process standards and fundamental fairness, logic and common sense should compel states to conclude that, "if a parent's constitutional right to court-appointed counsel in appropriate dependency proceedings is to consist of something more than a meaningless formality, that right must include the right to effective assistance by the attorney who is appointed."[217]

215. Young, *supra* note 9, at 249.

216. *See id.*

217. L.W. v. Dep't of Children & Families, 812 So. 2d 551, 555 (Fla. 1st Dist. Ct. App. 2002).