

The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process

William L. Dick Jr.

Repository Citation

William L. Dick Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 Wm. & Mary L. Rev. 627 (1989), <http://scholarship.law.wm.edu/wmlr/vol30/iss3/5>

NOTES

THE RIGHT TO APPOINTED COUNSEL FOR INDIGENT CIVIL LITIGANTS: THE DEMANDS OF DUE PROCESS

The United States Supreme Court has held that the right to effective assistance of counsel, guaranteed by the sixth amendment and incorporated by the fourteenth amendment, requires states to provide counsel to indigent criminal defendants before imprisoning them.¹ In *Gideon v. Wainwright*,² the Court overturned *Betts v. Brady*,³ which held that, in some cases, due process might not require appointed counsel for indigent criminal defendants. The decision rested on the important liberty interest each person has in his own physical liberty, due process, and fundamental fairness. Protecting these interests requires that the accused have counsel before the state deprives him of his liberty.

In subsequent decisions involving juvenile proceedings,⁴ parole revocation,⁵ and the termination of parental rights,⁶ the Court indicated that the right to appointed counsel could, in certain circumstances, extend to civil proceedings. In such cases, the right to appointed counsel is grounded not in the sixth amendment, but in the due process clause of the fourteenth amendment.⁷

With civil proceedings, however, the Court did not adopt the *per se* approach that it employed in criminal cases. Instead, the Court held that the decision whether due process requires the appointment of counsel in civil actions must be a case-by-case determina-

1. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

2. 372 U.S. 335 (1963).

3. 316 U.S. 455 (1942).

4. *In re Gault*, 387 U.S. 1 (1967).

5. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

6. *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981).

7. U.S. CONST. amend XIV, § 1 ("No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .").

tion.⁸ In *Lassiter v. Department of Social Services*,⁹ the Court went even further, holding that a presumption exists against requiring appointed counsel when an unsuccessful litigant cannot be deprived of his personal liberty. Based on *Lassiter*, then, when an indigent civil litigant could not possibly be deprived of his personal liberty as a direct result of the litigation, the Constitution does not require, in the absence of special and compelling circumstances, the appointment of counsel.

This Note evaluates whether the Court's stance is justified. First, the Note examines state and lower federal court decisions to determine when due process requires appointed counsel for indigent civil litigants. The due process requirement may be grounded in either the federal or state constitutions, or statutes. Second, after determining when courts have required appointed counsel, the Note analyzes the factors present in those cases.

The Note concludes that the due process clause of the fourteenth amendment does not require appointed counsel in all civil cases. This Note will show, however, that in certain cases, the *Lassiter* presumption should be reversed. When the state is in reality the opposing party and when the interests of the indigent litigant, although not involving his personal liberty, are fundamental and compelling, due process and fundamental fairness require a presumption in favor of appointed counsel. Cases included in this category are proceedings to terminate parental rights and paternity actions. To overcome this presumption, the state must show that, due to the particular legal and factual issues of the case, providing counsel for the indigent civil litigant will make no difference in the outcome of the litigation. This presumption should be a strong one and should place a heavy burden on the state to produce substantial evidence to rebut it.

THE DEVELOPMENT OF THE RIGHT TO APPOINTED COUNSEL

In *Gideon v. Wainwright*,¹⁰ the United States Supreme Court applied the right to counsel guaranteed by the sixth amendment to

8. The Court adopted the totality-of-the-circumstances approach in the criminal context in *Betts* and subsequently overruled it in *Gideon*.

9. 452 U.S. at 26-27.

10. 372 U.S. 335 (1963).

the states, via the fourteenth amendment.¹¹ The Court in *Gideon* held that the right to counsel for a criminal defendant is fundamental, and that “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.”¹²

In subsequent decisions, the Court clarified the *Gideon* holding. In *Argersinger v. Hamlin*,¹³ the Court made it clear that the grading of the offense was not the determinative factor of whether due process required the appointment of counsel.¹⁴ *Argersinger* was convicted of carrying a concealed weapon, a crime punishable under Florida law by imprisonment for up to six months or a \$1000 fine, or both.¹⁵ The Court held that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”¹⁶

The Court modified this holding in *Scott v. Illinois*,¹⁷ which restricted *Argersinger* to cases in which the defendant was actually imprisoned as a result of his conviction.¹⁸ *Scott* was convicted of shoplifting merchandise valued at less than \$150. The Illinois statute provided for a maximum penalty of a \$500 fine or one year in jail, or both. Upon conviction, *Scott* received only a \$50 fine. *Scott* argued that he was entitled to appointed counsel because imprisonment was authorized, regardless of whether the court actually imposed such a sentence.¹⁹ The Court held, however, that the sixth²⁰ and fourteenth amendments require the appointment of

11. *Id.* at 339. A Florida state court convicted *Gideon* of breaking and entering to commit a misdemeanor, a felony under Florida law. The trial court refused to appoint counsel for *Gideon*, stating that under Florida law, counsel was available only to a person charged with a capital offense. *Id.* at 336-37.

12. 372 U.S. at 344 (emphasis added).

13. 407 U.S. 25 (1972).

14. *Id.* at 34.

15. *Id.* at 26.

16. *Id.* at 37.

17. 440 U.S. 367 (1979).

18. *Id.* at 374.

19. *Id.* at 368.

20. The sixth amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

counsel only if a court actually sentences an indigent criminal defendant to a term of imprisonment.²¹

In *In re Gault*,²² a civil proceeding, the Court indicated that the defendant's interest in his personal freedom, and not simply the special sixth and fourteenth amendment right to counsel in criminal cases, triggered the right to appointed counsel.²³ The Court indicated that the right to appointed counsel could extend beyond criminal cases to civil cases. In the former, the right was rooted in the sixth amendment; in the latter, the right derived from the due process clause of the fourteenth amendment.²⁴

The Court examined the fourteenth amendment in *Gagnon v. Scarpelli*.²⁵ Scarpelli's parole was revoked after he was apprehended committing a burglary with another felon. Scarpelli contended that he should have had appointed counsel at the parole revocation hearing. However, the Court declined to adopt a per se rule for such situations. Instead, the Court held that the need for appointed counsel must be determined on a case-by-case basis;²⁶ in some cases, fundamental fairness would require appointed counsel for indigent probationers.²⁷

The Court first considered the right to counsel under the fourteenth amendment in proceedings to terminate parental rights in *Lassiter v. Department of Social Services*.²⁸ *Lassiter* involved a termination proceeding in which the indigent parent had not been represented by counsel. The Court held that as a litigant's interest in personal liberty diminishes, so does his right to appointed coun-

21. 440 U.S. at 373-74.

22. 387 U.S. 1 (1967).

23. *Lassiter v. Department of Social Serv.*, 452 U.S. 18, 25 (1981).

24. *In re Gault* concerned a juvenile proceeding. The Court held that the due process clause of the fourteenth amendment required that in proceedings which may result in the juvenile's confinement to an institution the juvenile has a right to appointed counsel even though the proceedings may be labeled civil and not criminal. 387 U.S. at 49-50.

25. 411 U.S. 778 (1973).

26. *Id.* at 790.

27. *Id.* The Court "presumed" that a court should appoint counsel at a probationer's request, based on a timely and colorable claim that he has not committed the violation of which he is accused, or that, even if he does not contest that the violation occurred, substantial reasons justify or mitigate the violation and the reasons are complex or otherwise difficult to present. A court should also consider whether the probationer appears to be capable of speaking for himself. *Id.* at 790-91.

28. 452 U.S. 18 (1981).

sel.²⁹ Furthermore, an indigent litigant is presumed to have a right to appointed counsel only when a loss on the merits would deprive him of his personal liberty. Courts were to measure the other elements in the due process decision against the presumption that the defendant is not entitled to appointed counsel.³⁰

The Court applied the test used in *Mathews v. Eldridge*³¹ to determine the "specific dictates of due process."³² The *Eldridge* test required the consideration of three factors:³³ the private interests at stake, the government's interest,³⁴ and the risk that the procedures used will lead to erroneous results. Analyzing these factors, the Court stated that in a proceeding to terminate parental rights the parent's interest is an extremely important one because of the fundamental nature of the parent-child relationship.³⁵ The Court then analyzed the government's interest, finding that the state shares the parent's interest in a correct decision, has a weak pecuniary interest, and, in some cases, has a strong interest in maintaining the informality of the proceedings. Finally, the complexity of the proceedings and the inability of the parent to present her own case could make the risk of an erroneous determination unacceptably high.³⁶

In balancing the interests involved, the Court said that when the parent's interest was at its strongest, the state's interest was at its weakest, and the risks of error were at their peak, the presumption against the appointment of counsel would be overcome. Due process, therefore, would require the appointment of counsel.³⁷ The Court indicated, however, that the Constitution did *not* require the

29. *Id.* at 26.

30. *Id.* at 27.

31. 424 U.S. 319 (1976).

32. *Id.* at 335.

33. *Id.*

34. In *Eldridge*, a case involving the entitlement to Social Security benefits, the Court said that the government's interest included the administrative burden and other costs to society of affording the additional due process protection. *Id.* at 347. In *Lassiter*, the Court said that in addition to its economic interest, the government had an interest in the welfare of the child. 452 U.S. at 27.

35. A parent's right to the custody of her children is an important interest that warrants deference and, absent a powerful countervailing interest, protection. 452 U.S. at 27 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

36. *Id.* at 31.

37. *Id.*

appointment of counsel in every termination proceeding. The trial court should therefore determine, based on the *Eldridge* factors, whether due process requires the appointment of counsel.³⁸

These cases suggest that whether due process requires appointed counsel for indigent civil litigants does not depend on the particular type of civil action involved. Instead, the specific facts and circumstances present in each individual case will determine what due process requires.

CIVIL CASES IN WHICH LITIGANTS HAVE ATTEMPTED TO ESTABLISH A RIGHT TO APPOINTED COUNSEL

Proceedings to Terminate Parental Rights

Both before and after *Lassiter v. Department of Social Services*, state courts have often considered the right to counsel for indigent civil litigants in actions to terminate parental rights. Courts have reached different results, some relying on the federal or state constitutions to mandate furnished counsel,³⁹ and others relying on statutes to reach the same result.⁴⁰ Other cases have rejected an absolute requirement of appointing counsel in this type of proceeding, instead choosing to decide the issue on a case-by-case basis.⁴¹ Finally, at least one court has flatly refused to recognize the right of a civil indigent litigant to counsel in a proceeding to terminate parental rights.⁴²

In *In re Welfare of Luscier*,⁴³ the Supreme Court of Washington held that in a termination proceeding, the due process clauses of the fourteenth amendment and the Washington Constitution mandated the parent's right to counsel.⁴⁴ The court cited two factors in

38. *Id.* at 31-32.

39. See *infra* notes 43-66 and accompanying text.

40. See *infra* notes 67-72 and accompanying text.

41. See *infra* notes 73-80 and accompanying text.

42. See *infra* notes 81-88 and accompanying text.

43. 84 Wash. 2d 135, 524 P.2d 906 (1974). *Accord* *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794 (Me. 1973) (citing ME. CONST. art. I, § 6: "In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election. . . ."); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *State v. Jamison*, 251 Or. 114, ___, 444 P.2d 15, 17 (1968) ("where the parent in a termination proceeding is indigent, counsel must be supplied at public expense.").

44. 84 Wash. 2d at 138, 524 P.2d at 908. See WASH. CONST. art. I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law.").

its decision. First, the court recognized that parental rights were a liberty interest that the due process clause of the fourteenth amendment protected. The court stated that, due to the fundamental nature of this interest, the "full panoply of due process safeguards applies"⁴⁵ to such proceedings. Second, the court emphasized that in a termination proceeding, a parent does not confront an opposing party with similar skills, but rather an attorney hired by the state. To demonstrate the importance of this fact, the court cited a study indicating that the presence of counsel in termination proceedings results in a significantly lower percentage of court findings against the parent.⁴⁶ The court stated that the lack of counsel, in itself, may lead to the unwarranted deprivation of parental rights.⁴⁷

In *In re Adoption of R.I.*,⁴⁸ the Supreme Court of Pennsylvania held that an indigent mother was entitled to appointed counsel. The court said that an individual is entitled to counsel in any proceeding that may lead to the loss of substantial rights, and found that parental rights were substantial rights.⁴⁹ The decision rested on a strong policy: when the state was represented by counsel, forcing a parent to defend herself without an attorney who could test the state's case by the rules of evidence and cross-examination would be grossly unfair.⁵⁰

In *In re D.B.*,⁵¹ the Supreme Court of Florida reached a similar conclusion—in proceedings involving the permanent deprivation of parental rights, the due process clauses of the Constitution and the

45. 84 Wash. 2d at 137, 524 P.2d at 908.

46. *Id.* (citing Note, *Representation in Child Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROBS. 230, 241-43 (1968)).

47. *Id.* at 138, 524 P.2d at 908. *Luscier* involved only proceedings that would result in permanent termination of parental rights. In *In re Myricks*, 85 Wash. 2d 252, 533 P.2d 841 (1975), the Supreme Court of Washington, using a similar rationale, extended the right to appointed counsel to proceedings in which the loss of custody is temporary, but permanent deprivation may likely follow. *Id.* at 253, 533 P.2d at 841.

48. 455 Pa. 29, 312 A.2d 601 (1973).

49. *Id.* at ___, 312 A.2d at 602.

50. *Id.* at ___, 312 A.2d at 603. The Superior Court of Pennsylvania has noted, however, that *R.I.* may no longer be good law. See *Corra v. Coll*, 305 Pa. Super. 179, ___ n.7, 451 A.2d 480, 485 n.7 (1982). If *R.I.* was based on federal grounds, then *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), may have overruled it. 305 Pa. Super. at ___ n.7, 451 A.2d at 485 n.7.

51. 385 So. 2d 83 (Fla. 1980).

Florida Constitution⁵² required the appointment of counsel. The court noted that generally the right to appointed counsel depended on the nature of the proceedings.⁵³ According to the court, the right to counsel in termination proceedings is governed by due process considerations rather than by the sixth amendment as in criminal cases. Again, the extent of procedural due process required in this specific type of action varies with the character of the parent's interest and the nature of the proceedings. Here, due process required the appointed counsel when the proceedings could result in permanent termination.⁵⁴

The Supreme Court of Appeals of West Virginia, in *State ex rel. Lemaster v. Oakley*,⁵⁵ held that a minimum standard of due process requires appointed counsel for indigent parents faced with charges of neglect and the potential for permanent termination of parental rights. The court cited the following reasons for its decision: the complexity of the charges against allegedly neglectful parents; the resources available to the state as the opposing party; the potential that the parents' testimony may be used against them in a criminal proceeding; and the fundamental nature of the parents' right to the custody and companionship of their children.⁵⁶

52. FLA. CONST. art. I, § 9 ("No person shall be deprived of life, liberty or property without due process of law. . . .").

53. 385 So. 2d at 89.

54. *Id.* at 90. The court also required appointed counsel when the proceedings could lead to criminal child abuse charges. *Id.* The court declined, however, to require appointed counsel in all dependency cases, irrespective of whether the deprivation was permanent or temporary. Rather, the court reaffirmed its decision in *Potvin v. Keller*, 313 So. 2d 703 (Fla. 1975), which listed several factors for determining whether to appoint counsel when no threat of permanent termination exists: (1) the potential length of the separation, (2) the degree of restrictions on parental visitation, (3) the presence or absence of parental consent, (4) the presence or absence of disputed facts, and (5) the complexity of the proceedings in terms of witnesses and documents. 385 So. 2d at 83, 90. The court further held that when permanent termination may result, a court must appoint counsel for (1) the natural mother or divorced indigent parents of the child, (2) the natural mother of an illegitimate child, and (3) the natural indigent father of an illegitimate child when he has legally recognized or is in fact maintaining the child. *Id.* at 91.

55. 157 W. Va. 590, 203 S.E.2d 140 (1974).

56. *Id.* at 599, 203 S.E.2d at 145.

In *V.F. v. State*,⁵⁷ the Supreme Court of Alaska held that, based on the Alaska Constitution,⁵⁸ indigent parents were guaranteed court-appointed counsel in proceedings to terminate parental rights.⁵⁹ Citing a previous decision, the court found that the “‘interest at stake . . . is one of the most basic of all civil liberties, the right to direct the upbringing of one’s child.’”⁶⁰

The Supreme Court of Michigan extended, in a sense, the right to counsel in *Reist v. Bay County Circuit Judge*,⁶¹ holding that the due process clause required court-appointed counsel for indigent parents involved in termination proceedings.⁶² The court then held that the equal protection clauses of the Constitution and the Michigan Constitution⁶³ required appointed counsel for indigent parents pursuing their first appeal as of right.⁶⁴ The court noted that parents who retained counsel were entitled to have such counsel represent them on appeal. To deny representation to indigent parents on their appeal as of right would violate equal protection:

Persons of means can fully exercise the statutory and constitutional avenues of appeal. The failure to provide poor persons an effective and meaningful appeal of a decision terminating their parental rights through the assignment of appellate counsel is a particularly invidious deprivation and distasteful reminder of their poverty. “[I]t is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.”⁶⁵

57. 666 P.2d 42 (Alaska 1983).

58. ALASKA CONST. art. I, § 7 (“No person shall be deprived of life, liberty, or property without due process of law.”).

59. 666 P.2d at 45.

60. *Id.* (quoting *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979) (holding that the Alaska Constitution guaranteed the right to court-appointed counsel in private child custody proceedings when the opposing party was represented by counsel provided by a public agency)). The court recognized in *V.F.* that *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981), held that the Constitution did not grant an automatic right to counsel for parents during such proceedings. The Alaska Supreme Court decided, however, to join the “growing number of jurisdictions which have held that the right to counsel in termination proceedings exists under the state constitution.” 666 P.2d at 45 n.3.

61. 396 Mich. 326, 241 N.W.2d 55 (1976).

62. *Id.* at 346, 241 N.W.2d at 64.

63. MICH. CONST. art I, § 2. (“No person shall be denied the equal protection of the laws . . .”).

64. 396 Mich. at 349, 241 N.W.2d at 65.

65. *Id.* at 348, 241 N.W.2d at 65 (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)).

The court concluded that the state's failure to provide counsel in this circumstance meant "an unconstitutional line ha[d] been drawn between rich and poor."⁶⁶

Apart from case law, several states have statutes that mandate appointed counsel for indigent parents during termination proceedings.⁶⁷ Based on such statutes, courts have held that the right to court-appointed counsel extends to appeals. In *Chambers v. District Court*,⁶⁸ parental rights were terminated at a hearing in which appointed counsel, as provided by an Iowa statute, represented the indigent parent.⁶⁹ The mother attempted to appeal the decision to the district court and asked the court to appoint counsel. The court denied her motion.

In reversing the district court's denial of counsel, the Supreme Court of Iowa pointed out that although common law granted no right of appeal, the legislature could provide for an appeal if it saw fit.⁷⁰ Once the legislature has granted the right to appeal, however, such a right must apply equally to all.⁷¹ The court concluded that the legislature had intended to offer all persons who came before a juvenile court a full review on appeal. Nothing in the statute provided that the right to court-appointed counsel excluded appeals. Noting that when authorizing the appeal, the legislature must have known that such an appeal would require counsel, the court held

66. *Id.* at 349, 241 N.W.2d at 65 (quoting *Douglas v. California*, 372 U.S. 353, 357 (1963)). Accord *In re B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972):

A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right . . . , to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would . . . constitute a violation of his due process rights and in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well.

Id. at 356-57, 285 N.E.2d at 290, 334 N.Y.S.2d at 136 (emphasis added) (citations omitted).

67. See, e.g., CAL. CIV. CODE § 232 (West 1983); IOWA CODE ANN. § 232.28 (West 1985); see also MICH. CT. R. 5.974(H).

68. 261 Iowa 31, 152 N.W.2d 818 (1967).

69. IOWA CODE ANN. § 232.28 (West 1985).

70. 261 Iowa at 33, 152 N.W.2d at 820.

71. *Id.* Section 232.28 of the Iowa Code guaranteed the mother's right to appeal.

that the right to counsel would continue through appeals that the state authorized.⁷²

The cases described above adopted an absolute rule, based on either constitutional or statutory grounds, that indigent parents have the right to court-appointed counsel in a termination proceeding. However, some courts have declined to adopt such an absolute right and have held, instead, that whether due process requires court-appointed counsel should be a case-by-case determination.

In *Cleaver v. Wilcox*,⁷³ plaintiffs brought a class action seeking to enjoin state authorities from proceeding with termination actions without first supplying counsel to indigent parents. The district court granted the injunction. The United States Court of Appeals for the Ninth Circuit reversed, finding no irreparable harm to the plaintiffs.⁷⁴ The court proposed a three-factor analysis to determine whether due process required the appointment of counsel. The first factor was the length of the separation that could result from the proceedings. The greater the length of the separation and the higher the probability of removal of the child, the greater the need for appointed counsel. The second factor was the presence or absence of parental consent or of disputed facts. The final factor was the parent's ability to cope with documents and examine witnesses. The greater the complexity of the case, the more pressing the need for counsel.⁷⁵ The court emphasized that a court refusing a request for appointed counsel must set forth in the record the grounds for refusal in order to permit review.⁷⁶ Due process required appointed counsel "whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child."⁷⁷

72. 261 Iowa at 35, 152 N.W.2d at 821. See *Sanchez v. Walker County Dep't of Family & Children Servs.*, 237 Ga. 406, 229 S.E.2d 66 (1976); *In re C.P.*, 463 So. 2d 899 (La. Ct. App. 1985).

73. 499 F.2d 940 (9th Cir. 1974).

74. *Id.* at 945-46. The court also noted that because of subsequent legislation, the named plaintiffs were now entitled to counsel. *Id.* at 945.

75. *Id.*

76. *Id.*

77. *Id.*

The Supreme Court of Montana applied this test in *In re M.D.Y.R.*,⁷⁸ in which an indigent mother who was not represented by counsel at a hearing lost custody of her child for six months.⁷⁹ The court found that due process did not require the appointment of counsel because the loss of custody was merely temporary, the mother had liberal visitation rights, and the state agency would return custody to the mother in less than six months if conditions improved. The court also noted that the mother did not dispute the facts or "necessarily oppose the proposal."⁸⁰ Based on the uncontested nature of the proceedings, the court believed that the assistance of counsel would have had no effect on the outcome.

Some courts have found no constitutional right to appointed counsel in termination proceedings. In *In re Blake C.*,⁸¹ parents had abandoned the child for at least six months and foster parents had cared for the child for two years.⁸² On petition by the foster parents, the trial court permanently terminated the parental rights of the natural parents. The mother appealed, contending that in termination proceedings indigent parents have a due process right to counsel.⁸³

The California Court of Appeals first noted that the United States Supreme Court had found no federal due process right to appointed counsel in termination proceedings.⁸⁴ The court of appeals then said that the California Supreme Court had recognized a due process right to counsel in only two cases: "when an indigent prisoner is threatened with a judicially sanctioned deprivation of property and the trial court determines that his right to a meaningful opportunity to be heard requires the appointment of counsel,"⁸⁵ and in a paternity action the state prosecuted.⁸⁶

78. 177 Mont. 516, 582 P.2d 758 (1978).

79. *Id.* at ___, 582 P.2d at 761.

80. *Id.* at ___, 582 P.2d at 765.

81. 178 Cal. App. 3d 608, 224 Cal. Rptr. 167 (1986).

82. *Id.* at ___, 224 Cal. Rptr. at 172.

83. *Id.* at ___, 224 Cal. Rptr. at 172, 177.

84. *Id.* at ___, 224 Cal. Rptr. at 177 (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981)).

85. *Id.* at ___, 224 Cal. Rptr. at 177-78 (citing *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976)).

86. *Id.* at ___, 224 Cal. Rptr. at 178 (citing *Salas v. Cortez*, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529, *cert. denied*, 444 U.S. 900 (1979)). Because the foster parents, rather than

The court of appeals noted the fundamental nature of the parenting right and the consequences of the permanent termination of the parent-child relationship. However, the court said that "a parent's liberty interest in his or her child has thus far not been equated with an individual's liberty interest in freedom from unjustified confinement."⁸⁷ The court held that the California Constitution did not require appointed counsel in termination proceedings.⁸⁸

The divergent results in these cases indicate that a better rule concerning the right of a civil indigent litigant to court-appointed counsel in proceedings to terminate parental rights is needed. One solution is to reverse the *Lassiter* presumption against appointed counsel and apply a presumption in favor of appointing counsel. When the parent contests the action, the state should appoint counsel unless it can show that, due to the particular legal and factual issues involved, the presence of counsel will have no effect on the outcome of the proceeding. Requiring appointed counsel in each case would probably go further than is absolutely necessary because undoubtedly in some cases the presence of counsel would do nothing to change the outcome. Given the state's role as the opposing party and the fundamental interests involved, however, the state should bear the burden of demonstrating why counsel should not be appointed. If the trial judge decides that the state has met its burden, he must put the reasons for his finding in the record to permit appellate review.

Paternity Actions

Another frequently litigated area involving the right to appointed counsel is paternity actions. Again, courts treat the right to counsel in these actions in a variety of ways. Some courts hold that due process requires appointed counsel if, as is often the

the state, brought this action, *In re Blake C.* may be distinguished from many of the prior cases.

87. *Id.* at ___, 224 Cal. Rptr. at 178.

88. *Id.* at ___, 224 Cal. Rptr. at 178. The Maryland Court of Appeals reached the same result in *In re Cager*, 251 Md. 473, 248 A.2d 384 (1968), although the opposing party in that case was a state agency. See also *In re Delaney*, 617 P.2d 886, 889 (Okla. 1980) ("In deprived-status proceedings, a parent has no constitutional right to a state-provided lawyer.").

case,⁸⁹ the state prosecutes the action. Other courts analyze the issue on a case-by-case basis, and others have held that no right exists.

In *Salas v. Cortez*,⁹⁰ an action prosecuted by the district attorney's office, the court found an indigent man to be the father of a child and ordered him to pay child support. The father was not represented by counsel at the hearing.⁹¹ The California Supreme Court reversed, holding that when a state prosecutes a paternity action, the fourteenth amendment and the California Constitution⁹² require that the court appoint counsel for an indigent defendant.⁹³ To determine what process was due, the court examined the nature and the importance of the interests involved, the possible consequences that the putative father would face, and the features that distinguish paternity actions from other civil proceedings. The court balanced the factors against the state interests.⁹⁴ In analyzing the three factors, the California court noted that the determination of paternity had serious implications for the alleged father, the child, the mother, and the state. The court recalled that it had recognized previously that the interest in maintaining a parent-child relationship was a compelling one, and said that the "[f]reedom from an incorrect imposition of that relationship on either a parent or a child is an equally compelling interest."⁹⁵

In addition, the court noted that several results flowed from an adjudication of paternity. First, an adjudication of paternity could seriously affect the lives of all the persons involved and would expose the alleged father to deprivation of property and, potentially, liberty.⁹⁶ Second, a judgment of paternity is *res judicata* in any

89. Federal law requires that states receiving funds for Aid to Families with Dependent Children enforce support obligations. 42 U.S.C. § 654 (1982).

90. 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979).

91. *Id.* at 25, 593 P.2d at 228, 154 Cal. Rptr. at 531.

92. CAL. CONST. art. I, § 7(a) ("A person may not be deprived of life, liberty, or property without due process of law . . .").

93. 24 Cal. 3d at 26-27, 34, 593 P.2d at 229, 234, 154 Cal. Rptr. at 532, 537.

94. *Id.* at 27, 593 P.2d at 230, 154 Cal. Rptr. at 533.

95. *Id.* at 28, 593 P.2d at 230, 154 Cal. Rptr. at 533.

96. *Id.* The court noted that an adjudication of paternity would obligate the alleged father to support and educate the child, an obligation that would not end at the child's majority. *Id.*

subsequent civil enforcement proceeding.⁹⁷ Finally, the failure to support a child could result in criminal prosecution. In such a proceeding, an earlier paternity action may have already established the question of paternity.⁹⁸

The court indicated that the entry of the state, with all its resources, on the side of the mother, had altered the balance between the opposing parties. Because the district attorney's office prosecuted the action, the defendant was "at a distinct disadvantage in facing the severe consequences of a paternity judgment. Unlike the ordinary civil litigant, [the defendant was] opposed by the full resources of the state, marshalled on the plaintiffs' behalf."⁹⁹

The court believed that the decision reached under these conditions was both unfair and unreliable. The court noted that because of the importance and complexity of the proceedings, the legislature had provided the mother with counsel. By not providing counsel for the alleged father, however, the legislature had tipped the balance between the two parties too far in favor of the mother. According to the court, the chances of paternity being imposed on an innocent man increased dramatically if, due to the lack of counsel, the defendant offered no defense.¹⁰⁰

The state argued that paternity actions were like any other civil proceeding in which no right to court-appointed counsel existed. The court disagreed, distinguishing paternity actions from other civil actions: "[I]n these cases the full power of the state is pitted against an indigent person in an adjudication of the existence of a fundamental biological relationship entailing serious financial, legal and moral obligations."¹⁰¹ As a result, to deny the defendant appointed counsel, the state must show a compelling interest. The court ruled that no such compelling interest was present.

The state argued further that it had a financial interest at stake—the public expense of providing counsel—and that the presence of counsel would make identifying the father more difficult. The court acknowledged the state's financial interest but ruled that the state had no legitimate interest in imposing fatherhood on

97. *Id.* (citing CAL. CIV. CODE § 7010(a) (West 1983)).

98. *Id.* at 28-29, 593 P.2d at 231, 154 Cal. Rptr. at 533-34.

99. *Id.* at 30, 593 P.2d at 231, 154 Cal. Rptr. at 534.

100. *Id.* at 31, 593 P.2d at 232, 154 Cal. Rptr. at 535.

101. *Id.* at 32, 593 P.2d at 233, 154 Cal. Rptr. at 536.

an innocent person. The presence of counsel would make the fact-finding process more accurate, thus "furthering the state's *legitimate* interests in securing support for dependent children."¹⁰² The appointment of counsel would serve the interest of the child as well. The child had an interest, not only in determining that some man was his or her father, but in ensuring that the person chosen was the correct man.¹⁰³ Based on these factors, the court held that when the state prosecutes a paternity action, due process required that the state provide counsel to the putative father-defendant.¹⁰⁴

In *Kennedy v. Wood*,¹⁰⁵ the Indiana Court of Appeals undertook a somewhat different analysis and found that due process required appointed counsel in a paternity action prosecuted by the state. The court cited the statement in *Lassiter v. Department of Social Services*¹⁰⁶ that in the absence of at least a potential deprivation of physical liberty, no defendant has a right to appointed counsel. Following the *Lassiter* analysis, a court must weigh the presumption against appointed counsel against the factors listed in *Mathews v. Eldridge*:¹⁰⁷ "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."¹⁰⁸ The court said that if the factors rebut the *Lassiter* presumption, due process requires appointed counsel.¹⁰⁹

The Indiana court ruled that the private interests at stake were substantial. Because of the resulting support obligation, the de-

102. *Id.* at 33, 593 P.2d at 233, 154 Cal. Rptr. at 536.

103. The court noted that the "child's rights of support and inheritance against the father are at issue, as well as his or her future obligation to support the father." *Id.* at 33, 593 P.2d at 234, 154 Cal. Rptr. at 537.

104. *Id.* at 34, 593 P.2d at 234, 154 Cal. Rptr. at 537. See also *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977) (similar holding based solely on ALASKA CONST. art I, § 7). A court reached a similar result in *Artibee v. Cheboygan Circuit Judge*, 397 Mich. 54, 243 N.W.2d 248 (1976) (based on MICH. CONST., art. I, § 17). The court said that paternity actions are quasi-criminal. But see *Franks v. Mercer*, 401 So. 2d 470, 472 (La. Ct. App. 1981) (discussed *infra* note 125). The court in *Artibee* distinguished paternity actions from divorce proceedings in which appointed counsel is generally not provided. The court said that paternity actions, unlike divorce actions, often involved sharply disputed factual questions about the relationship of the parties. 397 Mich. at 57-58, 243 N.W.2d at 249.

105. 439 N.E.2d 1367 (Ind. Ct. App. 1982).

106. 452 U.S. 18 (1981).

107. 424 U.S. 319 (1976).

108. 439 N.E.2d at 1369 (quoting *Lassiter*, 452 U.S. at 27).

109. *Id.*

fendant had a financial interest. He also had an interest in a correct adjudication because of the possibility that failure to make support payments could result in jail, and because evidence used in paternity proceedings could be used in subsequent criminal actions.¹¹⁰ The defendant also had an interest because of the fundamental nature of the parent-child relationship involved. The court also noted the private interest of the child in an accurate adjudication of paternity.¹¹¹ The court said that the child's interest in accuracy was at least equal to that of the defendant.¹¹²

The court distinguished the state's interest from that of the defendant and the child because the state's interest was primarily financial. The state had an interest in finding *any* man to hold financially liable.¹¹³ The state also wanted an economical determination and wished to avoid both the expense of appointed counsel and the likelihood that the use of counsel would result in a lengthened trial. The court found that "[w]hile these pecuniary interests are legitimate, they are hardly significant enough to overcome the compelling private interests of the putative father and child."¹¹⁴

In analyzing the risk that the state procedure would lead to erroneous results, the court first noted that the legislature, recognizing the complexity and importance of the proceedings, had provided the mother with counsel. The court found that providing counsel for the mother increased the risk that fatherhood would be imposed on the wrong man.¹¹⁵ Furthermore, the fact-sensitive nature of the proceedings and the importance of blood tests increased the need for the assistance of counsel. The court cited *Little v. Streater*,¹¹⁶ which held that an indigent defendant in a paternity

110. Also, if attempts are later made to hold the defendant in civil contempt, the paternity judgment would be *res judicata* in such a proceeding. *Id.* at 1370.

111. The court noted the various effects of a paternity action on the child: the child's right of support, inheritance, and custody; the child's health interest in an accurate family medical history; the possibility that the father may assert rights to custody and must give consent to the adoption of the child; and the fact that the father's providing the child with support gives the father a cause of action against the child for the father's own support, which can be enforced by contempt and result in criminal liability. *Id.* at 1370-71.

112. *Id.* at 1371.

113. The court noted that the state seldom requested blood tests because they were expensive and would not help its cause. *Id.* at 1371 n.8.

114. *Id.* at 1371.

115. *Id.*

116. 452 U.S. 18 (1981).

suit was entitled to a blood test at state expense. The court said that this right would be meaningless without counsel to advise the defendant that he has such a right and to ensure that the test results are admitted into evidence properly.¹¹⁷

The court emphasized that paternity actions were similar in importance to proceedings to terminate parental rights, in which the Indiana legislature had provided for the appointment of counsel. In comparing the two types of actions the court said:

Certainly the same considerations, the nature of the right in question and the relative power of the antagonists, are as applicable and as important in the creation of the parent-child relationship as they are in the parental rights termination case. We find no compelling State interest to justify a denial of the same fair opportunity to be heard by the indigent paternity defendant. The private interests and the likelihood of erroneous results in the current procedures used outweigh the State's financial interest and are sufficient to overcome the presumption earlier noted.¹¹⁸

Some courts have chosen not to adopt a per se rule in paternity cases and have instead held that appointed counsel is constitutionally required only in certain cases. In *Wake County ex rel. Carrington v. Townes*,¹¹⁹ the North Carolina Supreme Court held that indigent defendants do not have an absolute right to appointed counsel in paternity cases; instead, the decision to appoint counsel must be made on a case-by-case basis.¹²⁰

Noting the lack of an absolute right, the court stated that the purpose of the paternity proceeding is to determine whether the defendant is the child's father. Even if a court determines that the defendant is the father, the defendant will not be imprisoned at

117. 439 N.E.2d at 1371-72. The court cited three studies to establish the importance of this scientific evidence. One study found that 95% of all paternity disputes result in a finding of paternity. Another found that out of 1000 cases studied, blood tests showed 39.6% of the men not to be the father. In another study blood tests proved that 18% of a group of accused men who acknowledged paternity were not the fathers of the children in question. H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 149-51 (1971).

118. 439 N.E.2d at 1372.

119. 306 N.C. 333, 293 S.E.2d 95 (1982), *cert. denied*, 459 U.S. 1113 (1983).

120. *Id.* at 335, 293 S.E.2d at 97.

the conclusion of the hearing on that basis.¹²¹ The court found the possibility of the defendant's subsequent imprisonment for failure to make support payments too remote a possibility to require appointed counsel in all cases.

The court ruled that an appointment was required "only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness."¹²² When a motion is made to appoint counsel, the trial judge should evaluate the vital interests at stake and determine the complexity of the particular case and the nature of the defendant's peculiar problems in presenting his own defense without the assistance of counsel. The trial judge must then weigh the factors against the *Lassiter* presumption that the defendant is not entitled to appointed counsel in a proceeding that poses no immediate threat to his physical liberty.¹²³

Other courts, for various reasons, have found no right to counsel in paternity actions. In *State v. Walker*,¹²⁴ the Supreme Court of Washington declined to find such a right because the defendant would not be imprisoned as a result of the paternity action.¹²⁵ In *State ex. rel Adult & Family Services Division v. Stoutt*,¹²⁶ the

121. "As we have stated many times, the mere begetting of a child, standing alone, is not a crime in this State." *Id.* at 336, 293 S.E.2d at 98.

122. *Id.* at 339, 293 S.E.2d at 99 (quoting *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980)).

123. *Id.* at 340-41, 293 S.E.2d at 100. The court ruled that the trial judge had failed to conduct such an analysis and remanded the case. *Id.* at 341-42, 293 S.E.2d at 101. In *Hepfel v. Bradshaw*, 279 N.W.2d 342 (Minn. 1979), the Minnesota Supreme Court held, pursuant to its supervisory power, that indigent defendants were entitled to appointed counsel in paternity actions. The court specifically noted that the Constitution did not require appointed counsel in this case. After analyzing the interests at stake and noting the presence of the state on one side of the action, however, it ruled that fundamental fairness required appointed counsel for the other side as well. The court urged the legislature to take steps to make paternity actions less adversarial in nature. *Id.* at 348.

124. 87 Wash. 2d 443, 553 P.2d 1093 (1976).

125. "The purposes of a filiation action are two: (1) determination of paternity; and (2) imposition of a support obligation if the accused is found to be the father of the child. Never is a deprivation or restriction of liberty a direct result of a filiation proceeding." *Id.* at 445, 553 P.2d at 1095. A court reached a similar result in *Franks v. Mercer*, 401 So. 2d 470 (La. Ct. App. 1981). There the court stated that paternity actions were not quasi-criminal in nature. *Id.* at 472. *But see* *Artibee v. Cheboygan Circuit Judge*, 397 Mich. 54, 243 N.W.2d 248 (1976) (discussed *supra* note 104).

126. 57 Or. App. 303, 644 P.2d 1132 (1982), *cert. denied*, 461 U.S. 928 (1983).

Oregon Court of Appeals also declined to find a right to counsel in a paternity action. The court found that the factual and legal issues involved in the case were simple and that an attorney could have had little effect on the outcome.¹²⁷

Courts should handle paternity actions and termination proceedings similarly. The presumption should favor appointed counsel unless the state can show that, because of the particular legal and factual issues involved, appointing counsel would not affect the outcome. Given the availability and possible complexity of the scientific evidence in the cases, the state will not often be able to overcome the presumption. If the putative father contests the action, the state should be required to show that a blood test would not preclude a finding of paternity.

Divorce Actions

Divorce actions present another situation in which litigants have argued, albeit unsuccessfully, for a right to appointed counsel.¹²⁸ In *Kiddie v. Kiddie*,¹²⁹ an indigent defendant in a divorce action contended that he had a right to appointed counsel.¹³⁰ The Supreme Court of Oklahoma stated that the right to counsel generally does not extend to civil proceedings even when the proceedings may have a great impact on the litigants.¹³¹

127. *Id.* at —, 644 P.2d at 1137. The court noted that it did not decide whether due process ever required the appointment of counsel in a filiation proceeding. *Id.* at — n.7, 644 P.2d at 1137 n.7. The fact that the court conducted a *Lassiter-Eldridge* analysis could suggest that, in a proper case, such a right would exist.

128. Generally, this argument is based on *Boddie v. Connecticut*, 401 U.S. 371 (1971). Connecticut required the payment of court fees and costs for service of process as a condition for filing a divorce suit. Plaintiffs argued that this denied them access to the courts. The Court held that because of the importance of the marriage relationship and the fact that only the state could grant a divorce, due process did not permit a state to deny access to its courts for those seeking a divorce solely because of inability to pay. *Id.* at 374.

129. 563 P.2d 139 (Okla. 1977).

130. *Id.* at 141. The court first noted that because the defendant had not been charged with a crime, the sixth amendment did not apply; rather, his claim must be grounded in the due process clause of the fourteenth amendment. *Id.*

131. *Id.* The court cited several situations in which the right to counsel had been denied in civil cases: at a court-ordered psychiatric hearing, *United States v. Cohen*, 530 F.2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976); at a labor union hearing, *Smith v. General Truck Drivers, Warehousemen & Helpers Union Local 467*, 181 F. Supp. 14 (S.D. Cal. 1960); at a hearing before a local draft board, *United States v. Sturgis*, 342 F.2d 328 (3rd Cir.),

The court noted that other courts have granted the right to counsel in child custody hearings. The court distinguished that situation by saying that in child custody hearings, the state, with all its resources, was the opposing party, but in divorce actions another private individual opposed the defendant. Given that no absolute constitutional right to a divorce exists,¹³² the court held that the state and federal constitutions did not grant a right to counsel in divorce cases.¹³³

In *Parsley v. Knuckles*,¹³⁴ the indigent defendant argued that the trial court could not render a judgment of divorce without first appointing counsel for him. The Kentucky Court of Appeals found no right to appointed counsel in divorce actions. The court said that at common law, counsel was not required in civil cases and that the legislature was responsible for changing this situation.¹³⁵

These decisions are probably correct. Because another private party opposes the indigent party in divorce actions, the state has not taken action to aid one party to the detriment of the other. In the absence of special circumstances, such as when mental incapacity deprives a party of the ability to represent himself, courts should treat divorce actions like other civil actions in which no right to appointed counsel exists.

Civil Contempt

Indigent defendants have also sought appointed counsel in civil contempt actions. Some courts have held that when the defendant is faced with the possibility of imprisonment as a result of a civil contempt action, he has an absolute right to appointed counsel.

cert. denied, 382 U.S. 879 (1965); and at a hearing concerning dentistry licensing, *Bancroft v. Board of Governors of Registered Dentists*, 202 Okla. 108, 210 P.2d 666 (1949).

132. 563 P.2d at 142.

133. In response to the argument based on *Boddie* that the defendant was denied access to the courts, the court said that in *Kiddie* the defendant did appear, albeit *pro se*.

134. 346 S.W.2d 1 (Ky. 1961).

135. *Id.* at 3. A somewhat related type of judicial deference was present in *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975). There, the Court of Appeals of New York found no right to counsel in divorce actions, and indicated that the lack of a legislative appropriation to cover payment for appointed counsel supported its decision. The court seemed reluctant to interfere with the uniquely legislative power of the purse.

In *Otton v. Zaborac*,¹³⁶ the defendant was jailed as a result of his failure to pay child support. The Alaska Supreme Court stated that although contempt for nonsupport was traditionally civil, certain aspects of the action, particularly the threat of imprisonment, make the action resemble a criminal proceeding. Although the purpose of the proceeding for nonsupport is to provide a remedy for a private party, disobedience of a court order is contempt of court.¹³⁷ The state thus has a role in the proceeding.¹³⁸ The court noted that it had held consistently that a person facing a possible deprivation of liberty must have all the fundamental rights the federal and state constitutions guaranteed. Additionally, the right to counsel applied to criminal, juvenile, and criminal contempt proceedings. The court ruled that the potential deprivation of liberty in nonsupport contempt proceedings was as serious as the deprivation in criminal, juvenile, and criminal contempt proceedings.¹³⁹ As a result, a court must appoint counsel for an indigent defendant involved in a nonsupport contempt proceeding.¹⁴⁰

Other courts have held that although defendants have no absolute right to counsel in civil contempt actions, what due process requires should be a case-by-case determination. In *Duval v. Duval*,¹⁴¹ the defendant was involved in a nonsupport civil contempt hearing. The defendant argued first that the decision in *Argersinger v. Hamlin*¹⁴² granted the right to counsel in any criminal action in which the defendant could be imprisoned. The de-

136. 525 P.2d 537 (Alaska 1974).

137. *Id.* at 538-39.

138. *Id.* at 539. The court also noted that appearance at a contempt hearing is compulsory and that "[i]mprisonment to coerce compliance is a remedy supplied by the state through both its judicial machinery and its penal institutions." *Id.*

139. *Id.* The court quoted the opinion of the California Supreme Court in *In re Harris*, 69 Cal. 2d 486, —, 446 P.2d 148, 152, 72 Cal. Rptr. 340, 344 (1968): "A defendant who is deprived of his liberty by civil process is as much entitled to due process of law as a defendant who is deprived of his liberty because he is charged with crime."

140. 525 P.2d at 540. The court also said that the defendant's right to a jury trial, with its increased complexity, increased the need for counsel. *Id.* A court reached a similar result in *Tetro v. Tetro*, 86 Wash. 2d 252, —, 544 P.2d 17, 19 (1975) ("Whatever due process requires when other types of deprivation of liberty are potentially involved, when a judicial proceeding may result in the defendant being physically incarcerated, counsel is required regardless of whether the trial is otherwise 'criminal' in nature.").

141. 114 N.H. 422, 322 A.2d 1 (1974).

142. 407 U.S. 25 (1972).

fendant urged the court to extend this rule to civil contempt proceedings when failure to comply with the court order could also result in imprisonment.¹⁴³ The New Hampshire Supreme Court refused, however, distinguishing civil contempt cases from criminal contempt proceedings. The court said that a civil contempt action arises out of a private wrong in which the defendant harms the plaintiff by his failure to comply with a court order. The purpose is to use the court's power to impose sanctions as a means of securing the defendant's compliance.¹⁴⁴

In contrast to a civil contempt action, a criminal contempt action arises out of a defendant's interference with the court's process or dignity. This interference is considered to be a criminal or a public wrong and the sanction imposed is punitive, rather than remedial. The court said that "[g]iven this distinction, it is apparent that the sixth amendment right to counsel as set forth in *Argersinger* is inapplicable to a civil contempt action because that right is confined to criminal proceedings."¹⁴⁵

The defendant then argued that the due process guaranteed by the fourteenth amendment required the court to appoint counsel. The court cited the principle in *Gagnon v. Scarpelli*¹⁴⁶ that the availability of appointed counsel in a proceeding involving the deprivation of liberty would be decided on a case-by-case basis; appointment of counsel would depend on such factors as the capability of the defendant to speak for himself, the character of the proceedings, and the complexity of the issues. According to the New Hampshire court, *Gagnon* required the appointment of counsel only when the defendant would be treated unfairly if counsel were not provided.¹⁴⁷ The court held that "the trial court may in its discretion appoint counsel to assist an indigent defendant to

143. 114 N.H. at ___, 322 A.2d at 2.

144. In effect, the defendant carries the keys to his prison in his own pocket. *Id.* at ___, 322 A.2d at 3.

145. *Id.* at ___, 322 A.2d at 3. The defendant also attempted to rely on N.H. CONST. pt. 1, art. 15 ("Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the State if need is shown."). Citing the record of the constitutional convention, the court said that "'offenses' refers to public, not private wrongs." 114 N.H. at ___, 322 A.2d at 3.

146. 411 U.S. 778, 790-91 (1973).

147. 114 N.H. at ___, 322 A.2d at 4 (1974).

present his case in a complicated nonsupport contempt hearing."¹⁴⁸ If the issues are not complex, however, the trial court is not obligated to appoint counsel.¹⁴⁹

The approach in *Duval v. Duval*¹⁵⁰ is the proper one. A defendant could face imprisonment as a result of a civil contempt hearing. A defendant should, however, have the power to free himself by complying with the court's order. Also, a private individual prosecutes a civil contempt action, the state becoming involved only for enforcement purposes. Unlike termination proceedings and paternity actions, therefore, the state has not entered the litigation on behalf of one side. The lack of state involvement and the ability of the defendant to purge himself of the contempt make it reasonable to require that a court appoint counsel only in cases that are sufficiently complex to make it fundamentally unfair to require the defendant to represent himself. Further, if the defendant claims an inability to comply with a court order because of lack of funds and this claim is colorable, the court should appoint counsel to aid in the presentment of this claim.

148. *Id.* at —, 322 A.2d at 4. See *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980) ("due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness").

149. The court found the record insufficient to judge the complexity of the issues and remanded the case to the trial court to determine whether due process required the appointment of counsel. 114 N.H. at —, 322 A.2d at 4. In *Sheedy v. Merrimack County Superior Court*, 128 N.H. 51, 509 A.2d 144 (1986), the court held that the trial court did not abuse its discretion when it failed to appoint counsel for a defendant jailed for contempt. The court said that the defendant "has failed to convince us that the issues in this contempt proceeding are sufficiently complex or that he is so incapable of speaking for himself that the trial court abused its discretion in refusing to appoint counsel." *Id.* at —, 509 A.2d at 148. The defendant contended that *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981), decided subsequent to the decision in *Duval*, created a presumption that any indigent litigant is entitled to appointed counsel whenever he faces imprisonment. The New Hampshire court ruled that the discussion of such a presumption in *Lassiter* was merely dicta. The court stated further that even if *Lassiter* created such a presumption, the presumption was rebutted here because of the nature of the threatened imprisonment:

[Defendant] will be imprisoned only if he is in contempt. He will be in contempt only if he fails to make a court-ordered payment. Finally he will be ordered to make payments only if the court finds that he has the "ability to pay." In such a situation, it can fairly be said that [defendant], if incarcerated, will hold the keys to his own prison.

128 N.H. at —, 509 A.2d at 148.

150. 114 N.H. 422, 322 A.2d 1 (1974).

28 U.S.C. § 1915(d)

Under a federal statute, trial courts have the power to appoint counsel for plaintiffs.¹⁵¹ This opportunity to have court-appointed counsel, however, is a privilege, not a right.¹⁵² The decision to appoint counsel is a matter within the sound discretion of the trial court.¹⁵³ In *Maclin v. Freake*,¹⁵⁴ the plaintiff, an indigent prisoner, alleged that a prison administrator had been deliberately indifferent to his serious medical needs in violation of his rights under the eighth amendment. The district court denied the plaintiff's request for appointed counsel. The United States Court of Appeals for the Seventh Circuit acknowledged that under 28 U.S.C. § 1915(d) the district court has broad discretion to appoint counsel and that the denial of counsel "will not be overturned unless it would result in fundamental unfairness impinging on due process rights."¹⁵⁵ The court said that the district court's decision must "rest upon the court's careful consideration of all the circumstances of the case, with particular emphasis upon certain factors that have been recognized as highly relevant to a request for counsel."¹⁵⁶ The court then listed and described these factors.

Initially, the trial court should consider the merits of the plaintiff's claim. The court stated that even in cases in which the plaintiff's claim is not frivolous, appointment of counsel is often unwarranted if the plaintiff's chances of success are extremely slim.¹⁵⁷ Once the claim is determined to be colorable, the trial court should consider the nature of the factual issues it raises. If the plaintiff is

151. "The court may request an attorney to represent any such person unable to employ counsel" 28 U.S.C. § 1915(d) (1982).

152. *United States v. Madden*, 352 F.2d 792, 793 (9th Cir. 1965).

153. *Id.*

154. 650 F.2d 885 (7th Cir. 1981).

155. *Id.* at 886.

156. *Id.* at 887.

157. Quoting another decision, the court said that:

"[T]he general rule seems to be that, before the Court is justified in exercising its discretion in favor of an appointment, it must first appear that the claim has some merit in fact and law. . . . Were it otherwise, the appointment in most instances would work a hardship on counsel with no concomitant benefit to the party requesting it."

Id. (quoting *Spears v. United States*, 226 F. Supp. 22, 25-26 (S.D. W. Va. 1967)).

in no position to investigate crucial facts, a court should appoint counsel.¹⁵⁸

The court stated that the trial court should next examine whether the search for truth will be better served if both sides are represented by persons trained in the presentation of evidence and in cross-examination.¹⁵⁹ Counsel may be required when the only evidence available to the factfinder is conflicting testimony.¹⁶⁰ Courts have declined to appoint counsel when the factual issues are uncomplicated or insubstantial and thus do not require "the aid of experienced trial counsel to sift through a complicated record or to take testimony."¹⁶¹

Next, the district court should consider the capability of the plaintiff to present his case. The court of appeals quoted *Gordon v. Leeke*:¹⁶² "If it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him.'"¹⁶³ The court said that, in contrast, when the plaintiff appears competent to present the claim, courts have declined to appoint counsel.

Finally, the district court should consider the complexity of the legal issues the claim raises. When the law is so clearly settled that counsel will serve no purpose, the court should deny a request for counsel. When, however, the law is not clear, justice will be better served if both sides are represented by persons trained in legal analysis.¹⁶⁴

The court then applied these factors to the case before it. The plaintiff presented a colorable claim by alleging a violation of his

158. *Id.*

159. *Id.* at 888.

160. *Id.* The court cited *Manning v. Lockhart*, 623 F.2d 536, 540 (8th Cir. 1980), in which the Eighth Circuit held that refusing to appoint counsel in a case "where there is a question of credibility of witnesses and where the case presents serious allegations of facts which are not facially frivolous" was an abuse of discretion. 650 F.2d at 888.

161. 650 F.2d at 888 (quoting *United States v. Meyer*, 222 F. Supp. 845, 848 (E.D. Pa. 1963), *aff'd*, 326 F.2d 972 (3d Cir. 1964)).

162. 574 F.2d 1147 (4th Cir. 1978).

163. 650 F.2d at 888 (quoting *Gordon v. Leeke*, 574 F.2d at 1153)).

164. *Id.* at 889.

eighth amendment rights.¹⁶⁵ According to the court, the plaintiff was in no position to investigate facts relevant to his complaint:

Confined to a wheelchair and in constant pain, he can hardly be thought capable of conducting an adequate examination of his own medical records, let alone of developing evidence of the medical treatment he ought to have received. Should his case go to trial, we think he will need an attorney to elicit relevant, comprehensible testimony that will elucidate for the factfinder the treatment he received and the adequacy of that treatment.¹⁶⁶

The court also noted the plaintiff did not appear to have a working knowledge of the legal process.¹⁶⁷ The court concluded that the district court abused its discretion when it failed to appoint counsel for the plaintiff.¹⁶⁸

165. The plaintiff presented evidence that he was a paraplegic and had not received any physical therapy for 11 months. *Id.*

166. *Id.*

167. When the defendant filed a motion for dismissal or summary judgment, the plaintiff made no attempt to contest the motion by showing genuine issues of material fact. *Id.*

168. *Id.* The Seventh Circuit Court of Appeals applied this test in a similar case in *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983). In *Merritt*, the plaintiff sought declaratory and injunctive relief and compensatory and punitive damages for the failure to provide him with proper medical treatment in violation of the eighth amendment. *Id.* at 763. The district court declined to appoint counsel, but the court of appeals reversed, saying that the refusal was an abuse of discretion. *Id.* at 761. The court decided: (1) that the plaintiff presented a colorable claim for relief in that he made allegations which, if proved, would show a violation of his rights and entitle him to relief; (2) that the plaintiff's blindness prevented him from investigating crucial facts; (3) that the evidence would consist of complex and contradictory testimony from medical experts, the plaintiff, and the defendant, and that to test this testimony and its credibility would require the skills of a trained advocate; (4) that the plaintiff was unable to present his case properly; and (5) that the legal questions raised by the case were too complex to be handled by a lay person. *Id.* at 765. Judge Posner dissented on the appointment of counsel issue, saying that "a prisoner who has a good damages suit should be able to hire a competent lawyer and . . . by making the prisoner go this route we subject the probable merit of his case to the test of the market." *Id.* at 769 (Posner, J., concurring in part, dissenting in part). Judge Posner indicated that a person with a good claim on the merits should have no difficulty obtaining an attorney willing to take the case on a contingency fee. Judge Cudahy took issue with Judge Posner's analysis, indicating that the fact that the plaintiff was incarcerated might have had an adverse effect on his ability to retain counsel:

Perhaps, however, the laws of economics take a different turn when prison walls intervene. Not entirely facetiously, it occurs to me that the barriers to entry into the prison litigation market might be very high. I think our knowledge of the state of effective competition among attorneys for the business of prisoners with legal claims is slight. Hence, I am not prepared to consign to the

The analysis the court used is entirely reasonable. When the indigent plaintiff has a weak claim, the legal and factual issues are clear, or the plaintiff is quite capable of investigating and presenting his own case, the appointment of counsel is unnecessary. When these factors are not present, however, the court should be willing to appoint counsel to the extent that it will enable a determination of the merits of the plaintiff's claim.

Civil Rights Cases

Indigents, usually prisoners, bringing cases under the civil rights statutes have also attempted to obtain appointed counsel.¹⁶⁹ In *Craig v. Hey*,¹⁷⁰ the plaintiff, an indigent prisoner, brought a suit alleging personal injuries in violation of his civil rights. The West Virginia Supreme Court found no constitutional or statutory right to counsel in all civil cases. The court stated that, "[n]evertheless, particularly when rights of a constitutional dimension are at stake, a poor person's access to the federal courts must not be turned into an exercise in futility."¹⁷¹ In fact, both Congress¹⁷² and the West Virginia Legislature¹⁷³ had indicated that the courts must be available to both the rich and the poor.¹⁷⁴

The court said that "[a]ppointment of counsel in civil rights cases is discretionary and warranted only in exceptional circumstances."¹⁷⁵ However, civil rights cases were often complex, the court noted; thus, "where a *pro se* litigant has a colorable claim but lacks capacity to present it, the court should appoint counsel

verdict of the marketplace the issue of prisoner representation; and this is, of course, not the law.

Id. at 769 (Cudahy, J., concurring).

169. *E.g.*, 42 U.S.C. § 1983 (1982).

170. 345 S.E.2d 814 (W. Va. 1986).

171. *Id.* at 817.

172. *See* 28 U.S.C. § 1915(d) (1982).

173. *See* W. VA. CODE § 59-2-1 (1966):

A poor person may be allowed by a court to sue or defend a suit therein without paying fees, or costs, whereupon he shall have from any counsel which the court may assign him and from all officers, all needful services and process, and also the assistance of witnesses, without any fees to them therefor, except what may be included in the costs recoverable from the opposite party.

Id.

174. 345 S.E.2d at 817-18.

175. *Id.* at 820. *See* *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982).

to assist him to prepare his complaint."¹⁷⁶ Once an indigent plaintiff files a *pro se* petition requesting appointed counsel, the trial court should apply the test used in *Merritt v. Faulkner*¹⁷⁷ to decide whether to appoint counsel to prepare the complaint:

"(1) [W]hether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint."¹⁷⁸

In *Whisenant v. Yuam*,¹⁷⁹ a plaintiff brought suit under 42 U.S.C. § 1983 alleging police misconduct in preventing him from obtaining medical treatment. The district court denied the plaintiff's repeated requests for appointed counsel because federal funds were not available to compensate counsel for section 1983 suits.¹⁸⁰ The plaintiff claimed that he was barely able to read and write and had no experience with law or legal procedures. The United States Court of Appeals for the Fourth Circuit held that the district court had abused its discretion by refusing to appoint counsel.¹⁸¹

The court of appeals found the circumstances in this case exceptional. The plaintiff had a colorable claim because he had alleged facts, which if proved would entitle him to relief. Once the plaintiff has established a colorable claim, the existence of exceptional cir-

176. 345 S.E.2d at 820.

177. 697 F.2d 761 (7th Cir. 1983).

178. 345 S.E.2d at 820-21 (quoting *Merritt*, 697 F.2d at 764). The Fifth Circuit Court of Appeals listed a similar set of factors in *Ulmer v. Chancellor*, 691 F.2d 209 (5th Cir. 1982). In *Ulmer*, an indigent prisoner brought a suit under 42 U.S.C. § 1983 alleging a violation of his civil rights because of inadequate and unsanitary jail conditions. The court said that although counsel in civil rights cases was required only in exceptional cases, 28 U.S.C. § 1915(d) allows a federal court the discretion to appoint counsel if doing so would advance the proper administration of justice. In determining whether the case is an exceptional one, the court said that the district court should consider: (1) the type and complexity of the case; (2) whether the plaintiff is capable of adequately presenting his case; (3) whether the plaintiff is in a position to investigate the case adequately; and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross-examination. *Id.* at 213.

179. 739 F.2d 160 (4th Cir. 1984).

180. *Id.* at 162-63.

181. *Id.* at 162.

cumstances depends on the type and complexity of the case and the abilities of the person bringing it.¹⁸² On this point the court said:

[The plaintiff] is ill-equipped to represent himself or to litigate a claim of this nature. He is relatively uneducated generally and totally uneducated in legal matters. He cannot leave prison to interview witnesses such as the doctors who eventually attended him. His version of events . . . is in sharp conflict with that of the defendants, so that the outcome of the case depends largely on credibility. [The plaintiff] has no training in cross-examination.¹⁸³

The court found that such exceptional circumstances were not present in *Lockert v. Faulkner*,¹⁸⁴ in which the plaintiff brought a suit under 42 U.S.C. § 1983 against state prison officials for refusing to allow him to marry a non-inmate. The United States District Court for the Northern District of Indiana said that in determining whether to appoint counsel for the plaintiff, the court should consider the standards established in *Maclin v. Freake*.¹⁸⁵ The facts of the case were not in dispute and the legal issues were clear. Nothing in the record indicated any mental or physical impairment of the plaintiff that would hamper his presentation of his claim. The court also noted the "generally good quality of the plaintiff's pleadings, and the obvious care with which he has framed and argued the legal questions raised."¹⁸⁶ As a result, the court denied the plaintiff's request for appointed counsel.¹⁸⁷

The possibility of recovering attorney's fees from the losing party encourages attorneys to represent nonprisoners with colorable constitutional claims.¹⁸⁸ However, when a prisoner brings the

182. *Id.* at 163.

183. *Id.* The court said that the failure to appoint counsel denied the plaintiff a fundamentally fair trial. The availability of federal funds was unrelated to the question of fundamental fairness. *Id.* at 163-64.

184. 574 F. Supp. 606, 608 (N.D. Ind. 1983).

185. 650 F.2d 885 (7th Cir. 1981). The standards include the legal and factual merits of the claim, the complexity of the issues, and the plaintiff's intellectual and physical abilities to present his case. 574 F. Supp. at 608. *See supra* notes 154-68 and accompanying text.

186. 574 F. Supp. at 608.

187. *Id.*

188. *See* 42 U.S.C. § 1988 (1982) (permits a trial court to award a reasonable attorney's fee to the prevailing party in an action to enforce 42 U.S.C. § 1983).

suit, the possibility of recovering attorneys fees is not a sufficient incentive. Given the isolation of many prisons, many attorneys will not likely be willing to even discuss a case with the prisoner. In these cases, if the inmate has a colorable claim and is unable to represent himself, a court should appoint counsel to help the prisoner develop his claim. Once the claim is developed, relying on the availability of attorney's fees to cause attorneys to undertake claims with merit may be sufficient.

Tort Actions

The California Supreme Court has held, in some very limited circumstances, that due process may require appointed counsel for indigent defendants in tort actions. In *Payne v. Superior Court*,¹⁸⁹ an indigent prisoner was convicted of theft. While still incarcerated, he was sued for damages arising out of the theft. The Department of Corrections refused to permit him to attend the civil trial and a default judgment was entered against him.¹⁹⁰

The court noted that the claim involved due process and equal protection issues, raising similar questions: "[W]e must determine whether state action has infringed upon a fundamental right of petitioner. If it has, the state action can be upheld only if necessary to effect an overriding governmental interest."¹⁹¹ Also, "the government must show that its interest cannot be satisfied by alternative methods less restrictive of the individual right abridged."¹⁹² The court held that due process requires, at a minimum, that in the absence of an overriding state interest, persons haled before a court when their rights are at stake must be given a meaningful opportunity to be heard.¹⁹³

189. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

190. The supreme court first ruled that the defendant's contention that he was denied access to the courts was not affected by a California statute once referred to as a "'civil death' statute." CAL. PENAL CODE § 2600 (West 1983). "[P]risoners, while forfeiting, as a necessary corollary of prison life, significant rights and privileges enjoyed by the general populace, retain those basic rights which are not incompatible with the running of the penal institution." 17 Cal. 3d at 913, 553 P.2d at 569, 132 Cal. Rptr. at 409 (quoting *Newkirk v. Butler*, 364 F. Supp. 497, 501 (S.D.N.Y. 1973)).

191. 17 Cal. 3d at 914, 553 P.2d at 570, 132 Cal. Rptr. at 410.

192. *Id.*

193. *Id.*

As a result of the litigation, the defendant had the potential of losing property that he already owned or might acquire in the future. The court found this interest in property to be fundamental.¹⁹⁴ The state's interests in not providing counsel and not allowing the defendant to attend his trial were not compelling enough in the face of the defendant's fundamental property right. Given defendant's fundamental right and the lack of a compelling state interest, denying him the opportunity to be heard in his own defense was a denial of due process and equal protection.¹⁹⁵ The court also said that "denial of appointed counsel to an indigent prisoner, when no other relief will preserve his right of access to the courts, is constitutionally impermissible."¹⁹⁶

The court then described the limited circumstances in which appointed counsel was required:

We do not rule that appointment of counsel is an absolute right. However, it is in many instances the only remedy enabling a prisoner to obtain access to the courts. The access right, in turn, comes into existence only when a prisoner is confronted with a bona fide legal action threatening his interests. If a prisoner is merely a nominal defendant with nothing of consequence at stake, no need emerges for an appointed attorney. Thus, before appointing counsel for a defendant prisoner in a civil suit the trial court should determine first whether the prisoner is indigent. If he is indigent and the court decides that a continuance is not feasible, it should then ascertain whether the prisoner's interests are actually at stake in the suit and whether an attorney would be helpful to him under the circumstances of the case. The latter determination should be comparatively simple: if the prisoner is not contesting the suit against him, or any aspect of it, there is no need for counsel; but if he plans to defend

194. The court ruled that although the defendant was indigent and had nothing to lose at present, statutes provided that the judgment could be enforced against him on his future earnings and acquisitions. *Id.* at 914 n.4, 553 P.2d at 571 n.4, 132 Cal. Rptr. at 411 n.4.

195. The court based its decision on the due process and equal protection clauses of the Constitution and the California Constitution. *Id.* at 922-23, 553 P.2d at 576, 132 Cal. Rptr. at 416.

196. *Id.* at 924, 553 P.2d at 576, 132 Cal. Rptr. at 416.

the action and an adverse judgment would affect his present or future property rights, an attorney should be appointed.¹⁹⁷

A factor involved in tort litigation may be the contingent fee system. A plaintiff with a colorable claim but without funds may be able to obtain counsel by agreeing to share the recovery. Counsel will probably be more willing to share the risks in hopes of obtaining a large reward.

An indigent defendant, however, does not have this benefit. Because he is the defendant, and not the plaintiff, the success of his suit will not result in a monetary reward. The system, then, may result in unfairness to an indigent defendant.¹⁹⁸ On the other hand, an indigent plaintiff who for some reason is unable to obtain counsel may decide to handle the case himself. Providing an indigent defendant with counsel in such a case would result in great unfairness to an indigent plaintiff.

197. *Id.* at 924, 553 P.2d at 576-77, 132 Cal. Rptr. at 416-17. The court went to great pains to emphasize the limits of its holding:

We have not ruled that all indigents have a right to counsel in civil cases. Nor have we established that indigent prisoners who are plaintiffs in civil actions may secure appointed counsel or the right to appear personally. . . . All we decide is that when a prisoner is threatened with a judicially sanctioned deprivation of his property, due process and equal protection require a meaningful opportunity to be heard. How that is to be achieved is to be determined by the exercise of discretion by the trial court.

Id. at 926-27, 553 P.2d at 578-79, 132 Cal. Rptr. at 418-19.

The court was called upon to apply this holding in *Yarbrough v. Superior Court*, 39 Cal. 3d 197, 702 P.2d 583, 216 Cal. Rptr. 425 (1985). In *Yarbrough*, the defendant was sued for wrongful death arising out of a shooting for which he was imprisoned. The court expanded on the criteria listed in *Payne*. First, an adverse judgment must affect property rights. The court ruled that the trial court should evaluate the potential for loss to the prisoner, weighing factors such as the defendant's age, term of imprisonment, employment history, education, skills, family background, and the likelihood of his inheriting property. Second, counsel must be helpful to the defendant under the circumstances of his case. The court should consider whether undetermined issues of fact exist. The conviction could be admissible at the civil trial and collateral estoppel could prohibit the relitigation of issues decided in the criminal case. Even if no new factual issues remain, the court should consider the question of damages. The court should consider whether other defendants are jointly and severally liable, and likely to be required to pay the judgment. The final factor is whether a court can provide access by granting a continuance until the defendant is released from custody. The court found that the trial court failed to consider these factors and remanded the case. *Id.* at 206-07, 702 P.2d at 589, 216 Cal. Rptr. at 431.

198. One might question how much a truly indigent defendant could actually lose as the result of a judgment against him in a tort suit. A plaintiff may name an indigent as a defendant to obtain the benefits of whatever insurance coverage the defendant might have.

In a perfect world, providing counsel for indigent defendants in cases in which an indigent plaintiff has counsel might be better. Given the high cost of such a system, however, this result is not practical. The contingency fee system may work an unfairness on indigent defendants; an unfairness that perhaps must be tolerated. The cases in which indigent tort defendants receive appointed counsel should be exceedingly rare ones, probably restricted to cases in which prison authorities prohibit inmates from attending the trial and representing themselves.

REVERSING THE *Lassiter* PRESUMPTION: A NEW APPROACH TO
WHEN DUE PROCESS REQUIRES APPOINTED COUNSEL

Although appointed counsel in civil cases is not unheard of, the preceding cases demonstrate that it is the exception rather than the rule. In the typical civil case, this treatment is appropriate. In a tort action, when only property is at risk and the indigent party is opposed by another private party, fundamental fairness does not require that the state bear the great expense of providing appointed counsel. The California Supreme Court has held that in some limited circumstances, due process may require appointed counsel for an indigent prisoner who is a defendant in a tort action.¹⁹⁹ Such a situation is, however, a fairly unique one. The California court relied heavily on the fact that the prisoner was not permitted to attend his trial and present his own case. The indigent prisoner thus could neither represent himself nor afford to hire an attorney. He was denied *any* opportunity to be heard, much less a meaningful opportunity. Under these circumstances, due process does require that the state either allow the prisoner to attend the trial and represent himself or appoint counsel for him. In the normal tort action involving an unincarcerated defendant, however, a litigant is free to attend and represent himself and due process does not require appointed counsel. Although a litigant who cannot afford an attorney undoubtedly will be at a disadvantage vis-à-vis an opponent who has sufficient funds to retain counsel, this disadvantage is simply part of the unfairness that life provides.

199. *Payne v. Superior Court*, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976). See *supra* notes 189-97 and accompanying text.

Due process also does not require appointed counsel for indigent litigants charged with civil contempt. The decision to appoint counsel in a noncriminal proceeding in which a potential deprivation of liberty exists, such as in a civil contempt action, should be a case-by-case determination, depending on the capability of the defendant to speak for himself, the character of the proceedings and the complexity of the issues.²⁰⁰ When the issues are not complex, and special circumstances do not make the defendant incapable of speaking for himself, due process does not require appointed counsel.²⁰¹ Normally, civil contempt defendants hold the key to the prison in their pockets. They can purge themselves of their contempt merely by complying with the court's order. Fundamental fairness does not require appointed counsel for litigants who are in a position to resolve their difficulty through their own actions.²⁰² Importantly, another private party prosecutes a civil contempt action; the state becomes involved only through enforcement.

In cases brought under civil rights statutes, such as 42 U.S.C. § 1983, due process does not require appointed counsel for all indigent litigants. Congress has provided that a court may award the prevailing party attorney's fees.²⁰³ An indigent litigant with a colorable claim, but insufficient funds to retain counsel, then, should be able to retain counsel because of the possibility of receiving attorney's fees. Courts have held that appointing counsel in a civil rights case is discretionary and warranted only in exceptional cases.²⁰⁴ Courts have ruled that some cases involving indigent prisoners meet this high standard.²⁰⁵ These cases involved incarcerated

200. *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1983).

201. *Duval v. Duval*, 114 N.H. 422, —, 322 A.2d 1, 3-4 (1974). *See supra* notes 141-49 and accompanying text.

202. A court will only imprison a defendant if he is found in contempt. He will be in contempt only if he fails to make a court-ordered payment and he will be ordered to make such a payment only if the court finds he has the ability to pay. *Sheedy v. Merrimack County Superior Court*, 128 N.H. 51, —, 509 A.2d 144, 148 (1986). A defendant can thus remove any potential threat to his liberty merely by doing that which a court has already found him to be capable of doing.

203. *See* 42 U.S.C. § 1988 (1982).

204. *See Craig v. Hey*, 345 S.E.2d 814, 818 (W. Va. 1986).

205. *See Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984).

plaintiffs and sharply contested issues of fact.²⁰⁶ When an analysis of the relevant factors²⁰⁷ reveals an exceptional case, a court should appoint counsel, at least for the purpose of helping the litigant prepare his complaint.²⁰⁸ Based on the reported decisions, a case would be exceptional only when the litigant is incarcerated. In such a situation in which the litigant is unable to investigate his own claim, the court should appoint counsel to help prepare the complaint. Once a complaint is prepared, however, the provision for attorney's fees should enable a litigant to obtain an attorney if he has a meritorious claim. The unfairness to an impecunious litigant in a civil rights action is largely eliminated or mitigated through the provision for attorney's fees.

Yet, although the resulting unfairness to an impoverished litigant is acceptable in the civil actions just described, in other civil actions the unfairness is much greater and results in a denial of due process. Constitutional problems arise when two factors are present: the state is the opposing party and the interest that the indigent litigant has at stake is more fundamental than his interest in property.

These factors are present in proceedings to terminate parental rights and in paternity actions. Generally, the opposing party in these actions is the state, with its legal expertise and vast resources, rather than another private party. Additionally, the right that the litigant has at stake is much more fundamental than any property interest at risk in most civil actions; it is the creation or termination of the parent-child relationship.²⁰⁹

206. *Cf. Lockert v. Faulkner*, 574 F. Supp. 606 (N.D. Ind. 1983) (declining to appoint counsel for an indigent prisoner after determining that the facts of the case were not in dispute).

207. In deciding whether the case is an exceptional one, the trial court should consider: (1) the type and complexity of the case; (2) whether the plaintiff is capable of adequately presenting his case; (3) whether the plaintiff is in a position to investigate his case adequately; and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross-examination. *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982).

208. *Craig*, 345 S.E.2d at 820. Once a complaint is prepared, relying on the provision for attorney's fees and the market to see that good damages claims are prosecuted may be adequate.

209. "[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of So-*

The importance of the interest at stake is not sufficient, standing alone, to warrant a reversal of the *Lassiter* presumption, however. In a civil contempt action, in which the interest is personal liberty, the state has not acted to aid one party to the detriment of the other and it is not required to appoint counsel to bring the parties back into balance. Similarly, the importance of the liberty interest at stake in a divorce action is arguably as great as the interest in paternity and termination actions. In divorce actions, however, the state has not provided one party with counsel. The entry of the state on behalf of one side distinguishes divorce actions from paternity and termination actions.²¹⁰ The state's decision to aid one party justifies requiring the state to bear the financial burden of providing counsel for the other party as well.

In fact, in termination and paternity actions, to send an unrepresented person against the state is fundamentally unfair. The due process requirement of a meaningful opportunity to be heard would, in many cases, be a hollow promise to an indigent person forced to cope with rules of evidence and unfamiliar procedures. For the state to favor one litigant to the disadvantage of another, especially when the interest at stake is such an important one, offends due process.

In termination proceedings and paternity actions, due process and fundamental fairness require a reversal of the *Lassiter* presumption against appointing counsel. Instead, a strong presumption in favor of appointed counsel should arise in these situations. To overcome this presumption, the state should have to make a substantial showing that, because of the particular legal and factual issues involved, the presence of counsel would have no effect on the outcome. For example, if a paternity action is contested, the state should be required, at a minimum, to show that a blood test would not preclude a finding of paternity. The Supreme Court has held that a state may not deny a blood grouping test to an indigent

cial Servs., 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). "This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. . . . Just as the termination of such bonds demands procedural fairness, . . . so too does their imposition." *Little v. Streater*, 452 U.S. 1, 13 (1981) (citations omitted).

210. *Kiddie v. Kiddie*, 563 P.2d 139, 142 (Okla. 1977).

paternity defendant because of his lack of financial resources.²¹¹ As one court observed,²¹² an indigent's right to a free blood grouping test would be of little value without counsel to advise him of his right to demand a test and to ensure that the results are admitted into evidence properly.²¹³ Additionally, the trial judge who finds that the presence of counsel would not affect the outcome should have to set forth his reasons in the record to permit appellate review.

This approach represents a compromise between criminal cases, in which a court must appoint counsel before imprisoning a defendant, and civil cases, in which a presumption against the appointment of counsel exists. The litigant's interest in paternity and termination actions is less than his interest in his personal liberty, at risk in a criminal case, but greater than his interest in property, at risk in an ordinary civil action. Reversing the *Lassiter* presumption in these actions reflects the midway position that the liberty interest at risk in paternity and termination proceedings occupies on a continuum of interests that can be at risk in litigation; a continuum that ranges from a litigant's interest in property to his interest in his personal liberty. The importance of the litigant's interest at stake in termination and paternity cases falls somewhere between the importance of his interest at stake in criminal and other civil cases. Similarly, the presumption in favor of appointing counsel in paternity and termination actions falls somewhere between the per se approach to appointing counsel in criminal cases and the presumption against appointing counsel in civil cases. When the interest at stake is a very important one—the defendant's personal liberty—the court will appoint counsel automatically. When the litigant's interest is less important—his property—a court will appoint counsel only in exceptional cases. When,

211. *Lassiter*, 452 U.S. at 16-17.

212. See *Kennedy v. Wood*, 439 N.E.2d 1367, 1372-73 (Ind. Ct. App. 1982).

213. A joint study by the American Medical Association and the American Bar Association has recommended that seven serologic systems be tested. The study found that such tests would establish nonpaternity for 91-93% of all falsely accused men. American Medical Assoc., Comm. on Transfusion & Transplantation, & American Bar Assoc., Section on Family Law, Comm. on Standards for the Judicial Use of Scientific Evidence in the Ascertainment of Paternity, *Joint AMA-ABA Guidelines: The Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 257 (1976).

however, the litigant's interest is less important than his personal liberty, but more important than his property, a court should appoint counsel, not automatically, but more as the rule than as the exception.

Applying the *Lassiter* presumption to all types of civil cases equates the interests at stake in all civil actions. The interests at stake in paternity and termination actions, however, are compelling and far-reaching and greatly outweigh the litigant's property interest in typical civil litigation. Reversing the *Lassiter* presumption will not require appointed counsel in every paternity action and in every proceeding to terminate parental rights. Unlike criminal cases, in which a court appoints counsel even for defendants who intend to plead guilty, a court need not appoint counsel in paternity or termination actions unless those actions are contested. Even when the actions are contested, a court need not appoint counsel if the state can show that, because of the particular legal and factual issues involved, appointing counsel would make no difference in the outcome. In a paternity action, then, if a blood test indicated a high likelihood of paternity, a court need not appoint counsel.

The cost to the state would fall somewhere between the cost borne by the state in providing counsel for virtually all indigent defendants in criminal cases and the cost the state bears in providing counsel for only a few defendants in most civil cases. In termination and paternity actions, the state would have to bear the cost of providing counsel for many litigants, but not all litigants.

Undoubtedly, this approach could financially burden the states and would likely prolong such proceedings. Compared to the interests of the private parties involved, however, the state interests are insignificant. The state has chosen to intervene in favor of one party in termination and paternity actions. Once the state has chosen to favor one side of the litigation in this fashion, to refuse appointed counsel for the opposing party as well is fundamentally unfair. Due process and fundamental fairness require that before the state can establish or terminate a parent-child relationship, it must provide its indigent opponent with counsel.

CONCLUSION

The United States Supreme Court has found a presumption against appointing counsel for indigent civil litigants when the litigant will not likely be deprived of his personal liberty if he is unsuccessful in the litigation. Various courts have gone further, recognizing a right to counsel in paternity actions and proceedings to terminate parental rights because of the state's presence as the opposing party and the important liberty interest at stake. A few courts have held that indigent litigants have a right to counsel in civil rights cases and civil contempt proceedings. One court has found a limited right to counsel for defendants in tort actions.

Due process does not require appointed counsel for indigent civil litigants in tort actions, civil rights actions, civil contempt proceedings, and divorce actions. In these types of civil cases the *Lassiter* presumption against appointing counsel is appropriate. In paternity actions and in proceedings to terminate parental rights, however, due process and fundamental fairness require a reversal of the presumption. Given the important liberty interests at stake in such cases, and the entry of the state on behalf of one side of the litigation, the state must restore the balance between the private parties and provide counsel for the other side as well. The state must do so unless it can demonstrate clearly that providing the other side with counsel will have no effect on the outcome of the litigation. Nothing less will satisfy the demands of due process.

William L. Dick, Jr.