

SPECIAL REPORT

## Parents' Right to Counsel in Proceedings to Terminate Parental Rights: Factors to Consider

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*In June 1981 the U.S. Supreme Court ruled that parents whose parental rights were in jeopardy of legal termination did not have an automatic right to appointed counsel. The author reports on the details and possible consequences of the Supreme Court's decision that are of immediate concern to child welfare professionals.*

Do parents involved in proceedings to terminate their parental rights have a right to counsel? That is, do parents who cannot afford to hire a lawyer have a Constitutional right to a court-appointed one? Until last June, most legal scholars assumed that they did. Appellate courts, in fact,

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have been almost unanimous in holding in favor of the right to counsel. In addition, 33 states and the District of Columbia have passed laws providing for the appointment of counsel in termination cases. The United States Supreme Court, however, had never ruled on the question, and so it had not yet been resolved authoritatively.

### **No Automatic Right to Counsel**

Last June, the Supreme Court finally addressed the issue. In *Lassiter v. Department of Social Services of Durham County, North Carolina* [1], the Court held that indigent parents do not have an automatic right to appointed counsel in termination proceedings. The Court ruled instead that the decision whether to appoint counsel must be made on a case-by-case basis, "in the first instance by the trial court, subject, of course, to appellate review."

The Court's opinion is obviously important in those states that do not now provide counsel to indigent parents. But it is also important in the states that, prior to *Lassiter*, decided to provide counsel. Many of these states undoubtedly did so because they assumed that parents had an absolute Constitutional right to representation, and that the Supreme Court would eventually force them to provide counsel anyway. Freed from this prospect at a time when state budgets are under great pressure, some of these states may seek to limit the provision of counsel. (Those who assume that legal services, once provided, will not be withdrawn should be reminded of the prospective weakening of the Legal Services Corporation.)

In most states, then, questions about the right of parents to counsel are sure to consume time and energy at the local level, as agencies and trial courts seek to apply the Court's decision to the cases before them. It is important, therefore, for child welfare professionals, especially those involved in termination and adoption proceedings, to understand the factors that the Court said should be considered in deciding whether counsel is Constitutionally required.

### **Factors to Be Considered**

Speaking for the Court, Justice Stewart expressly refused to specify the

factors to be considered in deciding that an indigent parent has a right to appointed counsel. He said that it is "neither possible nor prudent to attempt to formulate a precise or detailed set of guidelines to be followed in determining when the providing of counsel is necessary" since the "facts and circumstances . . . are susceptible of almost infinite variation. . . ." Nevertheless, Justice Stewart's opinion suggests that one or more of the following four factors might lead the Court to hold that counsel is Constitutionally required.

#### *Allegations of Criminal Behavior*

The Court suggested that counsel might be required if there were allegations of "neglect or abuse upon which criminal charges could be based." In an explanatory footnote, Justice Stewart wrote: "Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need counsel to guide them in understanding the problems such petitions may create." For example, the parent's testimony in the civil termination proceeding, if damaging, might be introduced by the prosecution in a subsequent criminal proceeding.

#### *Complexity of the Case*

The Court suggested that counsel might be required when there is "[e]xpert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute. . ." Counsel might also be required when there are "troublesome points of law, either procedural or substantive."

#### *Parents' Interest in the Child*

Stewart's actual words are important enough to repeat them here: ". . . a court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing." In this vein, both Justice Stewart and Chief Justice Burger were critical of Ms. Lassiter's apparent lack of concern for her son. In 1975, a North Carolina court found her to be a neglectful parent, and had placed her infant son in foster care. In 1976, she was convicted of murder and given a 25-to-40-year sentence. Since her son was

first taken away from her in 1975, Ms. Lassiter had apparently made no attempt to see him. Justice Stewart concluded that "the weight of the evidence" was that Ms. Lassiter had "few sparks" of "interest in her son." Similarly, the Chief Justice said that Ms. Lassiter "showed little interest in her child."

#### *Weight of the Evidence*

The Court suggested that there was a greater need for counsel in less clear-cut cases, where "the weight of the evidence. . ." is not clearly in favor of terminating parental rights. The Court seemed to say that, in cases whose outcome is preordained, providing counsel would be an empty gesture that would not be required. In the case before it, the Court seemed particularly hesitant to reverse the trial judge's decision because it appeared that the resultant delay in making the termination order final would have been unnecessarily detrimental to the child's interests. Justice Stewart expressly recognized the child's interest in the finality of the termination order when he pointed out that: "child-custody litigation must be concluded as rapidly as is consistent with fairness. . ." In an accompanying footnote, he expanded on this consideration: "According to the respondent's brief, William Lassiter is now living 'in a preadoptive home with foster parents committed for formal adoption to become his legal parents.' He cannot be legally adopted, nor can his status otherwise be finally clarified, until this litigation ends."

#### **Conclusion**

In *Lassiter v. Department of Social Services of Durham County, North Carolina*, the Supreme Court held that, under certain circumstances, an indigent parent could have a Constitutional right to counsel in a proceeding to terminate parental rights. The factors that the Court seemed to consider crucial to such a determination were: (1) allegations of criminal behavior, (2) the complexity of the case, (3) the parents' interest in the child, and (4) the weight of the evidence.

Unless these four factors are interpreted in the most narrow way possible, applying them would probably result in the provision of counsel in many, if not most, termination proceedings. Basically, the grounds for

most involuntary terminations divide into three broad categories: (1) severe abuse or neglect; (2) severe, and apparently long-term, parental inability to care properly for the child; and (3) constructive abandonment. Cases in the first category, because of the possibility of criminal prosecution, seem to fall within the Court's guidelines for the appointment of counsel. So would cases in the second category, because they usually require expert testimony about the parents' prognosis for improvement. Only cases in the third category seem to fall outside of the Court's holding. These cases involve parents who, for no good cause, fail to maintain contact with a child over a sufficient period of time, or otherwise demonstrate a clear lack of concern about the child's care and welfare. (A majority of the Court seems to have concluded that Ms. Lassiter was such a parent.) Given the realities of current practice in such cases, the appointment of counsel is unlikely to have more than a marginal effect on the outcome of the proceeding.

Unfortunately, there is no way of knowing how state and federal courts will interpret the tentative guidelines that seem to have been established in *Lassiter*. It remains to be seen what the Court will do in cases where there is the possibility of a criminal prosecution, where the issues are complicated or require the use of expert witnesses, where the parent has demonstrated at least a minimal interest in the welfare of the child, or where the weight of the evidence is not overwhelmingly in favor of termination. But, like other recent Supreme Court rulings concerning child welfare practices, two things are certain about *Lassiter*: it adds yet another legal uncertainty to termination proceedings, and it will generate much subsequent litigation on its meaning and application. ♦

#### Reference

1. *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. —, 101 S.Ct. 2153 (1981).

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