Who Does an Attorney Represent in Special Education Cases—the Parent or the Child? By Courtney R. Baron and Jennifer T. Beach

In most areas of child advocacy, accepted practice instructs us that the child-client directs the course of her legal representation. However, litigation under the Individuals with Disabilities Education Act (“IDEA”) presents attorneys with special legal and ethical dilemmas. The IDEA aims to ensure that children with disabilities receive a “free appropriate public education” (20 U.S.C. § 1400(d) (1) (A) (2005)). Historically, the ambiguity of the IDEA caused courts to differ over who has substantive legal rights under the Act—the child, the parents, or both. This legal uncertainty created an ethical debate among lawyers concerning who they represent in special education cases under the IDEA—the child or the parents. In May of this year, the United States Supreme Court resolved the long-standing legal question, holding that the IDEA confers substantive rights to both children and their parents (Winkelman v. Parma City Sch. Dist., 125 S.Ct. 1994, 2005 (2007)). Although Winkelman did not settle explicitly the ethical issue of who attorneys represent, current practitioners interpret Winkelman to place the substantive rights of litigating legal issues under the IDEA with the parents. Despite the Winkelman ruling, lawyers in special education cases continue to face ethical dilemmas. This article explores the legal debate over who has substantive rights under the IDEA prior to Winkelman, the impact of Winkelman, and the ethical issues that remain in the wake of Winkelman.

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Justice, Access To The Courts, and The Right To Free Counsel For Indigent Parents* by Bruce Boyer

Nearly a century ago, legal services pioneer Reginald Heber Smith observed that “substantive law, however fair and equitable itself, is impotent to provide the necessary safeguards unless the administration of justice, which alone gives effect and force to substantive law, is in the highest sense impartial.”1 The expression of this lofty ideal introduced Smith’s sweeping indictment of the manner in which indigents seeking to enforce basic civil rights in the early twentieth century were routinely denied meaningful recourse to the courts:

The administration of American justice is not impartial; the rich and the poor do not stand equally before the law; the traditional method of providing justice has operated to close the doors of the courts to the poor,

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FROM THE CHAIRS

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Committee Co-Chairs

This Newsletter marks the first of the new leadership year where our current co-chair – Angela Vigil, is joined by two new co-chairs and champions of children’s rights: Phyliss Craig-Taylor and Shari Shink. As we embark on a new year of trying to freshly examine what the Section of Litigation and the bar can do to protect children, the energy and effort of these two heroes will be evident to those of you who have not already heard of their successes or had the opportunity to see them in action.

Phyliss Craig-Taylor is a visiting professor and Director of Teaching Excellence at Charlotte Law coming from North Carolina Central University School of Law where she has served as a Professor of Law since 2002. Phyllis has been an ABA leader in many capacities including Division Director, Task Force member and ABA Advisor to the National Conference of Commissioners on Uniform State Laws (NCCUSL). We are delighted that Phyliss is able to put her many leadership talents to work for the Children’s Rights Litigation Committee. For more information about Phyliss, go to http://www.charlottelaw.org/facultyandstaff/default.asp?PageID=77.

Shari Shink, founder and executive director of the Rocky Mountain Children’s Law Center, is someone whose life’s work has been to better the lives of maltreated children through high quality legal advocacy. For over 25 years, Ms. Shink has represented thousands of Colorado children, foster parents, biological parents, and grandparents in court. Ms. Shink also provides specialized training on children’s issues to child welfare lawyers from across the country at national conferences; has intervened as an amicus curiae (friend of the court) in appellate courts in many States; teaches a year-long child advocacy legal clinic for law students at the University of Denver College of Law; and gives technical help to child advocates worldwide. For more information on Shari, go to http://www.rockymountainchildrenslawcenter.org/about-founder.html.

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Children’s Rights Litigation Committee
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Before Winkelman: The Legal Debate over Who has Substantive Rights

Before Winkelman, two separate theories emerged in response to the question of who possessed substantive rights under the IDEA. According to the first theory, the IDEA grants only the child the substantive right to a free appropriate public education. This position rests on the principle that the IDEA focuses on the needs of the child with a disability, not the parents. As a result, “the child, not the parents, is the real party in interest in any IDEA proceeding” (Doe v. Bd. of Educ. of Baltimore County, 165 F.3d 260, 263 (4th Cir. 1998)). Supporting this view before Winkelman, several circuit courts held that children do not share their right to a free appropriate public education with their parents, and consequently, parents may not bring an action under the IDEA pro se (see Cavanaugh v. Cardinal Loc. Sch. Dist., 409 F.3d 753 (6th Cir. 2005); Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225 (3d Cir. 1998); Wenger v. Canastota Central Sch. Dist., 146 F.3d 123 (2d Cir. 1998); Devine v. Indian River County Sch. Bd., 121 F.3d 576 (11th Cir. 1997)). These courts conceded that the IDEA grants parents procedural rights, but “only to ensure that the child’s substantive right to a free appropriate public education is protected” (Cavanaugh, 409 F.3d 753, 757). Moreover, the fact that parents possess procedural rights does not imply that they possess substantive rights as well. (Collinsgru, 161 F.3d 225, 227). The rulings in Cavanaugh and Collinsgru infer that because the child holds the right to a free appropriate public education, the child must direct the course of her representation.

In contrast, according to the second theory, the IDEA grants parents substantive rights, and therefore parents should direct the representation of claims brought under the IDEA. The first circuit interpreted the IDEA to provide substantive rights to parents based on the statute’s language and Congress’ commitment to encouraging parental involvement throughout the IDEA’s enforcement process (Maroni v. Pemi-Baker Regl. Sch. Dist., 346 F.3d 247 (1st Cir. 2003)). Adherents to the first circuit’s line of thinking ground their position on the traditionally accepted notion that parents are legally entitled to make educational decisions on behalf of their child; they are “the ultimate arbiters of their child’s education” (Justin M. Bathon, Defining “Parties Aggrieved” under the Individuals with Disabilities Education Act, 29 S. Ill. U. L.J. 507, 529 (2005)). Moreover, parents should direct representation under the IDEA because young children may be incapable of either accurately assessing their long-term best interests or effectively communicating those interests to their lawyers (see Jonathan O. Hafen, Children’s Rights and Legal Representation- The Proper Roles of Children, Parents, and Attorneys, 7 Notre Dame J.L. Ethics & Pub. Pol’y 423 (1993)).

Winkelman Holds that Parents Have Substantive Rights under the IDEA

In May 2007, the Supreme Court sided with the second theory by holding that parents have independent, enforceable rights under the IDEA (Winkelman, 127 S.Ct. 1994, 2005). Rejecting the notion that parents possess merely procedural rights, the Court held that parents possess the substantive right to a free appropriate public education for their child (Id.). The Court reached this conclusion by reviewing the overall structure of the IDEA, beginning with the Act’s central purposes: to ensure that “all children with disabilities have available to them a free appropriate public education” and that “the rights of children with disabilities and parents of such children are protected” (20 U.S.C. § 1400(d)(1)(A)-(B)). Designed to achieve these objectives, provisions throughout the IDEA intimately involve parents in both the formulation and oversight of their child’s individualized education program. Based on the inclusion of parents in these various provisions, the Court reasoned that Congress intended to provide parents with substantive rights under the IDEA.

While the Winkelman ruling resolved the issue of whether or not parents hold any substantive rights under the IDEA, the ethical debate over whom attorneys represent in special education cases remains. The majority of current practitioners interpret Winkelman to say that because parents possess substantive rights under the IDEA, and because parents hold the decision-making rights for their children, parents should direct litigation of claims brought under the IDEA. This position comports with the traditionally accepted notion that parents possess legal authority over their child’s education, and more broadly, over all child-rearing decisions. The American legal system has long recognized the “liberty of parents and guardians to direct the upbringing and education of children under their control” (Pierce v. Soc’y of the Sisters, 268 U.S. 510, 534-35 (1925); see also Meyer v. Nebraska, 262 U.S. 390, 400 (1923). Further, parents have

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and has caused a gross denial of justice in all parts of the country to millions of persons.²

Eighty-five years after Smith issued his indictment, gaps in the ability of our civil courts to achieve the ideal of fair and equitable administration of justice are more profound than ever.³ Modern limits on the indigents' access to counsel in civil cases are rooted in the Supreme Court’s 1981 decision in Lassiter v. Department of Social Services,⁴ which concluded despite the long line of cases acknowledging fundamental constitutional protections applicable to nuclear parent-child relationships, that individuals faced with the possible termination of their parental rights are not automatically entitled to counsel. Both in and out of the family law arena, the decision in Lassiter remains as a major barrier to the vindication of basic civil rights. Professor Deborah Rhode wrote pointedly about the impact of Lassiter: “It is a cruel irony that, in domestic violence cases, defendants who face little risk of significant sanctions are entitled to counsel, while victims whose lives are at risk are expected to seek legal protection without legal assistance.”⁵ Any serious effort to effectuate Smith’s ideal is a cruel irony that, in domestic violence cases, defendants who face little risk of significant sanctions are entitled to counsel, while victims whose lives are at risk are expected to seek legal protection without legal assistance.⁶ Any serious effort to effectuate Smith’s ideal of equal access to justice must come to grips with this decision.

The Plight of Deborah Frase

There is little question that access to counsel continues to be a critical factor in determining the extent to which parents and children are able to successfully safeguard fundamental rights. This point is powerfully illustrated by the plight of a woman named Deborah Frase, whose battle to preserve her right to parent her three-year-old son was documented in Frase v. Barnhart⁷ in the Maryland Appellate Court. During an eight-week period of incarceration for charges related to her possession of marijuana, Ms. Frase made informal arrangements through her mother for an unrelated couple — the Barnharts — to care for her son Brett. Several days after returning Brett to his mother’s care, the Barnharts filed an action to wrest custody of the child from his mother.

Because she was unable to afford counsel, Ms. Frase was forced to represent herself in the legal proceedings that followed. Prior to the hearing, she conducted no discovery or preparation of her defense. During the hearing itself, she failed to prevent the admission of irrelevant and prejudicial hearsay evidence, challenge the Barnharts’ characterization of themselves as “good Samaritans” who had formed an important bond with her son during the few weeks he had been in their care, or present any applicable law or legal argument as to the limits of the assigned domestic relations master’s authority to interfere with the custodial rights and responsibilities of a fit parent.⁸ Ms. Frase also failed to identify or complain of a patent conflict of interest arising from the master’s past attorney-client relationship with Ms. Frase’s mother, who supported the Barnharts.

It is difficult to escape the conclusion that Ms. Frase’s case was “badly compromised” by her proceeding pro se. At the conclusion of the trial court hearing, without any of the requisite findings that would have warranted limiting Ms. Frase’s custodial rights, the master ordered her to reside in a “family support center,” permit visitation between her son and the Barnharts at a location of the court’s choosing, and remain subject to the continuing supervision of both the court and the Department of Social Services.⁹ In the wake of the United States Supreme Court decision in Troxel v. Granville,⁷ all of these conditions were plainly unconstitutional. Only with the able assistance of volunteer appellate counsel was Ms. Frase ultimately able to have the full panoply of her custodial rights restored.

Ms. Frase’s story is highly reminiscent of that of Abby Gail Lassiter, whose pro se efforts to defend herself in an action to terminate her parental rights led to the Court’s 1981 split decision declining to acknowledge a broad, constitutionally-based right to counsel for indigents in proceedings to terminate parental rights.¹⁰ Justice Blackmun’s dissenting opinion in Lassiter documents examples of Ms. Lassiter’s utter inability to comprehend the legal proceedings, including her failures to discern the purpose of cross-examination, object to inadmissible testimony, or argue on her own behalf.¹¹ Despite the obvious prejudice to Ms. Lassiter arising from her lack of representation, the Court refused to extend the same type of comprehensive requirement of counsel for indigents provided to criminal defendants under Gideon v. Wainwright.¹² Instead, though it recognized the fundamental, constitutionally-protected liberty interests at stake in a termination action, the Court concluded that states should be free to conduct an individualized balancing of factors in each case, under the three-part test described in Mathews v. Eldridge.¹³

THE POST-LASSITER LANDSCAPE

Since 1981, the Court’s opinion in Lassiter has served as the touchstone for every judicial consideration
wide latitude in deciding how to raise their children, even if the decisions they make conflict with the child’s best interests. (Christine Gottlieb, *Children’s Attorneys’ Obligation to Turn to Parents to Assess Best Interests*, 6 Nev. L.J. 1263 (2006)). Given parents’ broad authority over their children’s education and upbringing, it follows that parents should direct their representation in special education cases.

This position also squares with the practical realities of special education cases. Parents oversee their child’s special education needs long before and after a particular legal issue arises. Under the IDEA, parents contribute actively to the development and implementation of their child’s individualized education program. Also, parents are most likely in the best position to evaluate whether their child’s education meets the standards required by the IDEA. In addition, when a particular case closes, parents continue to play an integral role in monitoring their child’s education (Pete W.D. Wright, Wrightslaw.com <http: www.wrightslaw.com/phprint.php> (accessed July 25, 2007)).

As the Court in *Winkelman* recognized, empowering parents with responsibility for their child’s education ultimately will improve the quality of the education the child receives (*Winkelman*, 127 S.Ct. 1994, 2006-07).

A crucial aspect of parents’ long-term responsibility for their child’s education rests on the ability to direct the representation of claims brought under the IDEA.

**Ethical Dilemmas Post-Winkelman**

While *Winkelman* ascertains parents’ substantive and procedural IDEA rights, it does not take such rights away from children. In other words, the parental rights were awarded in addition to, not in place of, a child’s substantive rights granted under IDEA. Consequently, the special education attorney may be challenged by some ethical dilemmas—specifically those regarding conflicts of interest.

The first dilemma is what to do when parents and a child with a disability desire different outcomes from the proceedings. In special education proceedings, conflicts of interest between the parents and the child are unlikely, for they typically desire the same outcome—the most appropriate educational services (Nancy J. Moore, *Conflicts of Interest in the Representation of Children*, 64 Fordham L. Rev. 1819, 1996). Such a conflict, however, is not unheard of. For example, a parent may hire an attorney because she wants her child removed from a general education setting and placed in a self-contained classroom. Upon talking to the child, the attorney may learn that s/he vehemently opposes the change in placement and may become uncooperative in the process. Despite *Winkelman*, for the attorney to proceed without considering the child’s desires would be ethically questionable.

To best address this dilemma, the attorney must be cognizant that a conflict of interest may arise at the beginning of representation. The attorney must inform parents before entering into a representation agreement who she is representing and of the potential for a conflict of interest between the parents and the child if they have differing expectations for the outcome of the case (Bruce Green, *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children*, Report of the Working Group on Conflicts of Interest, 64 Fordham L. Rev. 1379 (1996); Nancy J. Moore, *Conflicts of Interest in the Representation of Children*, 64 Fordham L. Rev. 1819, 1996; Recommendation of the Fordham Conference on Ethical Issues in the Legal Representation of Children, 6 Nev. L. J. 1408 (2006)). Failure to do so may lead to confusion about who is to direct the attorney if a conflict of interest arises (Green, 64 Fordham L. Rev. 1379).

A conflict may arise even if the attorney is clear about who she represents from the beginning of the case. When this occurs, the attorney should counsel both parents and child regarding the strengths and weaknesses of both positions and try to bring the child and parents to an agreement (Kim B. Tandy and Teresa Heffernan, *Representing Children with Disabilities: Legal and Ethical Considerations*, 6 Nev. L. J. 1396, 1404 (2006)). Ultimately, if an agreement cannot be reached, the attorney will have to assess the status of the case and decide whether to advocate for the parent’s position or to withdraw.

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A second source for a conflict of interest arises when the attorney does not believe that the parent’s desired outcome is in the child’s best interest. In order to practice special education law, attorneys must understand the complexities of the education system, including the benefits and detriments of various programs and services offered under the IDEA. This knowledge sometimes leads to a conflict of opinion between attorney and parent. The attorney in this case must take extreme caution to address this issue in an ethically sound manner, for to disagree with a child’s parent is to disagree with the person who is typically the most knowledgeable about what is appropriate for the child. Gottlieb conveys the opinion of the 2006 UNLV Conference on Representing Children and Families, which states that attorneys are incapable of knowing what is in the best interest of the child and that it is the attorney’s ethical responsibility to turn to parents for assistance in discovering this. For an attorney to “comprehensively” assess a child’s best interest, Gottlieb writes, is “an impossible task given the concerns that such assessment of best interests be subjective, not impose the attorney’s race, class, gender or cultural biases...” She goes on to advise that, “Rather than take on this impossible task, attorneys should ensure that the assessment of best interests is located where it should be. Most of the time... this is with the parents” (Gottlieb, 6 Nev. L.J. at 1266). What is more, the child’s parents “typically...know their children’s needs, desires, strengths, weaknesses, personality, and history in nuanced ways that others cannot come close to approaching. In virtually all instances, parents also care more deeply about their children’s well-being than anyone else” (1264). Both Guggenheim (Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children, 64 Fordham L. Rev. 1399 (1996)) and the Fordham Conference on Ethical Issues in the Legal Representation of Children (2006) similarly advocate against attorneys acting as “de facto” guardians of the child. Consequently, the attorney who disagrees with a parent’s position must remind himself that he does not have the same knowledge of the community, culture, school, family, and personality traits of the child as the parent.

Nevertheless, experienced special education attorneys do have substantial knowledge of the education system, programs, and services that may cause the attorney to see the parents’ wishes as unrealistic, not compatible with the standards of the law, or in direct conflict with what the child has a disability desires. As a result, the attorney needs to be prepared to counsel and educate the parents on the various options available to the child. If, after appropriate tutoring and counseling, the parents remain persistent in their wishes, the attorney must choose to either determinedly advocate for the parents’ objectives or withdraw from the case, if possible (Guggenheim, 64 Fordham L. Rev. 1399, 1418 (1996)).

Conclusion

Although the Court, in Winkelman, conferred previously questionable substantive rights to parents under the IDEA, the decision only partially settles the ethical dilemmas attorneys face in special education cases. Current practitioners interpret Winkelman to mean that parents must direct the litigation of claims brought under the IDEA. However, special education lawyers still must carefully manage any conflicting interests between parent and child in order to reach the best possible outcome for the child. □

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One of the most difficult cases to handle is that of a sexually abused child. What follows is a condensed version of the experience of a girl who was molested by her own father and then spent six years in state custody. (This is a real case—however I did change the names).

Sheila, a 12-year-old, has an older sister Andrea who is 13 and a younger brother Michael who is six. One day she tells her mother who is living in a trailer home on her grandparent’s property that her dad has been molesting her since she was 10. Her mother waits a month before reporting to child welfare. Child welfare takes Sheila and her two siblings into state’s custody. They have severe head lice. Her father denies any improper activity and agrees to take a polygraph. He fails the polygraph and the children are adjudicated deprived and are placed in different foster care homes.

Over the course of the next six years Sheila has many different placements from traditional foster care to therapeutic foster care to group homes and mental health institutions as well as a six month stay with her mother.

In the meantime her father follows his individualized service plan i.e. AA meetings, sex offender treatment and anger management. In his stipulation he denied any sexual molestation but said he gets drunk from time to time and doesn’t know what might have happened during his intoxication. He successfully completes the treatment plan including parenting classes and shortly thereafter the state places his son Michael back with him. About a year later the older daughter Andrea who steadfastly denies that her dad molested Sheila is also returned home.

After being home for about five months Andrea now 16 and a friend are spending the night at Andrea’s dad’s home. He buys them wine coolers and they also have a few shots. That night Andrea’s dad sexually assaults her friend. The state files charges against the father and he is arrested and jailed on $60,000 bond. Child welfare places Michael and Andrea into foster care.

Andrea’s description of the assault is strikingly similar to Sheila’s experience. As a result some in Sheila’s family begin to take her more seriously. However, by now Sheila is 15 and is extremely difficult to manage. She continues to drift in the system and is mercilessly moved from foster home to foster home, group home to group home, mental institution to mental institution for various reasons. For instance, during a stay in one foster home where she was making good grades, her foster family promised her a trip to the Grand Canyon and the Pacific Ocean if she could keep her grades up. She was not able to do so, and shortly thereafter her behavior resulted in removal to another foster home in a city over a hundred miles away. In this new “therapeutic” foster home the foster father runs a “pool bar” and is gone most of the time. Sheila is put in charge of the other foster children living in the home until she complains to DHS which closes the foster home.

DHS then sends Sheila to an inpatient mental health facility so she can be stabilized on drugs until an opening becomes available for a group home.

By now Sheila is requesting that she be adopted, however her parental rights were never terminated.

During this time Sheila has several more moves from therapeutic foster care to youth shelters, traditional foster care homes and another stint in inpatient treatment. Her older sister Andrea lives in a traditional foster home but refuses to live with Sheila, and Michael goes to live with his mother (he has a different mother from Sheila and Andrea) who now lives on the East Coast.

Several months later Sheila’s mother dies and the State finally files an application to terminate the parental rights of the father to all three children. Dad voluntarily relinquishes his parental rights to Sheila only. Now for the first time Sheila is eligible for adoption. Unfortunately, no adoptive families can be found. Over the course of the next year Sheila continues to go from place to place. On the day of her dad’s felony jury trial he pleads guilty and receives a 10 year prison sentence.

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From the Inside Looking Out (continued from page 7)

Sheila asks the court to place her in independent living where she lasts a little over 30 days. Since she has nowhere else to go she is placed back in the youth shelter. She continues in school and the court allows her to visit with her brother and his mother on the East Coast during spring break. By all accounts the visit goes well. Sheila temporarily returns to the youth shelter but sick of foster care, psych wards, and group homes she reluctantly moves in with her paternal grandmother. Activities with her grandmother include a trip to see how her dad is doing in prison and to give him a picture of herself that he can keep in his cell.

Although she hates living with her grandmother she really has no place else to go and at least she is in school and has a job. Michael and his mother return to Oklahoma for the final hearing to have his case dismissed and Michael’s mother, learning of Sheila’s predicament, requests guardianship of Sheila which the court grants. Sadly, things do not work out and in less than a month she is back in Oklahoma. She moves in with her sister Andrea who is now 18 and is working at a gentlemen’s club making “good money.”

Sheila is also pregnant and a couple of months later the police arrest her for second-degree burglary. She waives preliminary hearing, pleads no contest and has a sentencing date early in 2008. She gave birth to a healthy baby and has applied for TANF benefits, food stamps and rent assistance.

In retrospect while this is not the best outcome I’ve seen, it is not the worst either. I’ve seen children in similar situations successfully graduate from college and also end up in prison for being involved in felonies involving physical violence such as armed robbery.

One of the main problems in these kinds of cases is that it is extremely difficult to prosecute the perpetrators. Also many of these victims become extremely rebellious, promiscuous and act out. Their behavior results in frequent moves and/or placement in inpatient facilities where they are heavily drugged. As a result, it is almost impossible to find adoptive families.

So what is an attorney to do? I had a conversation with Sheila not long ago and asked her about her experiences and what suggestions she would have for an attorney representing someone like her.

Question: Sheila you were in the system for over six years—from age 12 to 18, what was it like?

Answer: I was scared. Things were hectic. I was only 12 years old. I did not know what to do. In my first foster family I had to cook and clean and take care of my little brother Michael and when he acted up they spanked him. I didn’t know this was against the rules but when child welfare found out about it they moved us at 3 a.m. into what they called a respite home. The next thing I knew I was being moved from place to place every two or three months sometimes with Michael and sometimes without him. Finally, my mom stabilized and I lived with her.

I stayed with my mother for 6 months until she went to the hospital for spider bites or drugs [we never knew which] and never recovered where she could take care of me again. We had our fights and I thought about running away [when I was living with her] but never did. It turned out to be the longest place I stayed for any given time.

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At least two of the foster homes I stayed in were shut down.

Question: Any suggestions or comments on what an attorney might do for someone in your situation?

Answer: One thing an attorney could do is to check on us and visit with us in our foster home. Make sure they're safe and that they follow the law. Not many people take the word of a child over an adult so it is hard for us to prove these things.

Group homes can be even worse. There are a lot of other troubled kids there and sometimes it's hard to get along with them. From there they move you to a mental health place and load you up on drugs. About the only thing I can say is it's better than living on the street which is something I tried a few times as well.

It's tough to get family placement in a situation [like this] as nobody in the family believes you. I am the black sheep in my family. Everybody hated me even my brother and sister because I was the one that got them moved as well. None of the other relatives want to take you because they're afraid you will say something about them.

Also during this time I had six to seven different workers. One good thing was I only had two different attorneys. The big problem with attorneys is that they are very busy and it's hard to get in touch with them when you are moving from place to place and you don't have your own phone and your placements are more than an hour's drive away. Attorneys need to understand when they get a call that it's an emergency and they need to call back right away. Two or three days later doesn't do much good.

Sometimes the only time we get to see each other face-to-face is when we come to court. Also coming to court is depressing and sometimes I'd rather not come. But there were sometimes though I felt like I needed to see and hear for myself what was happening in my case. At times court was only time I got to see my brother and sister.

Question: what do you think about the outcome and what are you doing now?

Answer: At least my dad’s locked up. I worry about Michael although I have no control over that and I have made up with my sister and she has quit her job at the gentlemen’s club.

My baby is well and I plan on enrolling in the alternative school so I can complete my high school degree.

Judge Murphy has been Associate District Judge of Payne County, Oklahoma for the past 13 years. In addition to handling cases involving children he also has docket responsibilities for felony, civil and domestic matters. In 2003 CASA selected him as Oklahoma Judge of the Year.
The Right To Free Counsel For Indigent Parents (continued from page 4)

of the rights of access to the courts for poor people in civil cases. With the door left open to experimentation by the states, indigent civil litigants in the family law arena face a wide array of responses to requests for appointed counsel, as well as related obstacles to court access. In child protection cases involving state-initiated actions to terminate parental rights, the right of an indigent parent to appointed counsel continues to be widely protected by state statutes. However, in situations other than state-initiated actions to terminate parental rights, the entitlement to counsel is far less certain, even when the potential consequences of the action are every bit as dire. Most significantly, when a suit to terminate parental rights is brought by a private individual rather than by the state, indigent parents commonly have no guarantee of free counsel.

For example, in *Rosewell v. Hanrahan*, on the petitioners’ application to adopt their grandson, the trial court appointed counsel for the parents alleged to be unfit. On appeal, the court upheld the county’s objection to the payment order, finding that the mere fact of judicial involvement in the termination hearing did not amount to state action sufficient to bring the matter within the narrow constitutional protection of *Lassiter*. In unusual circumstances, where child protection officials have actually investigated allegations of abuse that are relevant to a private adoption petition, there may be sufficient state action to support the argument that a claim for counsel should at least be weighed under the balancing test adopted by *Lassiter*. However, only one state appears to have accepted the argument that the state’s involvement in private adoptions is not meaningfully distinguishable from its role in state-initiated termination hearings, and that the same right to counsel should attach to any action in which a parent faces the possible permanent termination of her rights. In most jurisdictions, parents contesting private suits for adoption of their children still have no right to the assistance of counsel.

Individuals facing the possible termination of their parental rights may also confront a broad range of other barriers to access to the courts left untouched by the constitutional parameters of *Lassiter* and its progeny. Individuals facing the possible termination of their parental rights may also confront a broad range of other barriers to access to the courts left untouched by the constitutional parameters of *Lassiter* and its progeny. Even when an indigent’s right to counsel is recognized, many people clearly lacking the means to hire an attorney may not be able to satisfy applicable standards of indigence that vary widely in their degrees of strictness. Poor people facing the termination of parental rights may also be effectively prevented from meaningful access to the courts by the imposition of litigation access fees, necessary ongoing litigation expenses, the requirement of advance security or payment for litigation expenses, and the taxation of costs. Outside of state-initiated termination hearings, where indigent parents are guaranteed free transcripts for appeals, parents may also be barred from seeking meaningful appellate review of decisions resulting in the permanent loss of their children. Each of these categories of barriers, though subject to significant differences in the legal and policy arguments made in support of their validity, brings with it the same practical result for an indigent potential litigant whose ability to pursue a cause is dependent on satisfaction of a debt. A potential litigant who lacks the resources to pay a $500 bill is just as effectively barred from court, regardless of whether that charge is intended to cover the cost of an expert or transcript, rather than an attorney.

Reginald Heber Smith observed in 1919 that the financial costs of bringing and prosecuting a civil action “work [ed] daily to close the doors of the courts to the poor.” Financial barriers to court access continue to weigh especially heavily on birth parents caught in the world of gray market adoption practices that continue to exist under the radar of both the courts and child welfare agencies responsible for regulatory oversight. Twenty-five years ago, Richard Posner and Elisabeth Landes imagined a free market in which babies could be bought and sold unfettered by oppressive government regulation, resulting hypothetically in a reduction in the production of less “desirable” children and a concomitant increase in permanence for children deemed easier to place by market forces. Posner’s utopia seems distant indeed from the lucrative and loosely regulated world of private adoptions, where financial incentives to cut corners of ethics and law abound. Stories are told of adoption agencies in Chicago and elsewhere that prey upon populations of financially and emotionally vulnerable women, in particular Caucasian immigrant communities capable of feeding a lucrative market for healthy white babies. Recurring predatory practices designed to free such infants for adoption include threats, false or unenforceable

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promises, and the provision of financial or other incentives that border on the illegal purchasing of children, such as “loan agreements” that are forgiven once an adoption is finalized. For women willing to raise questions about abusive adoption practices, obstacles to gaining access to the courts may be virtually insurmountable.

Recently, the Loyola ChildLaw Clinic represented a non-English speaking immigrant mother from Poland who surrendered her child to an adoption agency based on false promises of post-adoption contact. The mother’s circumstances were dire: she had been abandoned in turn by both her husband and her newborn child’s father, leaving her to face the prospect of supporting four young children on the income from several part-time, menial, low-wage jobs. The agency obtained the mother’s signed surrender after two short meetings following the child’s birth. Motivated by the staggering fee of $50,000 which it received for placing the child, the agency’s caseworker dispensed with any approximation of adoption best practices, offering the mother neither arm’s length counseling, nor even the most basic assistance of a proper translator.

As a petitioner claiming that her rights were violated in the procurement of her surrender to adoption, this mother had no entitlement to free legal assistance, despite the fact that her relationship with her child was no less in jeopardy than if she had been named as a respondent in a petition charging her as an unfit parent. Moreover, at the conclusion of an unsuccessful trial based on allegations of fraud, the judge ordered the $3300 bill of the court-appointed guardian ad litem to be apportioned evenly between a profitable tax-paying adoption agency that had just been paid $10,000 over the highest going rate for private adoptions, and an indigent single mother with three young children. The trial court thus entered a judgment against the birth mother for $1,650, imposing what amounted to a trial tax for her unsuccessful effort to vindicate her rights as a birth parent.

The Need for a “Civil Gideon”

The threat of being taxed with such significant costs, notwithstanding the client’s inability to pay, presents disturbing implications about the fundamental ability of civil courts to provide a forum responsive to the needs of poor people. Commentators have acknowledged that even though post-adjudication taxation orders may not have the same preclusive effect on access to judicial remedies as front-end litigation access fees, they nevertheless stand as a powerful deterrent to a litigant seeking to vindicate legitimate, though uncertain rights. Even for the judgment-proof indigent client, against whom such costs cannot be collected, both the threat of wage garnishment and the prospect of negative credit reports are significant considerations in any calculation about whether to risk the incursion of any litigation costs. As one commentator noted, a rule hinging the taxation of costs on the litigant’s degree of success turns judicial recourse into a “high stakes economic gamble for the indigent litigant.” For clients aware that they will be obliged to pay post-judgment litigation costs without regard to the outcome of the case, the deterrent effect is even greater. It is virtually inconceivable that the mother discussed above would have been able to proceed with her case had she been confronted in advance with the prospect of a $1650 fee.

Nor is it particularly satisfying to deem this penalty proper simply because the mother stood in the posture of a petitioner rather than a respondent. Much of the commentary questioning the ongoing legitimacy of Lassiter has suggested extending the right to counsel to civil litigants who are, in the frequently cited words of Justice Blackmun, “haled into court” unwillingly as respondents.

Indeed, the majority opinion in Lassiter lends support for this view by opening the door to the consideration of individual circumstances that may have little to do with the nature of the interests at stake. However, to the extent that the Supreme Court’s jurisprudence regulating the imposition of barriers to judicial access truly turns on the nature of the interests involved, it seems to make little conceptual sense to mete out procedural protections based solely on the positioning of the parties. Justice Blackmun’s dissenting opinion in Lassiter points out that prior to that decision, the Court’s tradition in applying the Mathews test had been to conduct case-by-case consideration of different decision-making contexts, not of different litigants’ circumstances within a given context. What ought to weigh in the Mathews calculus, according to Justice Blackmun, are not the particular facts of each case, but rather the nature of the generic interests shared by all parents threatened with termination of parental rights, and by the state in all cases where a parent’s conduct implicates the state’s role as parens patria. Similarly, Justice Harlan’s opinion in Boddie v. Connecticut urges that “persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard,” without regard to

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the accidents of procedural posture. Indeed, especially in the family law arena, procedural posture may well be nothing more than an unhappy chance of circumstance, reflecting only the results of the race to court between competing litigants.

Much more significant are the concerns about the extent to which the state exercises exclusive control over the mechanism by which a party’s rights may be adjusted or circumscribed, and the fundamental nature of the interests involved. The conclusion of the court in *Rosewell v. Hanrahan* that judicial termination of a parent-child relationship does not necessarily amount to state action seems implicitly to have more to do with financial and practical concerns about extending the right to counsel than with defensible logic. Professor Frank I. Michelman argues persuasively against reliance on procedural posture as a basis for regulating waiver of access fees, noting with particular respect to divorce disputes that states exercise exclusive control over the regulation of marital relationships.33 This observation is every bit as applicable to the termination of parental rights, where the states’ *parens patria* interest in regulating parent-child relationships requires even so-called “private” termination actions to be heard by the courts.34 Most importantly, the stakes for the parents in *Rosewell* were exactly the same as for a parent charged as a respondent with unfitness: the threatened permanent loss of her relationship with a child.

Studies have repeatedly explored the inability of the great majority of United States citizens to access the assistance of counsel to help protect basic rights and needs.

The continuing failure of the American legal system to approach the ideals mapped out by Reginald Heber Smith has been well documented. Studies have repeatedly explored the inability of the great majority of United States citizens to access the assistance of counsel to help protect basic rights and needs.39 California Appellate Justice Earl Johnson Jr., a frequent critic of barriers limiting indigent access to the courts, recently compared the United States unfavorably to a long list of other Western democracies that guarantee counsel for indigents in civil cases, concluding that Smith’s concept of “equal justice” is nothing more than an illusory ideal.40

Building on this uninspiring history, a steady stream of commentators have issued calls for a “civil Gideon,” and for the reversal of the pinched view of due process applied to fundamental family relations by the narrow majority in *Lassiter*.41 Professor Rhode, for example, condemns the case law governing access to the effective assistance of counsel as a “conceptual embarrassment,”42 noting that “the right to sue and defend is a right ‘conservative of all other rights, and lies at the foundation of orderly government.’”43 Occasionally, these calls have been echoed in judicial opinions. Most significant among these, of course, is Justice Blackmun’s dissent in *Lassiter* itself,44 exploring both the compelling practical obstacles faced by an indigent parent seeking to defend herself against a termination action,45 and the legal illogic of requiring an individual-

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ized judgment of the need for counsel, even after consideration of the Mathews factors compels acknowledgment of the parent’s fundamental protected liberty interests.46 Similarly, Deborah Frase’s hapless efforts to represent herself prompted one Maryland Appellate Justice — cognizant of the strictures of Lassiter — to argue eloquently for the interpretation of state constitutional provisions to encompass a broader right to counsel for indigent parents threatened with intrusions into their parent-child relationships.47 For all their powerful and persuasive rhetoric, however, these voices will almost certainly remain in dissent as long as Lassiter stands as the law of the land.

Notably, Justice Black’s landmark opinion in Gideon came twenty-one years after the low-water mark decision in Betts v. Brady,48 which refused to recognize a comprehensive right to counsel for indigents charged with felonies in criminal court. With the added years of perspective, the Court in Gideon took a markedly different tack, acknowledging that Betts had been a clear break with the Court’s precedents recognizing the fundamental nature of the right to counsel and its relationship to Fourteenth Amendment protections.49 By this reckoning, reassessment of Lassiter’s treatment of parents’ fundamental liberty interest in their relationships with their children is now at least several years overdue.\footnote{* Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents by Bruce A. Boyer, published in Spreading Justice, Volume 4, No. 1, Winter/ Spring 2007. Copyright © 2007 by the American Bar Association. Reprinted with permission.}

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Endnotes

2. SMITH, supra note 1, at 8.
7. Brief for Appellant at 29-32, Frase, 840 A.2d 114 (No. 6) (brief on file with author) [hereinafter “Clinic Brief”].
8. Frase, 840 A.2d at 117.
10. Lassiter, 452 U.S. at 33-34.
11. Id. at 53-56 (Blackmun, J., dissenting).
14. At the time of the decision in Lassiter, all but seventeen states had recognized such rights, either as a matter of constitutional law or statute. See also Rosalie R. Young, The Right to Appointed Counsel in Termination of Parental Rights Proceedings: the States’ Response to Lassiter, 14 TOURO L. REV. 247, 262, 278 tbl.3 (1997) (listing and describing the statutory grant of parental counsel in several states).
18. See Young, supra note 27, at 263 n.81 (discussing the various “indigence” standards used in different states and listing several statutory examples). Federal law prohibits individuals earning more than 125% of poverty guidelines from receiving federally funded free legal services. 45 C.F.R. § 1611.3(b) (2005). Current poverty limits for the forty-eight contiguous states and the District of Columbia are $9,310 annually for an individual, and $18,850 annually for a family of four. Annual Update of the Health & Human Services Poverty Guidelines, 69 FED. REG. 7335 (Feb. 13, 2004).
20. SMITH, supra note 1, at 28.
23. Illinois law requires adoption agencies to account for their fees but does not limit what an agency can require an adopting family to pay or sets standards defining what constitutes a reasonable fee. 750 ILL. COMP. STAT. 50/14(A) (2002).
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26. Id. at 293.
28. E.g., Simran Bindra & Pedram Ben-Cohen, Public Civil Defenders: A Right to Counsel For Indigent Civil Defendants, 10 GEO. J. ON POVERTY L. & POL’Y 1, 2 (2003) (arguing for special protection of indigent civil defendants, who unlike indigent civil plaintiffs lack even the prospect of a contingent recovery).
29. See Lassiter, 452 U.S. at 32-33 (taking into account circumstances regarding the mother’s behavior, and finding them to outweigh any parental interest in her child).
30. Id. at 49 (Blackmun, J., dissenting).
32. Supra, n. 14.
33. Michelman, supra note 43, at 1198 (“[T]he state is the author of both the rules imposing special restrictions on the freedom of married persons and the rule forbidding self-help retrieval of one's liberty from the grip of those restrictions . . .”).
34. See K.L.P., 763 N.E.2d at 751 (noting that adoption exists only as a creature of statute, and that “[p]rospective adoptive parents cannot achieve their goal of parenthood by contract or other private means; they must involve the court”).
38. See Besharov, supra note 3, at 221 (arguing that the Lassiter decision limits the constitutionally-protected status of the family relationship by denying indigent parents the right to counsel but that courts continue to mandate counsel for other indigent persons facing jail time, no matter how short).
42. Rhode, supra note 3, at 1786.
43. Id. at 1799 (citing Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907)).
44. Lassiter, 452 U.S. at 35 (Blackmun, J., dissenting).
45. Id. at 45-46, 52-56.
46. Id. at 48-49.
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