COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11739

Appeals Court No. 2014-P-1075
Probate & Family Court ES12P1792GD

IN RE GUARDIANSHIP OF V. V.

On Appeal of a Denial of a Motion to Vacate by the Probate & Family Court Department, Essex Division (Ricci. J.)

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

The **Massachusetts Law Reform Institute** ("MLRI") is a statewide nonprofit poverty law and policy center. Its mission is to advance economic, racial, and social justice through legal action, education, and advocacy that removes barriers to opportunity and creates a path to self-sufficiency for low-income individuals and families. Through its Child and Family Law Unit, MLRI advocates for judicial, administrative, and legislative policies, in both the private child custody and child welfare arenas, that make the lives of low-income parents and their children safer and more physically, emotionally, and financially stable.

The mission of the **Boston Bar Association** ("BBA") traces its origins to meetings convened by John Adams in 1761, thirty-six years before he became President of the United States. The BBA works "to advance the highest standards of excellence for the legal profession, facilitate access to justice, and serve the community at large." About Us, Boston Bar Association, http://www.bostonbar.org/about-us (last visited Dec. 5, 2014). The vast pool of legal expertise of the BBA's members serves as a resource

for the judiciary, as well as the legislative and executive branches of government.

The **Massachusetts Bar Association** ("MBA"), founded in 1910, is a non-profit organization that serves the legal profession and the public by promoting the administration of justice, legal education, professional excellence, and respect for the law. The MBA is the largest bar association in Massachusetts, with approximately 14,000 members state-wide. The mission of the MBA is to provide professional support and education to members, and advocacy on behalf of lawyers, legal institutions, and the public. As part of its advocacy goal, the MBA has formed an Amicus Curiae Committee to evaluate certain litigation in which the MBA may be interested in participating. The MBA has determined that the issues raised in this case so affect the public policy of the Commonwealth of Massachusetts that an amicus brief is warranted.

The **Women's Bar Association of Massachusetts** ("WBA") is a professional association comprised of over fifteen hundred attorneys, judges, and policy-makers dedicated to promoting and advancing gender equity and to advancing and protecting the interests

of women in society. In fulfillment of this mission, the WBA has been involved in submitting amicus briefs, and provides *pro bono* representation in areas including family law, child welfare, and those involving indigent individuals. The WBA has also been active in advocating for issues that impact the administration of justice and equal access to justice in the legal system, particularly in matters where fundamental rights are at stake. Therefore, the WBA has an interest in the outcome of this case and it represents an appropriate issue on which the WBA can offer its guidance.

Greater Boston Legal Services, **Community Legal Aid**, **Justice Center of Southeast Massachusetts LLC**, **MetroWest Legal Services**, the **Community Legal Services and Counseling Center**, the **Harvard Legal Aid Bureau**, the **Mental Health Legal Advisors Committee** ("MHLAC"), and the **Children's Law Center** ("CLC") all provide legal services to indigent litigants in a variety of civil proceedings, including matters in which the custody of children and the rights of parents are at stake. The Court's consideration of this case raises significant issues for custodial parents whose right to parent their children is threatened by the filing

of a guardianship proceeding by a family member or other non-parent. Many, if not most, of these parents are self-represented because they are unable to afford an attorney and existing legal services programs do not have adequate funding to provide services in this substantive area. These programs have a strong interest in ensuring access to justice for all litigants in the courts of the Commonwealth and are particularly interested in ensuring that everyone has the ability to protect their fundamental constitutional right to parent. MHLAC, through its Clubhouse Family Legal Support Project, focuses in particular on serving parents with psychiatric disabilities in their custody and parenting time cases. CLC focuses in particular on protecting the legal rights of youth, including teen parents who, without counsel, are especially vulnerable to third party custodial challenges.

The **Center for Public Representation** ("CPR") provides free legal services to people with disabilities. For more than a decade, CPR was an active member of Probate & Family Court committees that drafted and implemented Article V of the Massachusetts Uniform Probate Code.

Safe Passage is a non-profit organization addressing domestic violence in Hampshire County, which provides legal advice and counsel to pro se litigants in Probate and Family Court cases. Safe Passage has a strong interest in protecting the constitutional interest in parenting one's own children, especially for survivors of domestic violence who are particularly vulnerable to third party petitions for guardianship.

STATEMENT OF THE CASE

Amici Curiae (hereafter "Amici") adopt the Appellant's Statement of the Case.

ARGUMENT

Massachusetts has already established, through case law and statute, a legal framework that provides parents the right to counsel in legal proceedings in which the same fundamental parenting issue at stake in guardianship proceedings -- the potential loss of custody to a person who is not the child's parent -- is also at stake. The lack of a right to counsel in private guardianship is a troubling gap in that framework. Both the due process and the equal protection clauses of the Massachusetts Constitution require this gap be filled and that indigent parents

be guaranteed the right to counsel in guardianship proceedings, whether they are filed by the state or by private parties.

I. APPOINTMENT OF COUNSEL FOR PARENTS IN PRIVATE GUARDIANSHIP PROCEEDINGS IS REQUIRED UNDER THE DUE PROCESS PROVISIONS OF THE MASSACHUSETTS CONSTITUTION.

Amici agree with Amicus Curiae the Committee for Public Counsel Services ("CPCS") that the three-part analysis set forth in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), compels appointment of counsel for parents in private guardianship proceedings.[1] The process due in a given circumstance depends on: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Id. at 335. See also Care & Protection of Robert, 408 Mass. 52, 58-59 (1990) ("When making the

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[1] The term "parent," as used throughout this brief, includes any person who is legally the parent of the child, including adoptive parents.

determination as to what standard of proof is appropriate in a particular context, both this court and the United States Supreme Court have utilized the due process analysis contained in Mathews v. Eldridge.").

Amici adopt the arguments set forth by CPCS in its brief ("CPCS Brief"), including its statement of the state action predicate for due process and equal protection analyses in sections III and IV, and, given the interests of Amici, write further to underscore the fundamental interests at stake and risk of erroneous deprivation of those rights in light of the current operation of private guardianship proceedings.

A. Parents in Proceedings in Which They May Lose Custody of Their Children to Third Parties Face a Substantial Risk of Deprivation of Fundamental Rights.

In Massachusetts, "[t]he interest of parents in their relationship with their children has been deemed fundamental." Dep't of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979). In J.K.B., this Court noted that the "'loss of a child may be as onerous a penalty as the deprivation of the parents' freedom.'" Id. (citing Custody of Minor, 377 Mass. 876, 884 (1979)). Removing a child from a parent's custody is an intrusion on a

parent's fundamental liberty interest, even when the removal is temporary. Matter of Hilary, 450 Mass. 491, 496 (2008). "Due process requirements must be met where a parent is deprived of the right to raise his or her child." Care & Protection of Erin, 443 Mass. 567, 571 (2005).

Private guardianships, proceedings in which a person who is not the child's other parent seeks custody of the child, significantly restrict these fundamental rights. Massachusetts guardians have all of "the powers and responsibilities of a parent regarding the ward's support, care, education, health and welfare," G.L. c. 190B, § 5-209(a); in other words, the guardian gains both physical and legal custody of the child. See G.L. c. 190B, § 5-209(b)(1). Decisions made by the guardian, such as whether to permit the parent to visit with the child and thus maintain the parent-child relationship, can substantially impact a parent's ability to avoid termination of his or her parental rights. The instant case illustrates the impact a guardian can have on the parent-child relationship: the trial court limited Mother's rights by restricting her

contact with her child to supervised visitation granted at the sole discretion of guardian.

B. Massachusetts Guardianships Frequently Feature an Imbalance of Power, Increasing the Risk of Error.

In every guardianship case, parents facing the loss of custody are far more vulnerable than the opposing party seeking guardianship who does not have a fundamental parenting interest at stake. This creates an inherent power imbalance in guardianship proceedings, increasing the risk of error.

This is particularly true in cases where an unrepresented parent faces a potential guardian who is represented. A comprehensive study of Massachusetts guardianship cases indicates that frequently a power imbalance exists in private guardianship cases in which an unrepresented party is pitted against a represented one. Weisz & Kaban, Protecting Children: A Study of the Nature and Management of Guardianship of Minor Cases in Massachusetts Probate and Family Court 16 (Children's Law Center of Massachusetts 2008) [hereinafter Protecting Children] ("The percentage of parties who were represented by legal counsel in [guardianship of minor] cases was modest at best, and decreased overall from 1997 to 2006. Strikingly, the

combined percentage of mothers and fathers who were represented by counsel was less than the percentage of petitioners who had counsel.").

This power imbalance strikes at the heart of fundamental fairness. In its report, Gideon's New Trumpet, the Boston Bar Association Task Force on Expanding the Civil Right to Counsel ("BBA Task Force") flagged the "dramatic power imbalance" in many child custody cases that is caused when Massachusetts parents a) appear without counsel and b) face represented adversaries. Boston Bar Association Task Force on Expanding the Civil Right to Counsel, Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts 7-8 (Boston Bar Association 2008) [hereinafter Gideon's New Trumpet], available at https://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

A power imbalance is particularly likely when, as in this case, the Mother was a minor at the beginning of the case and had only recently turned eighteen when she signed the guardianship consent. Often, the person seeking guardianship is the child's grandparent. When the defending parent's youth is combined with the complex dynamics of the parent's

relationship with his or her parents, the potential power imbalance can be complicated, overwhelming, and difficult for a judge to guard against.

In addition, while the Commonwealth is not a party in private guardianship proceedings, the state still plays a role in these proceedings. The Massachusetts Court Improvement Program Reassessment 2006 report to this Court noted that the Department of Social Services ("DSS"), now the Department of Children & Families ("DCF"),[2] "itself frequently refers potential guardians (usually family members) to Probate and Family Court to prevent the agency from having to file a C&P [Care and Protection] case in Juvenile Court." Gout, Monahan, Richards, & St. Onge, Massachusetts Court Improvement Program Reassessment 43-44 (2006). Even in cases where there is no record of DCF involvement, DCF may be providing assistance behind the scenes to the potential guardian. In Protecting Children, the authors found that DCF frequently advised potential guardians to seek a guardianship, and that in fact, 54% of the children in private guardianship proceedings were involved with

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[2] These terms are used interchangeably throughout, depending on context.

DSS prior to the filing of the guardianship and an additional 32% were involved after the filing. Protecting Children, supra p. 8, at 12-14, 46-47. Amici also refer to CPCS Brief sections II(B) and (C), which further describe DCF's role in both Juvenile and Probate and Family Court guardianship proceedings.

The presence of all or any one of these imbalance factors -- one, often younger, party with fundamental rights at issue, facing an adversary who may be represented by a lawyer and who does not have fundamental rights as stake, with the state playing a role behind the scenes -- means that unless counsel is appointed, there is a constitutionally impermissible risk of erroneous deprivation of fundamental rights.

II. THE FAILURE TO PROVIDE COUNSEL IN PRIVATE GUARDIANSHIP PROCEEDINGS VIOLATES THE EQUAL PROTECTION PROVISIONS OF THE MASSACHUSETTS CONSTITUTION.

A. The Provision of Counsel in Child Welfare Custody Proceedings, but Not Private Guardianships, Must be Reviewed Under a "Strict Scrutiny" Analysis for a Violation of the Equal Protection Provisions of the Massachusetts Constitution.

"When a fundamental right is at stake, the so-called 'strict scrutiny' formula for examining the constitutionality of State infringement on that right comes into play." Blixt v. Blixt, 437 Mass. 649, 655-

656, 660 (2002), cert. denied, 537 U.S. 1189 (2003). "Under strict scrutiny analysis, a challenged statute will be upheld only if it is 'narrowly tailored to further a legitimate and compelling governmental interest.'" Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 366 (2006) (quoting Aime v. Commonwealth, 414 Mass. 667, 673 (1993)). The same strict scrutiny applies when evaluating the legislature's distinction between child custody proceedings in which the state's child welfare agency is a party and private guardianships, and this Court should find there is no "legitimate and compelling" reason (including the state's presence in the former proceedings) to justify the distinction. Id.[3]

B. Parents Are Similarly Situated in Child Welfare Proceedings in Which There is a Right to Court-Appointed Counsel and Private Guardianship Proceedings in Which There is Not a Right to Counsel.

In recognition of parents' fundamental interest in raising their children, Massachusetts has created a legal framework in which parents have the right to counsel in a wide range of proceedings which are

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[3] Amici adopt CPCS's argument that state action threatens fundamental family integrity rights in private guardianship proceedings. See CPCS Brief, section III(A).

similar to guardianship proceedings because the same fundamental interest -- a parent's interest in parenting his or her children -- is challenged by a third party.

Massachusetts already provides counsel to parents in guardianship proceedings if DCF is a party (DCF is a party whenever it is the child's legal custodian). See G.L. c. 119, § 29 ("Whenever the department or a licensed child placement agency is a party to child custody proceedings, the parent, guardian or custodian of the child . . . shall have and be informed of the right to counsel at all such hearings, including proceedings under section[] . . . 5-204 . . . of chapter 190B."). Massachusetts also provides counsel to parents in state-sponsored guardianship petitions which DCF brings on behalf of relatives and others who have served as foster parents for at least six months. Id.; 110 Code Mass. Regs. §§ 7.300-7.303A.

In addition, when DCF is a party, Massachusetts provides the right to counsel in many other proceedings in which the same fundamental interests at stake in guardianship proceedings are at stake. In 1973, Massachusetts created a statutory right to counsel for parents in Care and Protection ("C&P")

proceedings under G.L. c. 119, § 29, in which DCF seeks to temporarily remove custody from parents alleged to be currently unfit to care for their children. Then in 1979, this Court held that parents facing termination of their parental rights in proceedings brought by the Commonwealth under G.L. c. 210, § 3 and c. 119, § 24 have a right to counsel under the Fourteenth Amendment to the United States Constitution and article 10 of the Massachusetts Declaration of Rights. J.K.B., 379 Mass. at 3-4.

In 1983, Massachusetts expanded G.L. c. 119, § 29, to provide a right to counsel for parents in all proceedings in which DCF is a party, including private guardianship actions as noted above. G.L. c. 119, § 29, as amended through St. 1983, c. 517. In 2008, this Court held that parents' right to counsel pursuant to G.L. c. 119, § 29 extended to the dispositional stage of what were then called Children in Need of Services proceedings,[4] even though DCF was not a formal party to those proceedings, because after a child was adjudicated to be in need of services, one option at the dispositional stage was to place the

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[4] These are now called Child Requiring Assistance proceedings. Act Regarding Families and Children Engaged in Services, St. 2012, c. 240.

child in DCF custody. Matter of Hilary, 450 Mass. at 502.

Importantly, the right to counsel is not limited to proceedings in which DCF is a party. In 2012, this Court held that parents have the right to counsel in private adoption proceedings in which the state has no involvement either as a party or as a potential custodian of the child. In Adoption of Meaghan, 461 Mass. 1006, 1007 (2012). This Court reasoned that because parents in private guardianship proceedings faced the same deprivation as parents in termination of parental rights proceedings filed by the state, the considerations it had recognized in J.K.B. that necessitate the right to counsel in termination of parental rights cases were no less present in a private adoption proceeding. Id.

Not only do parents have the right to counsel in other proceedings in which DCF both is and is not a party, but there is little meaningful difference between the interests at stake, or the legal standard to be applied, in child welfare custody proceedings and private guardianships. For instance, this Court has held that the same standard, unfitness of the parent, applies both in actions where a state seeks

custody of a child and guardianship cases brought by a private party. R.D. v. A.H., 454 Mass. 706, 711-712 (2009) ("[I]n a dispute between a person seeking to become a child's guardian and a legal parent of a child, custody belongs to the legal parent, unless the parent is found to be unfit."); Guardianship of Estelle, 70 Mass. App. Ct. 575, 580 (2007) ("The term ['unfitness'] is the standard by which we measure the circumstances within the family as they affect the child's welfare.") (modification in original); Care & Protection of Laura, 414 Mass. 788, 790-791 (1993) ("Since the United States Supreme Court's decision in Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982), we have required that current parental unfitness be proved by clear and convincing evidence in both care and protection cases and in proceedings to dispense with consent to adoption under G.L. c. 210, § 3 (1990 ed.).") (citing Adoption of Frederick, 405 Mass. 1, 4-5 (1989) and Care & Protection of Three Minors, 392 Mass. 704, 711-712 (1984)).

Thus, Massachusetts has built a legal framework in which parents have a right to counsel in a wide range of legal proceedings in which their fundamental

interest in parenting their children is challenged by a non-parent. As this framework is based on the nature of the interest at stake determining the right to counsel, rather than whether the state is formally a party, parents are entitled to the right to counsel in private guardianship proceedings.

C. In Significant Ways, Massachusetts Parents Are at Greater Risk of Permanently Losing Custody in Private Guardianship Proceedings Than They Are in Care and Protection Proceedings Filed by DCF.

In a private guardianship with no DCF involvement, as here, the guardian is not required to provide any services or accommodations or make any reasonable efforts to reunite the family. In contrast, both federal and state law provide important procedural protections to parents in C&P proceedings.

Federal law protects parents in child abuse and neglect proceedings by requiring states to develop service plans for parents whose rights have not been terminated in order to "improve the conditions in the parents' home" and "facilitate return of the child to his own safe home." 42 U.S.C.A. § 675(1)(B).[5] This

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[5] Federal law also requires states pursuing a kinship guardianship to describe "the steps that the agency has taken to determine that it is not appropriate for the child to be returned home or adopted" and

protection does not apply to a private guardianship proceeding.

In Massachusetts C&P proceedings, G.L. c. 119, § 24, the presumption is that the goal of the state's taking temporary custody is to strengthen the family so that children can safely return home to live with their parents. The presumption in favor of family continuity in C&P proceedings derives from DCF's statutory mandate that it "direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children . . . and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection" to children. G.L. c. 119, § 1.

The presumption of reunification in federal and state law results in a number of important substantive safeguards to parents in C&P proceedings that do not exist in private guardianship proceedings. These include the continued case goal of reunification, 110 Code Mass. Regs. § 1.02(4); the fact that parents

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"the efforts made by the State agency to discuss with the child's parent or parents the kinship guardianship assistance arrangement, or the reasons why the efforts were not made." Id. at §§ 675(1)(F)(i) & (vi).

retain residual rights to visitation and services even after the child is placed in DCF custody, Care & Protection of Thomasina, 75 Mass. App. Ct. 563, 569-570 (2009); the right to participate in annual review and redetermination proceedings, id. at 569; and the requirement that DCF provide, upon request, accommodations to a parent with disability in DCF's provision of services in the attempt to make reasonable efforts to reunify the family. Adoption of Gregory, 434 Mass. 117, 122 (2001). In addition, for homeless parents, such as the Mother in this case, DCF may not remove or fail to reunify a child on the basis of homelessness alone, but instead must provide temporary shelter. See Adams v. Gallant, Super. Ct., Middlesex County, No. 93-4339-8, slip op. at 2-4 (Nov. 9, 1994).

Given the interests at stake, and the complexity of the proceedings, Amici submit that, absent appointment of counsel, even providing the procedural safeguards available to parents in C&P proceedings would not adequately protect the rights of parents in guardianship proceedings. Parents in C&P proceedings have all these rights, but they also have the right to counsel. Parents in guardianship proceedings need

counsel to protect the exact same interest that their counterparts in C&P proceedings have counsel to protect. This is particularly true in guardianship proceedings, which do not accord parents the range of other protections available in C&P cases.

Moreover, courts evaluating right-to-counsel claims have recognized the potentially permanent nature of private guardianships. For instance, a New York court finding a right to counsel in private guardianships recognized that "[w]hile guardianship does not have the legal finality of adoption, nevertheless the granting of guardianship of the person of an infant to a non-parent over the objection of a parent will de facto extinguish the basic parental right of rearing one's own child." In re Guardianship of Daley, 473 N.Y.S.2d 114, 115 (Surr. Ct. 1984).

Thus, because parents in private guardianship proceedings have the same fundamental interest at stake -- the loss of custody of their child to someone who is not the child's other parent -- but fewer protections designed to ensure their children are returned to them as soon as they are no longer "unfit" to parent them, the right to counsel is often more,

rather than less, important to parents in private guardianship proceedings than in C&P proceedings.

D. Treating Private Guardianship Cases Differently from Child Welfare Custody Proceedings with Respect to the Right to Counsel Violates the Equal Protection Provisions of the Massachusetts Constitution.

As set forth above in Section II B, parents facing the loss of their fundamental right to parent their children to a third party are similarly situated regardless of the court process. Therefore, the statutory and legal framework of providing counsel for child welfare custody proceedings but not private guardianship proceedings must be subject to strict scrutiny. Under such an analysis, the failure to provide counsel to indigent parents in private guardianship proceedings violates the equal protection provisions of the Massachusetts Constitution. See supra Section II.A.

There is no legitimate or compelling government interest that can justify this differential treatment. As noted by CPCS, the increase in the number of cases in which court-appointed counsel would be required, and thus the additional cost, is relatively small in light of the number of child welfare, guardianship,

and termination of parental rights cases in which court-appointed counsel is already required. See CPCS Brief, section III(B)(iii)(b). In balancing this potential cost of additional appointed counsel against the importance of the fundamental interest involved, the assistance counsel can provide the courts in reaching the appropriate decisions in these often complex cases, and the promotion of a sound child welfare system (see infra Section III), it is clear that the parents' fundamental interest outweighs any state interest.

A case in which the court conducted a similar analysis is the recently decided Matter of Adoption of A.W.S. and K.R.S., No. DA 14-001, slip op. (Mont. Dec. 2, 2014). Using an equal protection analysis and focusing on the fundamental right to parent, the Montana Supreme Court determined that parties whose parental rights were being terminated as part of an adoption case brought by a private party should have the same right to appointed counsel as those whose rights were being terminated by the state in an abuse and neglect case. In addressing the potential compelling state interest, the expense of appointed counsel and the cost of a lengthened process, the

court noted that the differences between the statutory termination of parental rights provisions in an abuse and neglect case and those in an adoption case were not narrowly tailored to serve a compelling state interests, and "[t]he state's pecuniary interests do not justify the denial of the right to counsel . . . ." Id. at slip op. 10.

This court may also look to Oregon for a similar equal protection analysis. In Young v. Alongi, 858 P.2d 1339, 1343-1344 (Or. Ct. App. 1993), the Oregon Court of Appeals held that not appointing appellate counsel to indigent parents in private guardianship cases when such counsel are provided to indigent parents appealing from a juvenile court guardianship order (a proceeding analogous to a Massachusetts C&P proceeding) violated that state constitution's equal protection provision. The Young court noted:

> [t]o an indigent parent facing a guardianship proceeding that will interrupt her custody over her child for a lengthy period, it matters little whether the court is proceeding under ORS 126.070 [guardianships] or under the juvenile court's authority in ORS 419.507 [abuse/neglect cases]. In each case, the same standard—the child's best interest—controls the court's decision making.

Id. at 1342-1343.

The Oregon Court of Appeals relied on Zockert v. Fanning, 800 P.2d 773, 778 (Or. 1990), a case involving a private adoption which held that as appointed counsel were provided to indigent parents in termination of parental rights cases under one section of state law, the state constitution's equal protection clause required appointed counsel in termination of parental rights cases under other sections of state law.

For all of the reasons set forth in this Section, the failure to provide counsel in private guardianship proceedings violates the equal protection provisions of the Massachusetts constitution.

III. PROVIDING A RIGHT TO COUNSEL IN PRIVATE GUARDIANSHIPS WOULD PROMOTE A SOUND CHILD WELFARE SYSTEM BY REDUCING THE CURRENT INCENTIVE TO USE THE GUARDIANSHIP PROCESS WHEN CARE AND PROTECTION PROCEEDINGS ARE MORE APPROPRIATE.

Although the same standard for change of custody applies in guardianships and C&P cases, it is easier for third parties to gain custody in private guardianship proceedings because parents do not have counsel. This provides an incentive, unrelated to what is best for children, for DCF and potential guardians to avoid the burden and expense of seeking

court authorization through C&P proceedings to place children in foster care. See Gupta-Kagan, The New Permanency, --- U.C. Davis J. Juv. L. & Pol'y ---, draft p. 28 (scheduled for publication 2015) (the lack of significant procedural protections for birth parents, especially the right to counsel, "can make guardianship appear attractive" to prospective guardians, because "[g]uardianship promises a 'simpler' judicial process") (citation omitted), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497434. It is easy to see why DCF might prefer to help family members initiate guardianship proceedings rather than initiate C&P proceedings itself. First, when private parties file for guardianship of a child in DCF's caseload who is not in state custody, DCF does not have to litigate a C&P proceeding. Second, DCF does not make foster care payments to guardians appointed through private guardianship proceedings.

While in many cases both the parents and the potential guardians agree that a private guardianship is preferable to DCF involvement, this is not always so. Child welfare experts have devoted considerable attention to the national trend of child welfare

agencies "diverting" children who may have been abused or neglected to live with relatives under guardianships rather than seeking custody and placing those children in foster care.[6] The major concern that some child welfare experts have about this practice is that it is not always in the best interests of the children and their families. A recent report characterized the concern as follows:

> While some family members may offer a safe, less intrusive alternative to the bureaucratic complexities of state-supervised foster care, some child welfare experts worry that too many abused or neglected children are being inappropriately "diverted" to live with relatives without the necessary safeguards and supportive services for children, caregivers and birth parents. Critics also argue that some child

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[6] See, e.g., The Kinship Diversion Debate: Policy and Practice Implications for Children, Families and Child Welfare Agencies (The Annie E. Casey Foundation 2013), available at http://www.aecf.org/m/pdf/KinshipDiversionDebate.pdf [hereinafter The Kinship Diversion Debate]; Stepping up for Kids 9 (The Annie E. Casey foundation 2012), available at http://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf; Macomber, Geen, & Main, Kinship Foster Care: Custody, Hardships, & Services (The Urban Institute 2003) (the difference between the estimated 542,000 children placed as a result of social services involvement and the 131,000 known to be in state custody in that year (2001) was approximately 400,000), available at http://www.urban.org/publications/310893.html.

> welfare agencies are prematurely directing children to live with willing relatives instead of providing struggling parents intensive services needed to keep children safely at home.

The Kinship Diversion Debate, supra p. 23 n.6, at 1.

The decision as to whether children who cannot live with their parents should come into private guardianship or into state custody should not turn on the fact that guardianship is an easier procedural route to gain custody as a result of parents' lack of counsel. Instead the decision should be made as the result of an individualized consideration for each family and child as to the appropriate tradeoff between the financial benefits and state oversight available through foster care on the one hand, and the understandable desire of families to care for their own relatives without state involvement on the other.

Courts have recognized a need to guard against the use of private guardianship when C&P proceedings would be more appropriate. See, e.g., In re Estate of H.B., 980 N.E.2d 811, 724 (Ill. App. 2012) (decision to avoid the Juvenile Court Act and to petition for guardianship under the Probate Act, without a biological parent's consent, is problematic); In re

Guardianship & Conservatorship for T.H.M., 640 N.W.2d 68 (S.D. 2002) (in which the South Dakota Supreme Court expressed serious concern about the use of the Guardianship Act to transfer custody to a non-parent based on allegations of abuse/neglect).

Massachusetts' own experience, and the warnings of courts and child welfare experts around the country, underscore the need for appointment of counsel for parents in private guardianship proceedings to maintain the overall integrity of the child welfare system.

IV. BOTH NATIONAL AND MASSACHUSETTS POLICY SUPPORT A RIGHT TO COUNSEL IN GUARDIANSHIP PROCEEDINGS.

A. A Number of States Already Guarantee Counsel in Guardianships of Minors.

Massachusetts would not be the first state to recognize the importance of providing counsel for indigent parents in private guardianship cases. At least six states already provide such a right by statute or court decision: Connecticut, Delaware, Maine, Maryland, New Jersey, and Oregon.[7] In fact,

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[7] Conn. Stat. Ann. § 45a-620 (In guardianship of a minor, "[t]he Court of Probate shall appoint counsel to represent any respondent who notifies the court that he or she is unable to obtain counsel, or is unable to pay for counsel"); Walker v. Walker, 892 A.2d 1053, 1055 n.5 (Del. 2006) (after observing

some states go even further and guarantee counsel for all or most private custody proceedings.[8]

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that Rule 207 required appointment of counsel for parents in abuse/neglect proceedings upon request, court stated, "Father's appeal did not raise the issue of right to counsel in a privately initiated dependency and neglect proceeding. Thus, the fact that our holding does not address that question should not be read as an indication that this Court takes a different view of the right to counsel at that stage"); F.C. v. B.C., 64 A.3d 867 (Del. Fam. Ct. 2013) (the court observed, "Our Supreme Court . . . held in Walker . . . that parents have a right to court-appointed counsel in private guardianship cases"); Me. Rev. Stat. Ann. tit. 18-A, § 5-204 ("If a proceeding is brought under subsection (c) or subsection (d) [involving nonconsenting parents], the nonconsenting parent or legal custodian is entitled to court-appointed legal counsel if indigent"); Md. Code Ann. Crim. Proc. § 16-204(b)(1)(vi) (providing right to representation by public defender in non-consensual guardianship action initiated by the state); Md. Code Ann. Fam. Law § 5-3A-07 (requiring appointment of counsel in guardianship sought by private agency, where parent is either a minor or "has a disability that makes the parent incapable of effectively participating in the case"); N.J. Stat. Ann. § 30:4C-85(a)(2) (in preliminary stages of kinship legal guardianship matters where current caregiver petitions for guardianship and legal representation is provided by Office of the Public Defender, indigent parent has same right to counsel as in abuse/neglect actions); Young v. Alongi, 858 P.2d 1339 (Or. Ct. App. 1993) (finding that provision of counsel in abuse/neglect guardianships but not private guardianships violated equal protection).

[8] See, e.g., Flores v. Flores, 598 P.2d 893 (Alaska 1979) (parent has right under due process clause of Alaska Constitution to be provided with appointed counsel in private custody case when opposing party is represented by public agency); Alaska Stat. § 44.21.410(a)(4) (requiring representation by office of public advocacy for "indigent parties in

B. Policy Statements in Massachusetts Underscore the Importance of Counsel in Basic Human Needs Cases Generally, and Cases Involving Child Custody in Particular.

Support for providing a right to counsel in Massachusetts guardianship proceedings can be found in a variety of state sources. In its recent report, the Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts ("BBA Statewide Task Force") outlined some of the statistics in Massachusetts regarding the desperate lack of counsel available for indigent clients. Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, Investing in Justice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts (Boston Bar Association 2014), available at http://www.bostonbar.org/docs/default-document-library/statewide-task-force-to-expand-civil-legal-aid-in-ma---investing-in-justice.pdf [hereinafter BBA Statewide Task Force Report]. Massachusetts judges surveyed by the BBA Statewide Task Force reported problems with respect to the lack of representation in

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cases involving child custody in which the opposing party is represented by counsel provided by a public agency"); N.Y. Fam. Ct. Act § 262 (providing right to counsel for both sides in all private custody disputes).

a variety of subject areas, including housing, family, and consumer cases, and that the problem is worsening. Id. at 12-13.

> Most disturbingly, 6 out of 10 judges who responded felt that lack of representation negatively impacted the courts' ability to ensure equal justice to unrepresented litigants. Those low-income litigants, who do not have the benefit of a lawyer, are hindered in presenting their cases. Meaningful access to justice, a basic right for all, is denied to them as a result.

Id. at 11. The BBA Statewide Task Force Report quoted Justice Black in Gideon v. Wainwright, 372 U.S. 335 (1963), observing that his words ring true today in civil matters where life essentials are at stake: "reason and reflection require us to recognize that in our adversary system of . . . justice, 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." Id. at 37.

Six years earlier, in 2008, Gideon's New Trumpet cited similarly desperate statistics illustrating the "justice gap" in Massachusetts and warned that "the crisis persists" and that "the need for action that moves toward the expansion of a civil right to counsel

is not negotiable." Gideon's New Trumpet, supra pp. 8-9, at 2-3. Gideon's New Trumpet then criticized the "rigid delineation that presumes that counsel is important in criminal cases but not civil cases." Id. at 1. It noted that studies have routinely shown how litigants with counsel experience dramatically better outcomes, while those without counsel "routinely forfeit basic rights, not due to the facts of their case or the governing law, but due to the absence of counsel." Id. It concluded: "[a] society is not truly democratic, and its justice system not truly just, when its poorest citizens do not have access to the protection of its laws." Id. at 4.

Prior to the release of Gideon's New Trumpet, both the amicus BBA and the amicus MBA had embraced the concept of a right to counsel in civil cases involving child custody as a solution to the problems described above. In 2006, the American Bar Association's House of Delegates unanimously adopted a resolution that "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving

. . . child custody." ABA Res. 112A. The resolution was co-sponsored by thirteen state and local bar associations, including the BBA, with seven more state bar associations and five Access to Justice commissions endorsing the right to counsel concept in subsequent measures. See Model Acts & Resolutions, National Coalition for a Civil Right to Counsel, http://civilrighttocounsel.org/bibliography/sections/12. The MBA also supported the resolution. Massachusetts Bar Association, House of Delegates Unanimously Supports Principle of Civil Gideon, Lawyers e-Journal (May 23, 2007), available at http://www.massbar.org/publications/e-journal/2007/may/523/hod.

V. TURNER V. ROGERS DOES NOT CHANGE THE CONCLUSION THAT PARENTS HAVE A CONSTITUTIONAL RIGHT TO COUNSEL IN GUARDIANSHIP PROCEEDINGS.

In Turner v. Rogers, 131 S. Ct. 2507 (2011), the United States Supreme Court expressed concern about civil proceedings that lack fundamental due process protections, relying in part on the Mathews factors. Id. at 2517-2518. Although the Turner Court held that appointment of counsel was not mandated based on the facts before it, the Court was explicit that its ruling was based on its interpretation of Fourteenth

Amendment's Due Process Clause. Id. at 2512. Consequently, any state claims, whether based on due process or equal protection, are outside the scope of Turner. Indeed, "[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language." Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 328 (2003).

Moreover, Turner itself presented two important factual differences from the case at hand, which further supports the need for appointed counsel in this scenario. First, the Court in Turner specifically distinguished the relatively simple child support contempt context in that case from an "unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'" Turner, 131 S. Ct. at 2520 (citing Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)). Guardianship proceedings, in which sophisticated psychological and other evidence is often necessary to determine whether a parent is currently unfit and whether the proposed guardian is qualified to care for the child, are just the sorts of

unusually complex cases the Turner Court suggested might require counsel for the parent. Amici rely on the CPCS brief for a more detailed explanation of the complex issues and evidence required in private guardianship proceedings. See CPCS Brief, section III(B)(ii).

Second, in Turner, the party opposing the request for counsel was herself an unrepresented litigant. In stark contrast, the unrepresented litigant in this case faced a private party represented by counsel, and possibly supported by the government for the reasons explained in above in Section III. This is precisely the type of power imbalance identified in Gideon's New Trumpet, where a "potential loss of basic human needs due to a dramatic power imbalance" is at stake. Gideon's New Trumpet, supra pp. 8-9, at 7. Moreover, as described in Section I.B above, there is an inherent power imbalance in a guardianship proceeding in which one party has a fundamental interest at stake and the other party does not.

Finally, Amici agree with Mother that Turner and the fundamental rights of parents require courts to protect due process by implementing the types of safeguards for guardianship agreements outlined in

Mother's brief. See Brief of the Appellant (Mother), Section d. However, Amici also agree with Mother that such due process safeguards are needed in addition to a state constitutional right to counsel, not in place of it. Id. at Sections c and d.

VI. THE RIGHT TO COUNSEL IN GUARDIANSHIP PROCEEDINGS MUST BE IMPLEMENTED IN A MANNER TO PREVENT THE UNKNOWING WAIVER OF SUBSTANTIVE RIGHTS BY VULNERABLE PARENTS.

Amici agree with CPCS that the right to counsel extends to contested guardianship cases and that the lower courts will not need to appoint counsel in guardianship scenarios in which the parent's consent to the guardianship is truly voluntary. In addition to appointing counsel where the parent signals an intent to contest the guardianship as described by CPCS (see CPCS Brief, n.1),[9] the court must ensure

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[9] Amici agree with CPCS that the issue of whether a right to counsel might extend to indigent guardians or proposed guardians is not before the Court. See CPCS Brief, n.1. The issue on which the Court framed its request for amicus briefs was "[w]hether the biological parent of a minor child has a right to counsel in a guardianship action, where someone other than the parent (here the child's great-grandparent) seeks to have herself appointed by the court as the child's guardian." Amici acknowledge that in certain guardianships, unlike in this case, the appointment of counsel for parents might create a different power imbalance by pitting an unrepresented guardian against a represented parent. While proposed guardians do not have the fundamental

that the parent's failure affirmatively to contest the guardianship is the product of informed and voluntary decision-making rather than coercion or the unknowing waiver of substantive rights. In cases that appear to be uncontested, the courts should exercise due diligence in determining whether the parents are knowingly and voluntarily waiving their rights to contest entry of a guardianship order or decree.

The right must be broad enough to reach cases in which power imbalances jeopardize the fairness of the proceedings and increase the chances that unrepresented parents are at risk of forfeiting their parenting rights. The court must assess the power lined up against the unrepresented parent and the parent's own vulnerabilities to identify cases where it is unlikely that the parent can fairly litigate the claims. Vulnerable parties are more likely to enter into a settlement agreement giving up parental rights, even though those settlements may be viewed as

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interests of parents identified in this brief, courts handling guardianship proceedings nonetheless remain courts of equity, with an obligation to protect the best interests of the child, and would presumably need to consider a wide range of potential protections in discharging its obligations, which may or may not call for the appointment of counsel for someone other than the natural parent.

coerced, unfair, unreasonable, or not the product of informed decision-making.

Factors indicating increased power against the unrepresented parent include the representation of the party seeking guardianship or a more active role of DCF behind the scenes. Factors that suggest increased vulnerability of the parent include, but are not limited to, the age, educational level, language or cultural barrier, presence of a learning disability or cognitive impairment, a lack of legal sophistication of the parent whose rights are in jeopardy, and the complexity of the proceeding. (Amici agree with CPCS that guardianship cases are inherently complex. See CPCS Brief, section III(B)(ii).)

Ideally, the procedures of the court would identify factors such as these early in a case, so that where appointment of counsel is appropriate, appointment occurs as soon as possible, enhancing the fairness and efficiency of the court proceeding. In purportedly uncontested cases, the court should be proactive, conducting an inquiry sufficient to ensure that a waiver of parental rights is knowing, voluntary, and informed.

In some cases, however, including the instant case, the identification of the trigger for appointment of counsel may not occur until the moment the court is asked to approve the settlement agreement. The Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants [hereinafter Judicial Guidelines], cited with approval by this Court in Carter v. Lynn Hous. Auth., 450 Mass. 626, 637 n.17 (2008), provide that judges

> should review the terms of settlement agreements . . . with the parties . . . [and] determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.

Judicial Guidelines, Guideline 3.4. The Commentary to the Guidelines further instructs that in assessing whether a waiver of substantive rights is "knowing and voluntary," a "judge may consider 'knowing and voluntary' as that phrase is used in the context of informed consent." Commentary to Guideline 3.4. Had the Court here followed the Judicial Guidelines, it would have been evident that the settlement should

have been rejected, and counsel appointed, even at that late stage.

Amici note that the approach urged here is consistent with the Targeted Representation approach set forth by the BBA Task Force in its two published reports, Gideon's New Trumpet and The Importance of Representation in Eviction Cases & Homelessness Prevention: A Report on the BBA Civil Right to Counsel Hous. Pilots (March 2012) [hereinafter The Importance of Representation], available at http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf. In describing Gideon's New Trumpet, the latter report noted that "[c]onsistent with the goal of understanding the situations in which assistance short of full representation would be unable to preserve a basic need or right, the 'targeted representation model' . . . identified categories of . . . cases in which. . . counsel was most needed and nothing short of full representation would be effective." The Importance of Representation at 1.

This Court's recognition of a right to counsel should be framed and implemented to reach cases where a label of "uncontested" would simply mask a parent's

ability to litigate fairly the claims. The right must not be defined on a case-by-case basis with the demonstrative burden on the unrepresented parent to prove the need for counsel. Instead, the court must insure that the parent's decision is the product of voluntary, informed decision-making rather than the unknowing waiver of substantive rights.[10]

CONCLUSION

This Court has said:

> Parents are the natural guardians of their children. They are under the legal as well as the moral obligation to support and educate them and to bring them up to be healthy, intelligent and virtuous, to the end that they become good

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[10] Should this court find that indigent parents have a constitutional right to counsel in guardianship establishment proceedings, that right should also necessarily extend to petitions filed by the parent under G.L. c. 190B, § 5-212 to review or dissolve a guardianship, as it does for parents at all stages of C&P proceedings including reviews and proceedings to terminate. In the context of guardianships for adults with developmental disabilities, states also either explicitly extend the right to counsel to guardianship review or termination procedures or imply (as Massachusetts does) that the right to counsel applies by stating the court should utilize the same procedures for guardianship review/termination as for establishment. See, e.g., Conn. Stat. Ann. § 45a-660(c); Fla. Stat. § 744.464(2)(e); Ga. Code Ann. § 29-4-42(a); Mo. Rev. Stat. § 475.083.6; La. Code Civ. Proc. Ann. art. 4544; G.L. c. 190B, §§ 5-106(a) and 5-311(c); State of Ohio ex Rel McQueen, 135 Ohio St. 3d 291, 296 (Ohio 2013).

> citizens and leave the world better for having lived in it. In civilized countries, the family is the unit of the social order. Upon the integrity, purity and strength of the family, the welfare of mankind depends according to present conceptions. The law recognizes and enforces underlying principles and obligations to maintain the family.

Richards v. Forrest, 278 Mass. 547, 553 (Mass. 1932). The importance of parents' fundamental rights stand in contrast to those of legal guardians, whose rights are "solely creatures of statute . . . [that] may be limited in scope or revoked entirely" and whose decisions are not entitled to the same presumption of validity as natural parents. In re Jamison, 467 Mass. 269, 283 (2014). The United States Supreme Court has said parental rights are "perhaps the oldest of the fundamental liberty interests recognized by this Court." Troxel v. Granville, 530 U.S. 57, 65 (2000).

In recognition of these fundamental rights, this Court has said that in determining whether a guardianship is appropriate, "[u]nfit is a 'strong word' . . . and that determination should not be reached easily." Freeman v. Chaplic, 388 Mass. 398,

404 (Mass. 1983). At the same time, this Court has recognized that

> [a]n indigent parent facing the possible loss of a child cannot be said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel. . . . Provision of appointed counsel not only safeguards the rights of the parents, but it assists the court in reaching its decision with the 'utmost care' and 'an extra measure of evidentiary protection,' required by law.

J.K.B., 379 Mass. at 4 (citation omitted).

The logical extension of these bedrock principles leads inexorably to the conclusion that Massachusetts parents are constitutionally entitled to appointed counsel in child guardianship proceedings.

Respectfully submitted,

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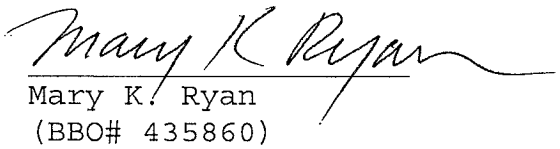

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ADDENDUM

CONTENTS

MASSACHUSETTS STATUTES AND REGULATIONS

Act Regarding Families and Children Engaged in Services, St. 2012, c. 240 provides in pertinent part:

> SECTION 1. Chapter 6A of the General Laws is hereby amended by inserting after section 16T the following section:-
>
> > Section 16U. (a) As used in this section, the following words shall have the following meanings:-
> >
> > "Child requiring assistance", as defined in section 21 of chapter 119.

G.L. c. 119, § 1 provides in pertinent part:

> It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

G.L. c. 119, § 24 provides in pertinent part:

> A person may petition under oath the juvenile court alleging on behalf of a child within its

jurisdiction that the child: (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention.

. . .

If the court is satisfied after the petitioner testifies under oath that there is reasonable cause to believe that: (i) the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect; and (ii) that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child for up to 72 hours to the department or to a licensed child care agency or individual described in subclause (ii) of clause (2) of subsection (b) of section 26.

G.L. c. 119, § 29 provides in pertinent part:

The following persons shall have and shall be informed of the right to counsel, and the court shall appoint counsel for all such persons if the person is not able to retain counsel: (i) an adult who is under the responsibility of the department under clause (1) of subsection (a) of section 23 [providing for foster parents] . . . .

Whenever the department or a licensed child placement agency is a party to child custody proceedings, the parent, guardian or custodian of the child . . . who is the responsibility of the department under clause (3) of subsection (a) of section 23: (i) shall have and be informed of the right to counsel at all such hearings, including proceedings under sections 5-201, 5-204 or 5-206 of chapter 190B, and that the court shall appoint counsel if the parent, guardian or custodian is financially unable to retain counsel

. . . The probate and family court and the juvenile court departments of the trial court shall establish procedures for: (i) notifying the parent, guardian or custodian of these rights; and (ii) appointing counsel for an indigent parent, guardian or custodian within 14 days of a licensed child placement agency filing or appearing as a party in any such action.

G.L. c. 190B, § 5-106(a) provides:

(a) After filing of a petition for appointment of a guardian, conservator or other protective order, if the ward, incapacitated person or person to be protected or someone on his behalf requests appointment of counsel; or if the court determines at any time in the proceeding that the interests of the ward, incapacitated person or person to be protected are or may be inadequately represented, the court shall appoint an attorney to represent the person, giving consideration to the choice of the person if 14 or more years of age. If the ward, incapacitated person or person to be protected has adequate resources, his counsel shall be compensated from the estate, unless the court shall order that such compensation be paid by the petitioner. Counsel for any indigent ward, incapacitated person or person to be protected shall be compensated by the commonwealth or the petitioner as the court may order. This section shall not be interpreted to abridge or limit the right of any ward, incapacitated person or person to be protected to retain counsel of his own choice and to prosecute or defend a petition under this article.

G.L. c. 190B, § 5-204 provides:

(a) The court may appoint a guardian for a minor if (i) the minor's parents are deceased or incapacitated, (ii) the parents consent, (iii) the parents' parental rights have been terminated, (iv) the parents have signed a voluntary surrender, or (v) the court finds the parents, jointly, or the surviving parent, to be unavailable or unfit to have custody. A guardian appointed pursuant to section 5-202 whose appointment has not been prevented or nullified

under section 5-203 has priority over any guardian who may be appointed by the court, but the court may proceed with another appointment upon a finding that the parental nominee has failed to accept the appointment within 30 days after notice of the guardianship proceeding.

(b) While a petition for appointment of a guardian is pending, if a minor has no guardian, and the court finds that following the procedures of this article will likely result in substantial harm to the health, safety or welfare of the minor occurring prior to the return date, and no other person appears to have authority to act in the circumstances, on appropriate motion, the court may appoint a temporary guardian who may exercise those powers granted in the order. A motion for appointment of a temporary guardian shall state the nature of the circumstances requiring appointment, the particular harm sought to be avoided, and the actions which will be necessary by the temporary guardian to avoid the occurrence of the harm. Such motion shall be accompanied by an affidavit containing facts supporting the statements and requests in the motion. The appointment of a temporary guardian for a minor may occur even though the conditions described in subsection (a) have not been established. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary circumstances set forth in its order, the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(c) If an appointed guardian is not effectively performing duties and the court further finds that the welfare of the minor requires immediate action, it may appoint, with or without notice, a special guardian for the minor having the powers of a general guardian, except as limited in the letters of appointment. The authority of any guardian previously appointed is suspended as long as a special guardian has authority. The appointment may be for a period of up to 90 days except that upon a finding of extraordinary

circumstances set forth in its order the court may order an appointment for a longer period to a date certain. The court may for good cause shown extend the appointment for additional 90 day periods.

(d) The petitioner shall give written notice 7 days prior to any hearing for the appointment of a temporary guardian in hand to the minor if 14 or more years of age and by delivery or by mail to all persons named in the petition for appointment of guardian. A certificate that such notice has been given, setting forth the names and addresses of those to whom notice has been given, shall be prima facie evidence thereof.

(e) If the court determines that an immediate emergency situation exists which requires the immediate appointment of a temporary guardian, it may shorten or waive the notice requirements in whole or in part and grant the motion, provided, however, that prior notice shall be given to the minor, if the minor is 14 or more years of age, as the court may order and post-appointment notice of any appointment is given to the minor and those named in the petition for appointment of guardian stating further that any such person may move to vacate the order of the court or request that the court take any other appropriate action on the matter, and on said motion to vacate. The court shall hear said motion as a de novo matter, as expeditiously as possible. A certificate stating that such notice has been given shall be filed with the court within 7 days following the appointment. Upon failure to file such certificate the court may on its own motion vacate said order.

(f) In the event that any person to whom notice is required is of parts unknown, such notice shall be delivered or mailed to that person's last known address, and the fact of such delivery or mailing shall be recited in the certificate of notice.

G.L. c. 190B, § 5-209(a) provides:

(a) A guardian of a ward has the powers and responsibilities of a parent regarding the ward's support, care, education, health and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence and prudence.

G.L. c. 190B, § 5-209(b)(1) provides:

(b) In particular and without qualifying the foregoing, a guardian of a ward or incapacitated person shall: (1) if consistent with the terms of any order by a court of competent jurisdiction take custody of the person of the ward or incapacitated person and establish his place of abode within or without the commonwealth.

G.L. c. 190B, § 5-212 provides:

(a) Any person interested in the welfare of a ward or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward or for any other order that is in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b) Notice of hearing on a petition for an order subsequent to appointment of a guardian shall be given to the ward, the guardian, the parents of the ward, provided that the parental rights have not been terminated or a voluntary surrender has not been signed, and any other person as ordered by the court.

(c) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate, including appointment of a successor guardian.

G.L. c. 190B, § 5-311(c) provides:

(c) Upon removal, resignation, or death of the guardian, or if the guardian is determined to be

incapacitated or disabled, the court may appoint a successor guardian and make any other appropriate order. Before appointing a successor guardian, or ordering that a person's incapacity has terminated, the court shall follow the same procedures to safeguard the rights of the incapacitated person that apply to a petition for appointment of a guardian.

G.L. c. 210, § 3 provides:

(a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if:— (i) the person to be adopted is 18 years of age or older; or (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child pursuant to paragraph (c).

(b) The department of children and families or a licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court in Suffolk county or in any other county in which the department or agency maintains an office, to dispense with the need for consent of any person named in section 2 to adoption of the child in the care or custody of the department or agency. Notice of such proceeding shall be given to such person in a manner prescribed by the court. The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party. The court shall issue a decree dispensing with the need for consent or notice of any petition for adoption, custody, guardianship or other disposition of the child named therein, if it finds that the best interests of the child as provided in paragraph (c) will be served by the decree. Pending a hearing on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named

therein. The department shall provide notice of the hearing on the merits to any foster parent, pre-adoptive parent or relative providing care for the child informing the foster parent, pre-adoptive parent or relative of his right to attend the hearing and be heard. The provisions of this paragraph shall not be construed to require that a foster parent, pre-adoptive parent or relative be made a party to the proceeding.

A petition brought pursuant to this paragraph may be filed and a decree entered notwithstanding the pendency of a petition brought under chapter 119 or chapter 201 regarding the same child. The chief justice of the trial court may, pursuant to the provisions of section 9 of chapter 211B, assign a justice from any department of the trial court to sit as a justice in any other department or departments of the trial court and hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or adoption of the same child. A temporary or permanent custody decree shall not be a requirement to the filing of such petition.

A juvenile court or a district court shall enter a decree dispensing with the need for consent of any person named in section 2 to the adoption of a child named in a petition filed pursuant to section 24 of chapter 119 in such court upon a finding that such child is in need of care and protection pursuant to section 26 of said chapter 119 and that the best interests of the child as defined in paragraph (c) will be served by such decree. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. Facts may be set forth either in the care and protection petition filed pursuant to said section 24 of said chapter 119 or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

The department of children and families shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to section 26 of chapter 119 to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent; or (iii) the child has been in foster care in the custody of the commonwealth for 15 of the immediately preceding 22 months. For the purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of: (a) the date of the first judicial finding, pursuant to section 24 or section 26 of chapter 119, that the child has been subjected to abuse or neglect; or (b) the date that is 60 days after the date on which the child is removed from the home. For the purposes of this paragraph, "serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

The department shall concurrently identify, recruit, process and approve a qualified family for adoption.

The department need not file a motion or petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, or, where the child is the subject of a pending petition pursuant to section 26 of chapter 119, a motion to amend the petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, if the child is being cared for by a relative or the department has

documented in the case plan a compelling reason for determining that such a petition would not be in the best interests of the child or that the family of the child has not been provided, consistent with the time period in the case plan, such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in section 29C of said chapter 119 are required to be made with respect to the child.

(c) In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the petitioners under said paragraph (a) to assume such responsibilities. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need for consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In considering the fitness of the child's parent or other person named in section 2, the court shall consider, without limitation, the following factors:

(i) the child has been abandoned;

(ii) the child or another member of the immediate family of the child has been

abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused, or were unable to utilize such services on a regular and consistent basis so that a substantial danger of abuse or neglect continues to exist, or have utilized such services on a regular and consistent basis without effectuating a substantial and material or permanent change in the circumstances which led to the abuse or neglect;

(iii) a court of competent jurisdiction has transferred custody of the child from the child's parents to the department, the placement has lasted for at least six months and the parents have not maintained significant and meaningful contact with the child during the previous six months nor have they, on a regular and consistent basis, accepted or productively utilized services intended to correct the circumstances;

(iv) the child is four years of age or older, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 12 of the immediately preceding 15 months and the child cannot be returned to the custody of the parents at the end of such 15-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(v) the child is younger than four years of age, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 6 of the immediately preceding 12

months and the child cannot be returned to the custody of the parents at the end of such 12-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vi) the parent, without excuse, fails to provide proper care or custody for the child and there is a reasonable expectation that the parent will not be able to provide proper care or custody within a reasonable time considering the age of the child provided that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vii) because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal;

(viii) a lack of effort by a parent or other person named in section 2 to remedy conditions which create a risk of harm due to abuse or neglect of the child;

(ix) severe or repetitive conduct of a physically, emotionally or sexually abusive or neglectful nature toward the child or toward another child in the home;

(x) the willful failure to visit the child where the child is not in the custody of the parent or other person named in section 2;

(xi) the willful failure to support the child where the child is not in the custody of the parent or other person named in section 2. Failure to support shall mean that the parent or other person has failed to make a material contribution to the child's care when the contribution has been requested by the department or ordered by the court;

(xii) a condition which is reasonably likely to continue for a prolonged, indeterminate period, such as alcohol or drug addiction, mental deficiency or mental illness, and the condition makes the parent or other person named in section 2 unlikely to provide minimally acceptable care of the child;

(xiii) the conviction of a parent or other person named in section 2 of a felony that the court finds is of such a nature that the child will be deprived of a stable home for a period of years. Incarceration in and of itself shall not be grounds for termination of parental rights; or

(xiv) whether or not there has been a prior pattern of parental neglect or misconduct or an assault constituting a felony which resulted in serious bodily injury to the child and a likelihood of future harm to the child based on such prior pattern or assault.

For the purposes of this section "abandoned" shall mean being left without any provision for support and without any person responsible to maintain care, custody and control because the whereabouts of the person responsible therefor is unknown and reasonable efforts to locate the person have been unsuccessful. A brief and temporary absence from the home without intent to abandon the child shall not constitute abandonment.

Hearings on petitions to dispense with consent to adoption that allege that a child has been abandoned shall be scheduled and heard on an

expedited basis. Notwithstanding the foregoing, the following circumstances shall constitute grounds for dispensing with the need for consent to adoption, custody, guardianship or other disposition of the child: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of the parent. For the purposes of this section, "serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

(d) Nothing in this section shall be construed to prohibit the petitioner and a birth parent from entering into an agreement for post-termination contact or communication. The court issuing the termination decree under this section shall have jurisdiction to resolve matters concerning the agreement. Such agreement shall become null and void upon the entry of an adoption or guardianship decree.

Notwithstanding the existence of any agreement for post-termination or post-adoption contact or communication, the decree entered under this section shall be final.

Nothing in this section shall be construed to prohibit a birth parent who has entered into a post-termination agreement from entering into an agreement for post-adoption contact or communication pursuant to section 6C once an adoptive family has been identified.

110 Code Mass. Regs. § 1.02(4) provides:

> In delivering services to children and families the Department shall:
>
> > (4) recognize that substitute care is a temporary solution, and require the Department and the parent(s) to direct their efforts toward reunification of child(ren) and parent(s). As soon as it is determined that reunification is not feasible, the Department shall take swift action to implement another permanent plan, such as adoption or guardianship.

110 Code Mass. Regs. §§ 7.300-7.303A provide in pertinent part:

> 7.300: The Department is committed to establishing permanent placements for all children in its care and custody. Pursuant to this commitment, the Department may sponsor a guardianship for selected children. The children selected will be those who are not likely to return to their parents and who, for whatever reason, are not candidates for adoption.
>
> 7.302(3): If guardianship is acceptable to the child and potential guardian, the social worker will make reasonable and diligent efforts to contact the child's parents. If the parents are contacted, they will be informed of the proposed guardianship proceeding, of their right to contest the guardianship proceeding, and of their right, if indigent, to court-appointed counsel. The parents' consent will then be sought.

FEDERAL STATUTES

42 U.S.C.A. § 675(1)(B) provides:

> (1) The term "case plan" means a written document which includes at least the following:
>
> > (B) A plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the

conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

42 U.S.C.A. §§ 675(1)(F)(i) and (vi) provide:

(F) In the case of a child with respect to whom the permanency plan is placement with a relative and receipt of kinship guardianship assistance payments under section 673(d) of this title, a description of—

(i) the steps that the agency has taken to determine that it is not appropriate for the child to be returned home or adopted;

(vi) the efforts made by the State agency to discuss with the child's parent or parents the kinship guardianship assistance arrangement, or the reasons why the efforts were not made.

OTHER STATES' STATUTES

Alaska Stat. § 44.21.410(a)(4) provides:

(a) The office of public advocacy shall

(4) provide legal representation in cases involving judicial bypass procedures for minors seeking abortions under AS 18.16.030, in guardianship proceedings to respondents who are financially unable to employ attorneys under AS 13.26.106 (b), to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency, to indigent parents or guardians of a minor respondent in a commitment proceeding concerning the minor under AS 47.30.775.

Conn. Stat. Ann. § 45a-620 provides:

> The Court of Probate may appoint counsel to represent or appear on behalf of any minor in proceedings brought under sections 45a-603 to 45a-622, inclusive, and sections 45a-715 to 45a-717, inclusive. In any proceeding in which abuse or neglect, as defined in section 46b-120, is alleged by the applicant, or reasonably suspected by the court, a minor shall be represented by counsel appointed by the court to represent the minor. In all cases in which the court deems appropriate, the court shall also appoint a person, other than the person appointed to represent the minor, as guardian ad litem for such minor to speak on behalf of the best interests of the minor, which guardian ad litem is not required to be an attorney-at-law but shall be knowledgeable about the needs and protection of children. The Court of Probate shall appoint counsel to represent any respondent who notifies the court that he or she is unable to obtain counsel, or is unable to pay for counsel. The cost of such counsel shall be paid by the person whom he or she represents, except that if such person is unable to pay for such counsel and files an affidavit with the court demonstrating his or her inability to pay, the reasonable compensation of appointed counsel shall be established by, and paid from funds appropriated to, the Judicial Department, however, if funds have not been included in the budget of the Judicial Department for such purposes, such compensation shall be established by the Probate Court Administrator and paid from the Probate Court Administration Fund. In the case of a minor, such affidavit may be filed by a suitable person having knowledge of the financial status of such minor.

Conn. Stat. Ann. § 45a-660(c) provides:

> (c) The court shall review each conservatorship not later than one year after the conservatorship was ordered, and not less than every three years after such initial one-year review. After each such review, the court shall continue, modify or terminate the order for conservatorship. The

court shall receive and review written evidence as to the condition of the conserved person. The conservator and a physician licensed to practice medicine in this state shall each submit a written report to the court not more than forty-five days after the court's request for such report, except that for a person with intellectual disability, as defined in section 1-1g, a psychologist licensed pursuant to chapter 383 may submit such written report in lieu of a physician. On receipt of a written report from the conservator or a physician or psychologist, as the case may be, the court shall provide a copy of the report to the conserved person and the attorney for the conserved person. If the conserved person is unable to request or obtain an attorney, the court shall appoint an attorney. If the conserved person is unable to pay for the services of the attorney, the reasonable rates of compensation of such attorney shall be established by, and the attorney shall be paid from funds appropriated to, the Judicial Department. If funds have not been included in the budget of the Judicial Department for such purposes, such rates of compensation shall be established by the Probate Court Administrator and the attorney shall be paid from the Probate Court Administration Fund. The physician or psychologist, as the case may be, shall examine the conserved person not more than forty-five days prior to the date of submission of the physician's or psychologist's report. Any physician's or psychologist's report filed with the court pursuant to this subsection shall be confidential. The court may issue an order for the disclosure of medical information or psychological information received pursuant to this subsection, except that the court shall issue an order for the disclosure of such information to the conserved person's attorney. Not later than thirty days after receipt of the conservator's report and the physician's or psychologist's report, as the case may be, the attorney for the conserved person shall notify the court that the attorney has met with the conserved person and shall inform the court as to whether a hearing is being requested. Nothing in

this section shall prevent the conserved person or the conserved person's attorney from requesting a hearing at any other time as permitted by law. (Footnote omitted.)

Fla. Stat. § 744.464(2)(e) provides:

(2) SUGGESTION OF CAPACITY.—

(e) If an objection is timely filed, or if the medical examination suggests that full restoration is not appropriate, the court shall set the matter for hearing. If the ward does not have an attorney, the court shall appoint one to represent the ward.

Ga. Code Ann. § 29-4-42(a) provides:

(a) Upon the petition of any interested person, including the ward, or upon the court's own motion, and upon a proper showing that the need for a guardianship is ended, the court may terminate the guardianship and restore all personal and property rights to the ward. Except for good cause shown, the court shall order that notice of the petition be given, in whatever form the court deems appropriate, to the ward, the guardian, the ward's legal counsel, if any, and the ward's conservator, if any. The court shall appoint legal counsel for the ward and may, in its discretion, appoint a guardian ad litem.

La. Code Civ. Proc. Ann. art. 4544 provides:

A. If the defendant makes no timely appearance through an attorney, the petitioner shall apply for an order appointing an attorney to represent the defendant. Pursuant to such a motion, or on its own motion, the court shall appoint an attorney to represent the defendant. If the defendant either retains his own attorney, or intelligently and voluntarily waives the assistance of an attorney, the court shall discharge the court-appointed attorney. The court-appointed attorney shall represent the defendant until discharged by the court.

B. The attorney representing a defendant shall personally visit the defendant, unless such visit is excused by the court for good cause. To the extent possible, the attorney shall discuss with the defendant the allegations in the petition, the relevant facts and law, and the rights and options of the defendant regarding the disposition of the case. Failure of the attorney to perform any of the duties imposed by this Paragraph shall not affect the validity of the proceeding, but may subject the attorney to sanctions.

Md. Code Ann. Crim. Proc. § 16-204(b)(1)(vi) provides:

(b) (1) Indigent defendants or parties shall be provided representation under this title in:

(iv) any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result.

Md. Code Ann. Fam. Law § 5-3A-07 provides:

(a)

(1) In a case under this subtitle, a court shall appoint an attorney to represent a parent who:

(i) has a disability that makes the parent incapable of effectively participating in the case; or

(ii) when the parent must decide whether to consent under this subtitle, is still a minor.

(2) To determine whether a disability makes a parent incapable of effectively participating in a case, a court, on its own motion or on motion of a party, may order examination of the parent.

(b)

(1) In a case under this subtitle, a court shall appoint an attorney to represent a child:

(i) who has a disability that makes the child incapable of effectively participating in the case; or

(ii) if the child must decide whether to consent to the adoption, who is at least 10 years old.

(2) To determine whether a disability makes a child incapable of effectively participating in a case, a court, on its own motion or on motion of a party, may order examination of the child.

(c) An attorney or firm:

(1) may represent more than one party in a case under this subtitle only if the Maryland Rules of Professional Conduct allow; and

(2) may not represent a prospective adoptive parent and parent in the same case.

(d) Counsel appointed under this section may be compensated for reasonable fees, as approved by the court.

Me. Rev. Stat. Ann. tit. 18-A, § 5-204 provides:

The court may appoint a guardian or coguardians for an unmarried minor if:

(a) All parental rights of custody have been terminated or suspended by circumstance or prior court order;

(b) Each living parent whose parental rights and responsibilities have not been terminated or the person who is the legal custodian of the unmarried minor consents to the guardianship and the court finds that the consent creates a condition that is in the best interest of the child;

(c) The person or persons whose consent is required under subsection (b) do not consent, but the court finds by clear and convincing evidence that the person or persons have failed to respond to proper notice or a living situation has been created that is at least temporarily intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights, and that the proposed guardian will provide a living situation that is in the best interest of the child; or

(d) The person or persons whose consent is required under subsection (b) do not consent, but the court finds by a preponderance of the evidence that there is a de facto guardian and a demonstrated lack of consistent participation by the nonconsenting parent or legal custodian of the unmarried minor. The court may appoint the de facto guardian as guardian if the appointment is in the best interest of the child.

A guardian appointed by will as provided in section 5-202 whose appointment has not been prevented or nullified under section 5-203 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

If a proceeding is brought under subsection (c) or subsection (d), the nonconsenting parent or legal custodian is entitled to court-appointed legal counsel if indigent. In a contested action, the court may also appoint counsel for any indigent de facto guardian, guardian or petitioner when a parent or legal custodian has counsel.

If a proceeding is brought under subsection (b), subsection (c) or subsection (d), the court may order a parent to pay child support in accordance with Title 19-A, Part 3. When the Department of Health and Human Services provides child support enforcement services, the Commissioner of Health and Human Services may designate employees of the department who are not attorneys to represent the department in court if a hearing is held. The commissioner shall ensure that appropriate training is provided to all employees who are designated to represent the department under this paragraph.

If the court appoints a limited guardian, the court shall specify the duties and powers of the guardian, as required in section 5-105, and the parental rights and responsibilities retained by the parent of the minor.

Mo. Rev. Stat. § 475.083.6 provides:

6. Upon the filing of a petition without the joinder of the guardian or conservator, the court shall cause the petition to be set for hearing with notice to the guardian or conservator. If the ward or protectee is not represented by an attorney, the court shall appoint an attorney to represent the ward or protectee in such proceeding. The burden of proof by a preponderance of the evidence shall be upon the petitioner. Such a petition may not be filed more than once every one hundred eighty days.

N.J. Stat. Ann. § 30:4C-85(a)(2) provides:

a. In the case of a child who has been removed from his home by the division within the last 12 months, or for whom the division has an open or currently active case and where legal representation is currently being provided by the Office of the Public Defender either through its Law Guardian Program or Parental Representation Unit:

(2)An indigent parent and child shall be afforded the same right to legal counsel and representation as in actions under P.L.1974, c.119 (C.9:6-8.21 et seq.) and section 54 of P.L.1999, c.53 (C.30:4C-15.4).

N.Y. Fam. Ct. Act § 262 provides:

(a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the judge shall advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same:

(i) the respondent in any proceeding under article ten or ten-A of this act and the petitioner in any proceeding under part eight of article ten of this act;

(ii) the petitioner and the respondent in any proceeding under article eight of this act;

(iii) the respondent in any proceeding under part three of article six of this act;

(iv) the parent or person legally responsible, foster parent, or other person having physical or legal custody of the child in any proceeding under article ten or ten-A of this act or section three hundred fifty-eight-a, three hundred eighty-four or three hundred eighty-four-b of the social services law, and a non-custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law;

(v) the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such

child, in any proceeding before the court in which the court has jurisdiction to determine such custody;

(vi) any person in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court, except for a contempt which may be punished summarily under section seven hundred fifty-five of the judiciary law;

(vii) the parent of a child in any adoption proceeding who opposes the adoption of such child.

(viii) the respondent in any proceeding under article five of this act in relation to the establishment of paternity.

(ix) in a proceeding under article ten-C of this act:

(1) a parent or caretaker as such terms are defined in section one thousand ninety-two of this act;

(2) an interested adult as such term is defined in section one thousand ninety-two of this act provided that:

(A) the child alleged to be destitute in the proceeding held pursuant to article ten-C of this act was removed from the care of such interested adult;

(B) the child alleged to be destitute in the proceeding held pursuant to article ten-C of this act resides with the interested adult; or

(C) the child alleged to be destitute in the proceeding held pursuant to article ten-C of this act resided with such interested

adult immediately prior to the filing of the petition under article ten-C of this act;

(3) any interested adult as such term is defined in section one thousand ninety-two of this act or any person made a party to the article ten-C proceeding pursuant to subdivision (c) of section one thousand ninety-four of this act for whom the court orders counsel appointed pursuant to subdivision (d) of section one thousand ninety-four of this act.

(b) Assignment of counsel in other cases. In addition to the cases listed in subdivision (a) of this section, a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel;

(c) Implementation. Any order for the assignment of counsel issued under this part shall be implemented as provided in article eighteen-B of the county law.

CASES

Adams v. Gallant, Super. Ct., Middlesex County, No. 93-4339-8, slip op. (Nov. 9, 1994)

Matter of Adoption of A.W.S. and K.R.S., No. DA 14-001, slip op. (Mont. Dec. 2, 2014)

2693429.1

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
NO. 93-4339-H

APRIL ADAMS[1]

vs.

JOSEPH GALLANT[2] and others[3]

Memorandum of Decision and Order On Plaintiff-Intervenor's Motion for Reconsideration of Denial of Preliminary Injunction

After hearing, this Court initially denied plaintiff-intervenor April Adams' ("Adams") motion for a preliminary injunction. Upon reconsideration the Court now allows Adams' motion and orders that the injunction shall issue. Specifically, the Court orders the Department of Social Services ("DSS") to place Ms. Adams and her seven children in a temporary residential program or to otherwise provide her with temporary shelter and assistance.

Pursuant to Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980), the Court finds as follows:

(1) Adams has met her burden of establishing irreparable harm to her seven children and herself if the injunction does not issue. Ms. Adams, whose abuse at the hands of her former boyfriend led her to move with her seven children out of their home and to seek a restraining order against him, has been unsuccessful in securing a

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[1] Plaintiff-Intervenor

[2] in his capacity as Commissioner of the Department of Public welfare

[3] Linda Carlisle, in her capacity as Commissioner of the Department of Social Services, and Charles Baker, in his capacity as Secretary of the Office of Health and Human Services

safe, long-term housing arrangement for her family. She is ineligible for EA relief until January of 1995 because she has received such relief within the last twelve months, and she can no longer rely on family and friends to temporarily house her. She has spent at least two nights with her children at South Station, attempting to keep them warm and unexposed to the elements. Due to the upheaval in their housing situation, the school-age children have been unable to attend school regularly. The family's situation is desperate.

(2) Adams has demonstrated a substantial likelihood of success on the merits of her claim seeking emergency shelter. General Laws c. 18B, §2(A)(14) requires DSS to provide "temporary residential programs providing counselling and supportive assistance for women in transition and their children who, because of domestic violence, homelessness or other situations, require temporary shelter and assistance." DSS has provided plaintiff with assistance in the form of contacting shelter providers on her behalf, seeking a placement for her family. DSS has been unsuccessful in securing such a placement. The Court infers that the number of young children in plaintiff's family presents a problem to shelter providers. DSS regulations regarding "Special Provisions Relating to Homelessness" stipulate that "the Department shall make all reasonable efforts to serve homeless families. Ensuring that families remain together whenever possible is a primary goal in serving the homeless. The Department's efforts on behalf of a homeless family shall include efforts to provide access to

facilities which allow a family to feed, bathe and care for their children and which provide meals and a safe place to sleep for the adults and children." 110 C.M.R. § 1.11. "If no temporary residential programs in existence are appropriate, DSS policies authorize expenditures of monies for services not available through other state agencies 'to ameliorate a family crisis' such as a 'housing catastrophe'." Connolly v. Carlisle, Suffolk Superior Court Civil Action No. 93-3159-C (Saris, J.) (August 25, 1993), citing 110 CMR § 7.030.

It is undisputed that Ms. Adams' situation is a family crisis arising from domestic abuse and homelessness. This crisis could be significantly ameliorated if DSS fulfilled its mandate to provide temporary shelter, until Ms. Adams again qualifies for EA funds.

(3) DSS has demonstrated no risk of irreparable harm which it would incur if the injunction should issue. In the event that no placement occurs, Ms. Adams risks having her children removed to foster care, at substantial expense to DSS. DSS has made no showing that temporary housing would be substantially more costly than the foster care payments that would be incurred should Ms. Adams' seven children be placed in foster homes. In fact, such foster care placement may itself be significantly more costly then temporary shelter of Ms. Adams' intact family. The balance between the risks of irreparable harm cuts in favor of Ms. Adams.

(4) The strong state policy in favor of maintaining the integrity of families, as articulated in c. 18B, § 3(A)(1), Departmental regulations and policy statements supports this

junction, which will obviate the need for foster placement.

ORDER

The Department of Social Services is hereby ordered to provide Ms. Adams and her children with appropriate and suitable temporary shelter, either through a program or other form of assistance, which will enable her to keep her family intact.

Vieri Volterra
Justice of the Superior Court

Date: November 9, 1994

DA 14-0101

IN THE SUPREME COURT OF THE STATE OF MONTANA

2014 MT 322

IN THE MATTER OF THE ADOPTION OF:
A.W.S. and K.R.S., Minor Children,

J.N.S.,

Petitioner and Respondent,

v.

A.W.,

Respondent and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause Nos. DA 13-13 and DA 13-14
Honorable James B. Wheelis, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Scott Peterson, Robert Farris-Olsen, Morrison, Sherwood, Wilson & Deola, PLLP, Helena Montana

For Appellee:

Linda Osorio St. Peter, St. Peter Law Offices, P.C., Missoula, Montana

Heather McDougall, Attorney at Law, Troy, Montana

Submitted on Briefs: October 15, 2014
Decided: December 2, 2014

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 A.W. (Mother) appeals the Nineteenth Judicial District Court's order terminating her parental rights to her two minor children in a proceeding for adoption by the children's stepmother. She raises two issues on appeal: whether the District Court erred when it did not appoint counsel to her for the involuntary termination proceeding, and whether the court's decision to terminate her parental rights was based on clear and convincing evidence. Because we conclude that Mother has a constitutional right to counsel in this case, we do not reach the second issue.

¶2 We reverse and remand for appointment of counsel to Mother and a new hearing on the petition to terminate Mother's parental rights.

PROCEDURAL AND FACTUAL BACKGROUND

¶3 Mother and W.A.S. (Father) entered into a common law marriage in 2000 and divorced in 2007. While married, they had two children: A.W.S. and K.R.S. In 2008, Father married J.N.S. (Stepmother). A.W.S. and K.R.S. reside with Father and Stepmother.

¶4 Mother had regular, unsupervised parenting time under the original parenting plan. This changed after her arrest in 2009, when the District Court issued an amended parenting plan that restricted Mother to supervised visitations. In her brief on appeal, Mother claims that she had difficulty scheduling supervised visits and that Father and Stepmother hindered her ability to visit the children. Her last visit with her children was in August 2010.

¶5 On November 25, 2013, Stepmother filed petitions for adoption of A.W.S. and K.R.S. and sought an order terminating Mother's parental rights. Mother never filed a formal objection or response to the petitions. The District Court held a show cause hearing on the petitions for both children on January 13, 2014. Mother was present at the hearing, but not represented by an attorney. She did not object to any of the evidence Stepmother presented.

¶6 At the hearing, counsel for Stepmother called Mother as a witness. Stepmother's attorney asked Mother why she "never followed through on anything" after initially attempting to set up supervised visitation. Mother responded:

> I did not have the money to go through to get an attorney to go to Court. That is obviously why I am here by myself. . . . [Y]ou have to have money to get an attorney . . . to come into court to go through all of this.

¶7 Mother did not testify on her own behalf. In fact, apart from her testimony in the Stepmother's case-in-chief, Mother did not call any witnesses or present any other evidence at all.[1] She did, however, inform the court that she opposed the termination of her parental rights.

¶8 On January 16, 2014, approximately five weeks after Mother first received notice of the petitions, the District Court entered a decree of adoption in Stepmother's favor and terminated Mother's parental rights to both children. The District Court found that Mother had willfully abandoned her children, that she had not supported her children, and that it

[1] Mother claims on appeal that her probation officer would have testified for her, but that the officer was not available on the date of the hearing. She claims that she did not know to request a continuance.

was in the children's best interests to terminate her rights under § 42-2-608(1), MCA, and to award adoption to Stepmother.

¶9 Mother timely appealed.

STANDARD OF REVIEW

¶10 This Court's review of constitutional issues is plenary. *Jaksha v. Butte-Silver Bow County*, 2009 MT 263, ¶ 13, 352 Mont. 46, 214 P.3d 1248; *In re L.V-B.*, 2014 MT 13, ¶ 12, 373 Mont. 344, 317 P.3d 191.

DISCUSSION

¶11 The Montana Constitution guarantees that no person shall be denied the equal protection of the laws. Mont. Const. art. II, § 4. "'The Fourteenth Amendment to the United States Constitution and Article II, Section 4, of the Montana Constitution embody a fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner.'" *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 15, 325 Mont. 148, 104 P.3d 445 (quoting *McDermott v. Montana Dept. of Corrections*, 2001 MT 134, ¶ 30, 305 Mont. 462, 29 P.3d 992). Montana's Equal Protection Clause "provides even more individual protection than the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution." *Snetsinger*, ¶ 15 (citing *Cottrill v. Cottrill Sodding Serv.*, 229 Mont. 40, 42, 744 P.2d 895, 897 (1987)).

¶12 "When analyzing an equal protection challenge, we 'must first identify the classes involved and determine whether they are similarly situated.'" *Snetsinger*, ¶ 16 (citing *Henry v. State Comp. Ins. Fund*, 1999 MT 126, ¶ 27, 294 Mont. 449, 982 P.2d 456). The two classes involved in this appeal are created by Montana's alternate statutory

frameworks for effecting the involuntary termination of parental rights: involuntary termination may be accomplished in connection with either an abuse and neglect petition under Title 41, MCA, or an adoption petition under Title 42, MCA, the Montana Adoption Act. Title 41, chapter 3, part 4, MCA, provides for the involuntary termination of parental rights by the State for abuse or neglect of a child, whereas Title 42, chapter 2, part 6, MCA, allows certain private parties to file a petition to involuntarily terminate parental rights to a child on the grounds enumerated in § 42-2-607, MCA, when the proceedings also involve the subsequent adoption of the child.

¶13 Indigent parents at risk of losing their parental rights under the provisions of Title 41 are entitled to counsel. Sections 41-3-422(11), -425(2)(a), MCA (requiring courts to immediately appoint counsel "pending a determination of eligibility pursuant to 47-1-111"). The attorney general, county attorneys, and attorneys hired by counties are required to use the process prescribed by Title 41, chapter 3 of the Montana Code when seeking termination of parental rights for abuse or neglect. Section 41-3-422(2), MCA.

¶14 Under the statutory framework set out in the Adoption Act, however, an indigent parent may have her rights involuntarily terminated by a court without any right to counsel. As happened here, a parent may have her rights terminated in an adoption proceeding on the same grounds that allow for termination in a child abuse and neglect proceeding. The Adoption Act provides for the involuntary termination of parental rights where a court has determined that the parent is "unfit." Section 42-2-607(2), MCA. Among other factors, a court may find that a parent is unfit if the parent has "willfully abandoned" the child, as defined in § 41-3-102, MCA, the same definition of abandonment applied in abuse and

neglect proceedings. Section 42-2-608(1)(b), MCA. The District Court made such a finding in this case. A court also may find a parent unfit where clear and convincing evidence demonstrates that "placing the child in the [parent]'s legal and physical custody would pose a risk of substantial harm to the physical or psychological well-being of the child because the circumstances . . . indicate[] that the [parent] is unfit to maintain a relationship of parent and child with the child," or that "failure to terminate the relationship of parent and child would be detrimental to the child." Section 42-2-608(1)(h)(ii)(C), (D), MCA.

¶15 Even though a court may terminate a parent's rights involuntarily under either statutory framework, indigent parents at risk of losing their parental rights are afforded a right to counsel only in abuse and neglect proceedings under Title 41. Thus, Montana's statutes create two similarly situated classes: indigent parents facing involuntary termination of parental rights on a petition by the state under § 41-3-422, MCA, and indigent parents facing involuntary termination of parental rights in an adoption proceeding under § 42-2-603, MCA. Both proceedings involve a court permanently and involuntarily terminating a parent's fundamental interest in the care and custody of her children because the parent is unfit. Yet only the parent in the former proceeding is entitled to counsel. Although the grounds for a finding of unfitness are not identical, the fundamental right to parent is equally imperiled whether the proceedings are brought by the State or by a private party. Because, in either case, a parent stands to lose the same fundamental constitutional right on a judicial determination of unfitness, we conclude that Mother is, for equal

protection purposes, similarly situated to a parent in a state termination proceeding. *See In re L.T.M.*, 824 N.E.2d 221, 230-31 (Ill. 2005).

¶16 The next step in our equal protection analysis is to determine the appropriate level of scrutiny. *Snetsinger*, ¶ 17. Strict scrutiny applies if a fundamental right is affected. *Snetsinger*, ¶ 17. The U.S. Supreme Court has said that a parent's interest in custody of a child "is perhaps the oldest of the [recognized] fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000). Montana also has determined that the right to parent one's child is a fundamental right. *Snetsinger*, ¶ 16; *In re L.V-B.*, ¶ 15. Because the challenge here implicates a fundamental right, we apply strict scrutiny.

¶17 In applying the strict scrutiny standard, we determine if the disparity in the current statutory framework is narrowly tailored to serve a compelling governmental interest. *Snetsinger*, ¶ 17. Ordinarily, the burden of proof falls on the State. *Snetsinger*, ¶ 17. The State is not a party here, which raises the question whether the State is involved sufficiently to warrant application of the equal protection clause. *See In re Adoption of K.A.S.*, 499 N.W.2d 558, 565-66 (N.D. 1993); *In re S.A.J.B.*, 679 N.W.2d 645, 650-51 (Iowa 2004).

> A stepparent adoption differs from other parental termination cases in that it is not an action brought by the state and argued by state attorneys. But neither is the adoption proceeding a purely private dispute. The state is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child and establish a new relationship, in accordance with an extensive statutory scheme. . . .

In re K.A.S., 499 N.W.2d at 565-66 (quoting *In re Jay*, 150 Cal. App. 3d 251, 262, 197 Cal. Rptr. 672, 680 (Ct. App. 1983)).

¶18 Under the Montana Adoption Act, like the laws considered in these cases, the State is an integral part of the process in private terminations. *See* Title 42, chapters 2-5, MCA. Whether an involuntary termination proceeding is initiated by the state or by a private party in conjunction with an adoption petition, "the challenged state action remains essentially the same: [a parent] resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 n. 8, 117 S. Ct. 555, 564 n. 8 (1996); *In re L.T.M.*, 824 N.E.2d at 230; *see also O.A.H. v. R.L.A.*, 712 So. 2d 4, 6 (Fla. Dist. Ct. App. 2d Dist. 1998); *In re K.L.J.*, 813 P.2d 276, 283 (Alaska 1991). We conclude that the extent of State involvement in adoption proceedings is sufficient to trigger the requirement of Article II, Section 4, of the Montana Constitution that equal protection of the law be afforded to individuals who are similarly situated. *See also In re K.A.S.*, 499 N.W.2d at 566.

¶19 The Stepmother has not addressed directly whether the differences in the current statutory scheme are narrowly tailored to serve a compelling governmental interest. Instead, she argues that Mother "was not a novice to the legal system" because previously she had been provided with counsel in other proceedings, and that Mother raised the right to counsel for the first time on appeal. We address these arguments briefly.

¶20 First, Mother's ability to obtain legal services through the public defender's office in unrelated cases has no bearing on the question posed here. Mother's involvement in separate criminal and youth in need of care cases concerned different interests—these prior cases did not jeopardize Mother's right to parent A.W.S. and K.R.S. Any relevance they

have to the issue under consideration may be to indicate Mother's indigence, having twice qualified for appointed counsel.

¶21 Second, although Mother did not request counsel formally, we have recognized that pro se litigants are not required to use specific words when requesting counsel. *State v. Buck*, 2006 MT 81, ¶ 48, 331 Mont. 517, 134 P.3d 53 ("[W]e still adhere to the rule that invocation of [the right to counsel] does not depend on the use of any particular words"); *State v. Johnson*, 221 Mont. 503, 514, 719 P.2d 1248, 1255 (1986), *overruled in part on unrelated grounds by Buck*, ¶ 48 ("To require precise words be uttered would elevate form over substance."); s*ee e.g. In re Fernandez*, 399 N.W.2d 459, 460-61 (Mich. Ct. App. 1986); *In re Adoption of J.D.F.*, 761 N.W.2d 582, 587-88 (N.D. 2009) (where a parent articulated his desire for an attorney and his inability to procure legal assistance, the trial court erred by not advising him of his state constitutional right to counsel). In this case, where Mother was not advised of any right to counsel, she preserved the issue when she explained that she represented herself only because she did not have the money to employ an attorney.

¶22 Whether Mother has a right to appointed counsel depends on whether the difference between the two statutory methods is narrowly tailored to serve a compelling governmental interest. More specifically, is there a compelling reason why counsel is provided to an indigent parent facing the involuntary termination of her parental rights in abuse and neglect proceedings, but not when such proceedings are commenced under the Adoption Act? Though Stepmother does not address this point, the governmental interest identified frequently as possible justification for denial of the right to counsel to indigent parents is

the State's pecuniary interest in "avoid[ing] both the expense of appointed counsel and the cost of the lengthened proceedings [the] presence [of counsel] may cause." *Lassiter*, 452 U.S. at 28, 101 S. Ct. at 2160; *In re L.T.M.*, 824 N.E.2d at 231 ("The only state interest served by denying appointed counsel under the Adoption Act is the interest in limiting the payment of attorney fees."). The U.S. Supreme Court has observed, however, that "though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here[.]" *Lassiter*, 452 U.S. at 28, 101 S. Ct. at 2160.[2]

¶23 The differences between the involuntary termination provisions in the abuse and neglect statutes and in the Adoption Act are not narrowly tailored to serve a compelling governmental interest. The state's pecuniary interests do not justify the denial of the right to counsel to indigent parents in involuntary terminations under the Adoption Act, where that same right is provided to indigent parents in state-initiated involuntary terminations.

¶24 Courts have held in similar contexts that where a statute violates equal protection because of underinclusion, a court "may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361, 90 S. Ct. 1792, 1807-08 (1970) (Harlan, J., concurring), *cited in In re K.A.S.*, 499 N.W.2d at 567; *In re S.A.J.B.*, 679 N.W.2d at 651. Extending coverage is the

[2] The U.S. Supreme Court held in *Lassiter* that an indigent parent's right to counsel under the federal due process clause must be made on a case-by-case basis. *Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161. Although the Court ultimately affirmed the trial court's failure to appoint counsel to Ms. Lassiter, it did so only after noting that Ms. Lassiter "expressly declined to appear at [her] child custody hearing," "had not even bothered to speak to her retained lawyer after being notified of the termination hearing," and "fail[ed] to make an effort to contest the termination proceeding." Because *Lassiter* involved the federal due process clause and considerably different facts—and because it did not address the equal protection issue we face here—it has limited application.

appropriate remedy in this case. Denying counsel in all termination proceedings would contravene legislative intent. *See In re S.A.J.B.*, 679 N.W.2d at 651. The legislature has provided a categorical right to counsel to indigent parents in state-initiated termination proceedings. Section 41-3-425(2)(a), MCA.

¶25 Further, denying the right to counsel in state-initiated termination proceedings would call into question the constitutionality of those proceedings. *In re S.A.J.B.*, 679 N.W.2d at 651 (citing *Lassiter*, 452 U.S. at 31-32, 101 S. Ct. at 2161-62). There is a "substantial risk of an unfair procedure and outcome" in proceedings brought to terminate parental rights. *In re A.S.A*, 258 Mont. 194, 198, 852 P.2d 127, 129-30 (1993). We have observed:

> Without representation, a parent would not have an equal opportunity to present evidence and scrutinize the State's evidence. The potential for unfairness is especially likely when an indigent parent is involved. Indigent parents often have a limited education and are unfamiliar with legal proceedings. If an indigent parent is unrepresented at the termination proceedings, the risk is substantial that the parent will lose her child due to intimidation, inarticulateness, or confusion.

In re A.S.A, 258 Mont. at 198, 852 P.2d at 129; *see also In re Declaring A.N.W.*, 2006 MT 42, ¶ 34, 331 Mont. 208, 130 P.3d 619 ("A parent's right to the care and custody of a child represents a fundamental liberty interest, and consequently, the state must provide fundamentally fair procedures at all stages in the proceedings to terminate parental rights."). Unfairness in a termination proceeding also has profound implications for the future of the child, and the risk of an unfair decision is equally significant to parent and child in both public and private proceedings.

¶26 A parent responding to private termination proceedings should not bear the disadvantage of the inability to obtain counsel. The decision to grant "the opportunity for a parent to benefit from the privilege of assistance by counsel in one mode of termination of parental rights requires that the opportunity to exercise that privilege be extended to all similarly situated parents directly threatened with permanent loss of parental rights." *Zockert v. Fanning*, 800 P.2d 773, 778 (Or. 1990); *accord Crowell v. State Pub. Defender*, 845 N.W.2d 676 (Iowa 2014). We conclude that Montana's right to equal protection requires that counsel be appointed for indigent parents in termination proceedings brought under the Adoption Act. On remand, the District Court is directed to appoint counsel for Mother, if it determines that she is financially eligible.[3]

¶27 Although Mother raises a separate due process argument, we need not address whether due process considerations alone would require a right to counsel under these circumstances. Courts that have considered the right to counsel for private termination proceedings on equal protection grounds have found that the right cannot be provided in state-initiated termination proceedings but denied in private terminations. *E.g. In re L.T.M.*, 824 N.E.2d at 229-32; *In re S.A.J.B.*, 679 N.W.2d at 648-51 (noting that a similar equal protection question "remains open under the federal constitution"); *In re Adoption of Meaghan*, 961 N.E.2d 110 (Mass. 2012); *In re K.A.S.*, 499 N.W.2d at 563; *Zockert*, 800 P.2d

[3] In abuse and neglect proceedings, the office of the state public defender is appointed and assigns counsel to represent indigent parents after determining eligibility as provided in § 47-1-111, MCA. Section 41-3-425, MCA. The public defender also is responsible for assigning counsel in paternity proceedings to indigent parties, including the natural mother and persons presumed or alleged to be the father. Sections 40-6-110, -119, MCA. The Adoption Act allows the payment of a birth parent's legal fees by the adoptive parent. Sections 42-7-101(1)(i), 42-7-102(2), MCA. We leave the manner of appointment of counsel in each case to the district courts' discretion.

at 776. Our interpretation of Montana's equal protection clause requires the same result here. Because we have decided this case on independent and adequate State grounds under Montana's equal protection clause, *Mich. v. Long*, 463 U.S. 1032, 103 S. Ct. 3469 (1983), we do not address Mother's due process arguments.

CONCLUSION

¶28 We reverse the decision of the District Court and remand for the appointment counsel for Mother, and for a new hearing.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ PATRICIA COTTER
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA