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## When Loss of Legal Custody Is Like an Indeterminate Prison Sentence: Ohio's Elimination of Indigent Parents' Right to Court Appointed Counsel in Civil Custody Suits

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## When Loss of Legal Custody Is Like an Indeterminate Prison Sentence: Ohio's Elimination of Indigent Parents' Right to Court Appointed Counsel in Civil Custody Suits

### Cover Page Footnote

Associate Member, 2014-2015 University of Cincinnati Law Review. I would like to thank Professor Michael Solimine for his help in selecting this topic, pointing me in the right direction as I tackled my first law review submission, and assisting me on some tricky citations. I also would like to thank my friend and mentor, Judge Sheila Calloway, Davidson County Juvenile Court, Nashville, Tennessee, for her continued encouragement and support and for modeling what it means to serve children and families. I also owe a special thank you to Supreme Court of Ohio Justice Sharon Kennedy for consulting with me during my first draft and for reminding me to "always check the pocket parts." And finally, to my mom, I continue to admire your selflessness and grit. Thank you for making me the advocate I am today.

WHEN LOSS OF LEGAL CUSTODY IS LIKE AN  
INDETERMINATE PRISON SENTENCE: OHIO'S ELIMINATION  
OF INDIGENT PARENTS' RIGHT TO COURT APPOINTED  
COUNSEL IN CIVIL CUSTODY SUITS

Renee Brunett\*

*"If permanent custody is the family law equivalent of the death penalty in criminal cases, then legal custody is the equivalent of an indeterminate prison sentence. An award of legal custody to a non-parent is a serious matter which cannot be taken lightly."*  
—Hon. Mary DeGenaro, Presiding Judge, Ohio Court of Appeals, Seventh District<sup>1</sup>

I. INTRODUCTION

The Supreme Court of Ohio exercises discretionary jurisdiction over cases that raise substantial constitutional questions or issues of "public or great general interest."<sup>2</sup> On June 25, 2014, the Supreme Court of Ohio declined to review *In re B.B.*, a juvenile court custody case.<sup>3</sup> Three justices dissented.<sup>4</sup> Writing for the dissent, Justice O'Neill trumpeted, "In no other situation has this court ever held that a fundamental constitutional right can be infringed without triggering an indigent person's right to appointed counsel."<sup>5</sup>

In *In re B.B.*, the great-grandparents petitioned the juvenile court for emergency custody of minor children, B.B. and D.B., and

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1. *In re Keylor*, No. 04 MO 02, 2005 WL 775890, at \*15 (Ohio 7th Dist. Ct. App. March 30, 2005) (DeGenaro, J., dissenting).

2. *See, e.g.*, Ohio Const. Art. IV § 2(B)(2)(e); Ohio Sup. Ct. Prac. R. 5.02(A)(3); Ohio Sup. Ct. Prac. R. 7.01(B)(1)(d)(iii).

3. *In re B.B.*, 11 N.E.3d 286 (Ohio 2014).

4. *Id.* (O'Donnell and Kennedy, J.J., dissenting) (O'Neill, J., dissenting with opinion).

5. *Id.* (O'Neill, J., dissenting). During my November 1, 2014 telephone conversation with Justice Sharon Kennedy, Justice Kennedy stated that she would have heard the issues raised in *In re B.B.*, because she believed them to be a matter of interest to Ohioans pursuant to Ohio Const. Art. IV § 2(B)(2)(e). Telephone Interview with Hon. Sharon Kennedy, Justice, Supreme Court of Ohio (Nov. 1, 2014).

requested that the court terminate visitation between the children and their parents.<sup>6</sup> In their complaints, the great-grandparents alleged that “the parents had sexually abused the children, had abandoned them, were unable to provide care and support for them, and were unfit parents.”<sup>7</sup>

Under current Ohio statutory construction and juvenile rules of court,<sup>8</sup> the Seneca County Court of Common Pleas determined that neither the parents in *In re B.B.*—nor their minor children—were entitled to appointed counsel.<sup>9</sup> Because the children were not wards of the state,<sup>10</sup> the court found that the “civil matters” exception specified in OHIO REV. CODE ANN. § 2151.352 applied.<sup>11</sup> The juvenile court magistrate awarded the great-grandparents legal custody of both children, and the common pleas court judge adopted the magistrate’s recommendation.<sup>12</sup> Notably, the great-grandparents were represented by their own private counsel throughout the custody proceedings.<sup>13</sup>

On appeal, the parents argued that the right to court appointed counsel should extend to indigent parties in private action custody cases.<sup>14</sup> While both the United States Supreme Court and the Supreme Court of Ohio have held that there is no absolute right to court appointed counsel in civil matters,<sup>15</sup> both courts recently have

6. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*2 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *rev. denied*, 11 N.E.3d 286 (Ohio 2014).

7. *In re B.B.*, 11 N.E.3d. at 286.

8. *See*, specifically, the qualifying language of both OHIO REV. CODE ANN. § 2151.352—“If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel . . . except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2) . . . .”—and Ohio R. Juv. P. 4—“This rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.” (West 2014).

9. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*4.

10. *See* OHIO REV. CODE ANN. § 2151.23(A)(2) (concerning jurisdiction of the juvenile court “to determine the custody of any child not a ward of another court of this state”) (West 2014).

11. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*6-7; OHIO REV. CODE ANN. § 2151.352 (West 2014) (“If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code *except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2) . . . of section 2151.23 of the Revised Code.*”) (emphasis added).

12. *In re B.B.*, 11 N.E.3d. at 286.

13. Appellant’s Mem. Supp. Jurisdiction, at 2, *In re B.B.*, 11 N.E.3d 286 (Mar. 27, 2014), available at [http://www.sconet.state.oh.us/pdf\\_viewer/pdf\\_viewer.aspx?pdf=743397.pdf](http://www.sconet.state.oh.us/pdf_viewer/pdf_viewer.aspx?pdf=743397.pdf)

14. *See*, in particular, Appellants’ first Proposition of Law. *Id.* at 4–5, 6.

15. *See, e.g.*, *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 33 (1981) (recognizing that while “wise public policy [] may require that higher standards be adopted than those minimally tolerable under the Constitution,” under the circumstances, the trial court was not required to appoint counsel for appellant in termination of parental rights case); *State ex rel. Asberry v. Payne*, 693 N.E.2d 796 (Ohio 1998), *superseded by* 2005 amendment to OHIO REV. CODE ANN. § 2151.352 (noting that there is no requirement under the federal Constitution that all indigent parties in a juvenile proceeding be provided appointed counsel).

examined that right through a fundamental fairness lens.<sup>16</sup> Although not child custody cases, these more recent decisions should provide prospective guidance for Ohio courts concerning the appointment of counsel to indigent parties.

This Comment examines whether Ohio courts should extend the right to appointed counsel to indigent parents in civil custody suits. Part II outlines how the United States and Ohio Supreme Courts have viewed the question of appointment of counsel to indigent parties in other civil matters. Tracing legislative history, Part II also reveals that in Ohio, an indigent parent's statutory right to appointed counsel was removed to reduce county and state budgets. Part III argues that, despite the textual differences between legal custody and permanent custody, the impact realized by indigent parents in civil custody cases is akin to permanent removal—irrespective of the statutory label—and runs afoul of due process and fundamental fairness. Finally, Part IV concludes that a categorical elimination of an indigent party's right to appointed counsel in so-called private action custody cases impedes meaningful access to the courts for indigent parents and their children. Ohio statutory law should not be read as a complete bar to appointed counsel for indigent parents in civil actions.

## II. BACKGROUND

The Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”<sup>17</sup> Article I, Section 16 of the Ohio Constitution parallels the Fourteenth Amendment's due process protections.<sup>18</sup> Both the United States and Ohio Supreme Courts have recognized a parent's “basic civil right” to raise his or her children.<sup>19</sup> Since parents have constitutional custodial rights, any action by the

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16. See *Turner v. Rogers*, 131 S.Ct. 2507 (2011); *Liming v. Damos*, 979 N.E.2d 297 (Ohio 2012).

17. U.S. Const. amend. XIV, § 1.

18. *In re B.C.*, 21 N.E.3d 308, 312 (Ohio 2014).

19. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (finding that the parent-child relationship “undeniably warrants deference and, absent a powerful countervailing interest, protection.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (supporting that a parent's interest in the care, custody, and management of his or her child is “fundamental,” and “does not evaporate simply because [the parents] have not been model parents or have lost temporary custody of their child . . .”); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (concluding “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”); *In re Perales*, 369 N.E.2d 1047, 1051–52 (Ohio 1977) (describing a parent's right to the custody of his or her child as “paramount.”); *In re Murray*, 556 N.E.2d 1169, 1171 (Ohio 1990) (recognizing that the right to raise a child is an “essential” and “basic civil right.”) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

state that affects this parental right, such as granting custody of a child to a non-parent, must be conducted pursuant to procedures that are fundamentally fair.<sup>20</sup>

In 1981, the United States Supreme Court held in *Lassiter v. Dept. of Social Services of Durham Cty., N.C.*<sup>21</sup> that the Constitution does not require courts to appoint counsel for indigent parents in all termination of parental rights proceedings.<sup>22</sup> According to the *Lassiter* majority, there is a presumption of a right to court appointed counsel only where loss of one's physical liberty is at stake.<sup>23</sup> Yet, under *Lassiter*, even when confinement is a possibility in a civil case, a court must balance the strength of the litigant's interest, the risk of error, and the state's interest to determine whether the court should appoint counsel.<sup>24</sup> Applying these balancing factors, the *Lassiter* Court recognized that "the State shares with the parent an interest in a correct decision, [and] has a relatively weak pecuniary interest" in avoiding the expense of court appointed counsel.<sup>25</sup> However, as reasoned by the majority, the failure to appoint counsel does not presumptively deny a parent of constitutional rights where the presence of counsel could not have made a determinative difference.<sup>26</sup>

Twenty years after *Lassiter*, the United States Supreme Court held in *Turner v. Rogers* that the State is not automatically required "to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration."<sup>27</sup> The Court further found that a State meets due process requirements when it provides "alternative procedural safeguards."<sup>28</sup> The *Turner* Court, however, ultimately determined that the defendant "received neither counsel nor the benefit of alternative procedures."<sup>29</sup> The defendant's incarceration thus violated due process.

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20. See *Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *In re Adoption of Mays*, 507 N.E.2d 453, 456 (Ohio Ct. App. 1986).

21. 452 U.S. 18 (1981).

22. *Id.* at 31.

23. *Id.* at 26–27.

24. *Id.* at 27 (referencing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

25. *Id.* at 19, 31 (emphasis added).

26. *Id.* at 33.

27. 131 S.Ct. 2507, 2510, 2520 (2011).

28. *Id.* at 2520 (finding that due process "does not require the provision of counsel where the opposing parent or other custodian . . . is not represented by counsel and the State provides alternative procedural safeguards . . .").

29. *Id.* (listing alternate procedures as "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings.")

### A. *Modifications to Ohio's Juvenile Law*

The Supreme Court of Ohio last interpreted the bounds of the appointment of counsel in civil custody suits in 1998 when it decided *State ex rel. Asberry v. Payne*.<sup>30</sup> In *Asberry*, the court held that the plain language of Ohio's "right to counsel" statute<sup>31</sup> provided that "indigent children, parents, custodians, or other persons in loco parentis were entitled to appointed counsel in *all juvenile proceedings*."<sup>32</sup> The court determined that a grandmother, who had cared for and supported her grandchild for several years,<sup>33</sup> satisfied the definition of in loco parentis<sup>34</sup> and thus qualified for court appointed counsel as a party to the proceeding.<sup>35</sup> Despite a previous amendment to the juvenile rules of procedure concerning assistance of counsel,<sup>36</sup> the court clarified that the grandmother's right to appointed counsel clearly emanated from statute, and, under the circumstances, Ohio statutory law required that counsel be appointed.<sup>37</sup>

The right to counsel statute,<sup>38</sup> however, was amended in 2005 specifically to "remove[] an indigent person's right to appointed counsel in certain civil proceedings in juvenile court."<sup>39</sup> Now, when

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30. 693 N.E.2d 794 (Ohio 1998), *superseded by* 2005 amendment to OHIO REV. CODE ANN. § 2151.352. See H.R. 66, 126th Gen. Assemb., Reg. Sess. (Ohio 2005) discussed *infra*, at notes 42, 44, and accompanying text.

31. OHIO REV. CODE ANN. § 2151.352.

32. *Asberry*, 693 N.E.2d. at 798 (emphasis added).

33. *Id.* at 795.

34. *Id.* at 798 n.2 (stating that "[a] person *in loco parentis* assumes the same duties as a guardian or custodian, although not through a legal proceeding."); see also Black's Law Dictionary (9th ed. 2009) (defining in loco parentis as "in the place of a parent . . . [o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent.>").

35. *Id.* at 798.

36. *Id.* See also qualifying sentence added to Ohio R. Juv. P. 4(A) in 1994 ("This rule shall not be construed to provide a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.>").

37. *Asberry*, 693 N.E.2d. at 798, 799.

38. OHIO REV. CODE ANN. § 2151.352.

39. See *In re M.E.H.*, No. 08CA4, 2008 WL 2766107, at \*3 n.1 (Ohio 4th Dist. Ct. App. July 10, 2008) ("We acknowledge that *State ex rel. Asberry v. Payne* . . . required a trial court to appoint counsel in a similar situation. However, after *Payne*, the legislature amended R.C. 2151.352, which now limits the right to counsel at government expense. See House Bill 66.") House Bill 66 modified an indigent party's right to appointed counsel in 2005. In *In re B.B.*, however, the Third District string cites to a case, *In re D.J.M.*, which incorrectly references January 1, 2002 as the date the statute changed. *In re B.B.*, Nos. 13-13-36, 13-13-37, at 7 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *review denied*, 11 N.E.3d 286 (Ohio 2014); see also *In re D.J.M.*, 2011-L-022, 2011 WL 6938427, at \*6 (Ohio 11th Dist. Ct. App. Dec. 30, 2011) (finding that "[t]he statute has since been amended, effective January 1, 2002, [sic] to specify that the right to appointed counsel for indigent parties at government expense does not apply to civil custody matters filed under R.C. 2151.23(A)(2)"). A close look at legislative history reveals that a Senate Bill enacted in 2002—S. 179, 123rd Gen. Assemb., Reg. Sess. (Ohio 2002), available at [http://archives.legislature.state.oh.us/BillText123/123\\_SB\\_179\\_ENR.pdf](http://archives.legislature.state.oh.us/BillText123/123_SB_179_ENR.pdf)—simply modified the

a proceeding is initiated for legal custody of a child who is not a ward of the state,<sup>40</sup> it is treated as a “civil matter,”<sup>41</sup> excepted from any entitlement to appointed counsel.

*B. Counting the Costs: Why Limit Indigent Ohioans’ Right to Appointed Counsel in Civil Matters?*

Ohio’s Amended Substitute House Bill 66 (H.B. 66),<sup>42</sup> labeled a “Budget Bill,”<sup>43</sup> specifically removed, “[f]or certain civil matters only, . . . an indigent person’s [statutory] right to appointed counsel when the person is a party to a proceeding in juvenile court.”<sup>44</sup> H.B. 66 adjusted Ohio’s main operating budget and implemented certain budget cuts for the fiscal year 2006 to 2007.<sup>45</sup> Interestingly, the bill, as introduced, did not contemplate eliminating an indigent party’s right to appointed counsel.<sup>46</sup> Nonetheless, after the Ohio General Assembly enacted H.B. 66, the lens for approving counsel for indigent parties in civil custody suits shifted from fundamental fairness to fiscal

language of OHIO REV. CODE ANN. § 2151.352 to make the statute gender neutral. *See* S. 179, 123rd Gen. Assemb., at 78. Thus, despite the court’s assertions in *In re D.J.M.*, an indigent party’s right to court appointed counsel in juvenile court proceedings remained intact until 2005. The source of the court’s error may be linked to a curious reference found in a 2002 Sixth District appellate court opinion concerning visitation. *See In re Bobbi Jo S. v. Jeff W.C.*, No. L-01-1252, 2002 WL 360675 (Ohio 6th Dist. Ct. App. Mar. 8, 2002) (finding that although the right to court appointed counsel for indigent parties in juvenile court cases was recognized by the Ohio Supreme Court in *Asberry*, the controlling “statute has since been amended, effective January 1, 2002, to specify that the right to appointed counsel . . . is now limited . . .”). The court in *In re D.J.M.* pin cites to the *Bobbi Jo* opinion to bolster its stance that the “appellant was therefore not entitled to appointed counsel.” *In re D.J.M.*, 2011 WL 6938427, at \*6. Importantly, the court in *In re D.J.M.* mischaracterizes the holding of *In re Bobbi Jo*. Despite the misinterpretation found in *In re Bobbi Jo* concerning the amendment to Ohioans’ statutory right to counsel, the *Bobbi Jo* court actually held that “the child was clearly entitled to an appointed attorney under the law *then in effect*.” *In re Bobbi Jo*, 2002 WL 360675, at \*2 (emphasis added). Thus, the Third District court’s string cite list of authorities, *In re B.B.*, Ohio 3d Dist. Ct. App. at \*7, contains procedural and factual errors.

40. Pursuant to OHIO REV. CODE ANN. § 2151.23(A)(2) (West 2014).

41. OHIO REV. CODE ANN. § 2151.352, which governs the right to counsel in juvenile proceedings, now provides:

A child, the child’s parents or custodian, or any other person in loco parentis of the child is entitled to representation by legal counsel at all stages of the proceedings under this chapter or Chapter 2152. of the Revised Code. If, as an indigent person, a party is unable to employ counsel, the party is entitled to have counsel provided for the person pursuant to Chapter 120. of the Revised Code *except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2)* . . . of section 2151.23 of the Revised Code. (emphasis added).

42. H.R. 66, 126th Gen. Assemb., Reg. Sess. (Ohio 2005).

43. OHIO 126TH GEN. ASSEMB., JOURNAL 2 (2005-2006), *available at* [http://www.sos.state.oh.us/sos/upload/records/journal/acts\\_126.pdf](http://www.sos.state.oh.us/sos/upload/records/journal/acts_126.pdf).

44. OHIO LEGIS. SERV. COMM’N, FINAL ANALYSIS 415 (2005), *available at* <http://www.lsc.state.oh.us/analyses126/05-hb66-126.pdf>.

45. *See* OHIO LEGIS. SERV. COMM’N, FINAL STATUS REP. OF LEGIS. 2 (May 4, 2007).

46. To track the changes from when the bill was introduced, passed, and enacted, see OHIO LEGIS. SERV. COMM’N, FINAL COMPARISON DOC. 746 (Sep. 27, 2005).

constraint.<sup>47</sup>

The projected fiscal effect of H.B. 66 reads as follows:

Fiscal effect: As a result of the provision's restriction on the use of appointed counsel in certain juvenile court matters, theoretically at least, (1) counties may realize a decrease in the amount of money spent annually on legal assistance, and (2) the state may realize a decrease in the amount of money that it reimburses counties annually for the provision of indigent defense legal services.<sup>48</sup>

This fiscal analysis is puzzling in light of a contemporaneous task force appointed by former Supreme Court of Ohio Chief Justice, Thomas J. Moyer, "to examine indigent and pro se legal representation . . . [and] ensure that Ohio citizens who cannot afford to . . . hire an attorney have the same fair and equal access to the court system as those with representation."<sup>49</sup>

Curiously, in April 2006—a year after H.B. 66 took effect—the task force released its report and recommended that funding be *increased* for civil legal representation, not stymied.<sup>50</sup> The report pointed out that "civil indigent representation in Ohio is seriously under-funded" and acknowledged that "adequate representation of indigent persons in civil proceedings, although not constitutionally mandated, *is a matter of substantial interest to the people of Ohio.*"<sup>51</sup> Importantly, the task force further found representation "of indigent Ohioans in civil disputes . . . critical to the fair administration of justice [in assuring] that indigent persons have meaningful access to the courts . . ."<sup>52</sup> The task force concluded that substantial additional funding was needed "to provide legal assistance to *all* indigent Ohioans involved in civil legal matters."<sup>53</sup>

Four months later, an American Bar Association (ABA) task force also recommended that indigent litigants be appointed counsel in civil

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47. *Id.*

48. *Id.*

49. Office of Pub. Info., *Moyer Appoints Task Force to Examine Indigent and Pro Se Legal Representation*, SUP. CT. & JUD. SYS. NEWS, May 13, 2004, available at [http://www.supremecourt.ohio.gov/PIO/news/2004/indigent\\_051304.asp](http://www.supremecourt.ohio.gov/PIO/news/2004/indigent_051304.asp).

50. HON. JOHN ADKINS, CHAIR, REPORT & RECOMMENDATIONS OF THE SUPREME COURT TASK FORCE ON PRO SE & INDIGENT LITIGANTS 36 (Apr. 2006), available at [http://www.supremecourt.ohio.gov/Publications/prose/report\\_april06.pdf](http://www.supremecourt.ohio.gov/Publications/prose/report_april06.pdf).

51. *Id.* at 36-37 (emphasis added); see also Ohio Const. Art. IV § 2(B)(2)(e); Ohio Sup. Ct. Prac. R. 5.02(A)(3); Ohio Sup. Ct. Prac. R. 7.01(B)(1)(d)(iii).

52. ADKINS, *supra* note 50, at 37.

53. *Id.* (emphasis added). The report did not address the 126th General Assembly's recent legislation excluding certain Ohioans from court appointed legal assistance.

matters.<sup>54</sup> The ABA “urge[d] 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 shelter, sustenance, safety, health or *child custody*.”<sup>55</sup>

More recently, Supreme Court of Ohio Chief Justice, Maureen O’Connor, has stated that “[a]ccess to justice should be an essential part of any state’s legal system and the need to meet that goal has only increased in [] times of economic stress.”<sup>56</sup> Yet, despite documented national and local concern, Ohio eliminated the right to appointed counsel for indigent persons in certain child custody cases and never reinstated it.

### C. *The Genesis of Ohio’s Restricted Right to Appointed Counsel*

Prior to Ohio’s statutory elimination of an indigent party’s right to appointed counsel in certain juvenile court proceedings, the Supreme Court of Ohio proposed a controversial amendment to the juvenile rule concerning assistance of counsel.<sup>57</sup> The existing rule provided, in relevant part, that “[e]very party shall have the right to be represented by counsel and every child, parent, custodian, or other person in loco parentis the right to appointed counsel if indigent.”<sup>58</sup> The Supreme Court, however, sought to abrogate an indigent party’s right to court appointed counsel in cases concerning “custody, visitation, and modification of child support” and in “so-called ‘private’ child abuse, neglect or dependency actions.”<sup>59</sup> In response, Representative David Hartley initiated House Concurrent Resolution 38 to “disapprove the proposed amendments to the Ohio Rules of Juvenile Procedure.”<sup>60</sup>

During committee meetings, members of the Ohio State Legal Services Association and Ohio Public Defenders Commission

54. HON. HOWARD H. DANA, JR., CHAIR, AM. BAR ASS’N TASK FORCE ON ACCESS TO CIVIL JUSTICE, 112A REPORT TO THE HOUSE OF DELEGATES 1, 17 (Aug. 2006), available at [http://www.legalaidnc.org/Public/Participate/community/ABA\\_Resolution\\_onehundredtwelve\[1\].pdf](http://www.legalaidnc.org/Public/Participate/community/ABA_Resolution_onehundredtwelve[1].pdf).

55. *Id.* at 1 (emphasis added).

56. Barbara Peck, *Access Crisis: Ohio and Other States Struggle to Provide Liberty and Justice for All*, ALL RISE, OHIO ST. UNIV. MORITZ COLLEGE OF LAW MAGAZINE 46, 47 (Summer 2013), available at <http://moritzlaw.osu.edu/news/allrise/2013/07/access-crisis-ohio-and-other-states-struggle-to-provide-liberty-and-justice-for-all/>.

57. See generally PAUL C. GIANNELLI & PATRICIA YEOMANS SALVADOR, OHIO JUV. L. § 40:3 (West 2014) (outlining the genesis of the 1994 amendment to Ohio R. Juv. P. 4(A)); see also HOUSE CIVIL & COMMERCIAL LAW COMM., H.R. CON. R. 38 COMM. REP. (Mar. 22, 1994), available at [http://www.rotundacollection.com/Hannah/Report\\_CommitteeReport.aspx?id=108&ps=true&HL=True](http://www.rotundacollection.com/Hannah/Report_CommitteeReport.aspx?id=108&ps=true&HL=True).

58. Ohio R. Juv. P. 4(A).

59. GIANNELLI & YEOMANS, *supra* note 57.

60. H.R. Con. Res. 38, 120th Gen. Assemb. (Ohio 1994).

strongly opposed the proposed rule amendment.<sup>61</sup> Attorney Michael Smalz, for example, challenged the new rule as “giv[ing] the court too much authority to deny a clear right to counsel.”<sup>62</sup> He further challenged the rule as a “major step backwards” from Ohio’s “effort to provide legal services to the poor.”<sup>63</sup> Other commenters also vigorously attacked the proposed amendment during the rule change public comment period as limiting the right to appointed counsel for indigent persons.<sup>64</sup> The court, in response, withdrew its proposal and substituted it with an amendment, subsequently accepted by the Ohio House of Representatives Civil & Commercial Law committee.<sup>65</sup> The substituted language of the juvenile rule retained the rule’s previous language concerning court appointed counsel, but added a qualifying sentence, which—as enacted—reads: “This rule shall not be construed to provide a right to appointed counsel in cases in which that right *is not otherwise provided for by constitution or statute.*”<sup>66</sup> The accompanying Staff Note indicates that this sentence was added “to clarify that Juv. R. 4 does not create a right to court-appointed counsel, and that the right to appointed counsel arises from other sources of law.”<sup>67</sup> Ohio courts, therefore, are left to decide whether and what “other sources of law extend the right to appointed counsel in [] juvenile court proceedings.”<sup>68</sup>

#### D. Applying “Other Sources of Law”: Are Any Doors Open?

In *Liming v. Damos*,<sup>69</sup> the Supreme Court of Ohio held that the due process clauses of the Ohio and United States Constitutions did not mandate appointment of counsel for an indigent parent at a purge

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61. See HOUSE CIVIL & COMMERCIAL LAW COMM., H.R. CON. R. 38 COMM. REPS. (Mar. 15, 1994, Mar. 22, 1994, & May 17, 1994), available at [http://www.rotundacollection.com/Hannah/Report\\_CommitteeReport.aspx?id=107&ps=true&HL=True](http://www.rotundacollection.com/Hannah/Report_CommitteeReport.aspx?id=107&ps=true&HL=True); [http://www.rotundacollection.com/Hannah/Report\\_CommitteeReport.aspx?id=108&ps=true&HL=True](http://www.rotundacollection.com/Hannah/Report_CommitteeReport.aspx?id=108&ps=true&HL=True); and [http://www.rotundacollection.com/Hannah/Report\\_CommitteeReport.aspx?id=110&ps=true&HL=True](http://www.rotundacollection.com/Hannah/Report_CommitteeReport.aspx?id=110&ps=true&HL=True). In contrast to the fiscal constraint proposed in the 2005 budget bill limiting a right to court appointed counsel in certain juvenile court matters, see text accompanying notes 47 and 48, *supra*, the Ohio Public Defenders Office—opposing Ohio R. Juv. P. 4(A)’s proposed amendment—presented testimony that private custody actions “are a small part of the caseload and wouldn’t be a financial burden.” HOUSE CIVIL & COMMERCIAL LAW COMM. at Mar. 22, 1994 report.

62. HOUSE CIVIL & COMMERCIAL LAW COMM., at March 15, 1994 report.

63. *Id.*

64. *Id.* See also GIANNELLI & YEOMANS, *supra* note 57.

65. See GIANNELLI & YEOMANS, *supra* note 57; HOUSE CIVIL & COMMERCIAL LAW COMM., *supra* note 61, at May 24, 1994 report.

66. Ohio R. Juv. P. 4(A) (emphasis added). See also GIANNELLI & YEOMANS, *supra* note 57.

67. See Ohio R. Juv. P. 4(A); GIANNELLI & YEOMANS, *supra* note 57.

68. GIANNELLI & YEOMANS, *supra* note 57 (internal quotation marks omitted).

69. 979 N.E.2d 297 (Ohio 2012).

hearing<sup>70</sup> for failure to pay child support, “when that parent was previously represented by counsel at the originating civil-contempt proceeding.”<sup>71</sup> Although appellant faced possible incarceration, the court nevertheless determined that the matter stemmed from the original *civil* contempt proceeding, and, therefore, due process did not require that the court provide counsel in civil matters.<sup>72</sup>

Conversely, in 2013, the Supreme Court of Ohio decided *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Division* and found that the right to appointed counsel extended to indigent parties in guardianship review hearings.<sup>73</sup> The court acknowledged that, while no absolute right to counsel exists in civil litigation, the Ohio legislature may provide an indigent party with such right.<sup>74</sup> Based on the plain language of the statutes governing guardianship proceedings, the court found that the hearing requirements concerning guardianship appointments extended to and provided for appointment of counsel at review hearings.<sup>75</sup>

On October 16, 2014, the Supreme Court of Ohio decided another matter concerning an indigent party’s rights—this time in the context of custody proceedings.<sup>76</sup> In *In re B.C.*, the court ruled that a parent is not entitled to file a delayed appeal contesting termination of his or her parental rights.<sup>77</sup> The Court acknowledged that “[t]he fundamental requisites of due process of law in any proceeding are notice and the opportunity to be heard.”<sup>78</sup> However, because appellant had voluntarily appeared before the court, surrendered her parental rights, and, moreover, was represented by counsel during the termination proceedings, the court found that sufficient procedural safeguards existed and ensured that the appellant’s termination hearing was “fundamentally fair.”<sup>79</sup>

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70. *Id.* at 299, 306 (defining a purge hearing as “a hearing to determine whether a contemnor has purged himself of [his previous] civil contempt” by complying with the court’s conditions). See also Black’s Law Dictionary (WestlawNext 2014) (defining “purge” as “[t]o exonerate (oneself or another) of guilt <the judge purged the defendant of contempt>.”).

71. *Liming*, 979 N.E.2d at 306.

72. *Id.* at 299.

73. 986 N.E.2d 925, 931 (Ohio 2013).

74. *Id.* at 928 (citing *State ex rel. Asberry v. Payne*, 693 N.E.2d 794 (Ohio 1998) to illustrate that the right to court appointed counsel in juvenile court custody cases existed pursuant to Ohio Revised Code prior to its amendment).

75. *Id.* at 929-30.

76. *In re B.C.*, 21 N.E.3d 308 (Ohio 2014).

77. *Id.* at 309, 315.

78. *Id.* at 312.

79. *Id.* at 312, 315.

## III. DISCUSSION

Because complete termination of a parent's rights over the custody and care of his or her child "has been described as the family law equivalent of the death penalty in a criminal case,"<sup>80</sup> parents, therefore, "must be afforded every procedural and substantive protection [that] the law allows."<sup>81</sup> Although *In re B.B.* involves something less than the permanent termination of parental rights, both parents were indigent parties to the custody removal hearing, and their fundamental right to the care and custody of their children was impacted by the magistrate's refusal to appoint them counsel.

A. *Right to Counsel, but No Right to Appointed Counsel*

Ohio statutory law<sup>82</sup> provides that an indigent party is entitled to counsel, but also qualifies that entitlement with enumerated exceptions to restrict the right to appointed counsel when a juvenile court exercises its jurisdiction in civil matters.<sup>83</sup> As applied to *In re B.B.*, the great-grandparents petitioned the court for emergency custody of B.B. and D.B.<sup>84</sup> The court informed the parents of their right to representation,<sup>85</sup> however denied the parents a right to an *appointed* attorney.<sup>86</sup> The court explained that Ohio statutory law limits an indigent party's entitlement to appointed counsel in certain civil matters before the juvenile court.<sup>87</sup> After the parents failed to retain a lawyer, the court cautioned that they would be proceeding *pro se*.<sup>88</sup>

The great-grandparents, through hired counsel, filed sworn statements that both parents had abandoned the kids, "were unable to provide [for their] care and support, and were unfit parents."<sup>89</sup> The great-grandparents subsequently filed amended complaints alleging

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80. *Id.* at 313 (citing *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991) (internal quotation marks omitted)).

81. *Id.*

82. See OHIO REV. CODE ANN. § 2151.352.

83. See OHIO LEGIS. SERV. COMM'N, FINAL ANALYSIS, *supra* note 44, at 415 ("[I]f the party is indigent, the party is not entitled to appointed counsel in a civil matter if the court is exercising jurisdiction pursuant to one of the following bases listed in R.C. 2151.23(A)(2), (3), (9), (10), (11), (12), or (13); (B)(2) through (6); (C); (D); or (F)(1) or (2) . . . To determine the custody of any child not a ward of another Ohio court . . .").

84. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*2 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *rev. denied*, 11 N.E.3d 286 (Ohio 2014).

85. *Id.*; see also OHIO REV. CODE ANN. § 2151.352 and Ohio R. Juv. P. 4(A).

86. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*2.

87. *Id.*; see also OHIO REV. CODE ANN. § 2151.352.

88. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*3.

89. *Id.* at \*2.

sexual abuse and failure to protect.<sup>90</sup> The Third District strictly construed the limiting language of Ohio R. Juv. P. 4(A)'s assistance of counsel<sup>91</sup> in conjunction with OHIO REV. CODE ANN. § 2151.352's right to counsel<sup>92</sup> when denying B.B.'s and D.B.'s parents court appointed representation. However, in light of the statutory definitions of dependency, abuse, and neglect,<sup>93</sup> coupled with the allegations of abuse, sexual abuse, and abandonment embedded in the great-grandparents' complaints,<sup>94</sup> the juvenile court could have—and, arguably, should have—appointed counsel for the parents, as well as a guardian ad litem to represent the best interests of the children.<sup>95</sup> Indeed, Chapter 2151 of the Ohio Revised Code outlines procedures for cases involving juveniles, including custody hearings, and directs courts to interpret the chapter's provisions liberally.<sup>96</sup> The statute further mandates that judicial procedures must ensure that the parties receive a fair hearing, in which “constitutional and other legal rights are recognized and enforced.”<sup>97</sup> Justice O'Donnell's dissent in *Liming* captures the same sentiment: “Assuming indigency . . . the court violated Liming's right to procedural due process when it denied his request for appointed counsel.”<sup>98</sup>

Although the Ohio General Assembly expressly “limit[ed] the right to counsel at government expense,”<sup>99</sup> this limitation should not foreclose the possibility that fundamental fairness—“the touchstone of due process”—might require the appointment of counsel under certain circumstances.<sup>100</sup> Notably, the *Liming* majority recognized

90. *Id.*

91. Ohio R. Juv. P. 4(A) (qualifying that “[t]his rule shall not be construed to provide for a right to appointed counsel in cases in which that right is not otherwise provided for by constitution or statute.”).

92. OHIO REV. CODE ANN. § 2151.352 (recognizing a right to court appointed counsel “except in civil matters in which the juvenile court is exercising jurisdiction pursuant to division (A)(2) . . .”).

93. See OHIO REV. CODE ANN. § 2151.04 (West 2014) (defining “dependent child”); OHIO REV. CODE ANN. § 2151.03 (West 2014) (defining “neglected child”); and OHIO REV. CODE ANN. § 2151.031 (West 2014) (defining “abused child”).

94. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*2.

95. See *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 986 N.E.2d 925, 930 (Ohio 2013) (comparing the plain language of the statutes to determine counsel should be provided).

96. OHIO REV. CODE ANN. § 2151.01 (West 2014).

97. OHIO REV. CODE ANN. § 2151.01(B).

98. *Liming v. Damos*, 979 N.E.2d 297, 309 (Ohio 2012) (O'Donnell, J., dissenting). See also *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 59 (1981) (Stevens, J., dissenting) (“Meeting the Court on its own terms, Justice Blackmun demonstrates that the *Mathews v. Eldridge* analysis requires the appointment of counsel in this type of case.”).

99. *In re M.E.H.*, No. 08CA4, 2008 WL 2766107, at \*3 n.1 (Ohio 4th Dist. Ct. App. July 10, 2008).

100. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (“We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis . . .”).

that an attorney represented Liming at the original hearing, and neither Liming nor his counsel objected to the magistrate's decision or otherwise appealed the contempt order.<sup>101</sup> According to the majority, Liming enjoyed the procedural safeguards akin to those outlined in *Turner*.<sup>102</sup> The court further determined that the risk that the judicial procedure would lead to an erroneous decision was low.<sup>103</sup>

In contrast, the parents in *In re B.B.* were forced to defend themselves during the custody hearing.<sup>104</sup> They timely filed objections to the juvenile court judgment.<sup>105</sup> Because “[b]oth parents and children have interests to protect when threatened with Court-ordered separation,”<sup>106</sup> it is fundamentally unfair to require indigent parents to face a represented opponent in court when their parent-child relationship is at stake. Indeed, the ABA task force warned of “the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers.”<sup>107</sup> Moreover, “our adversary system of justice assumes that both sides are capable of participating.”<sup>108</sup>

As noted by Ohio Supreme Court Chief Justice Maureen O'Connor, although the court “has been active in supporting litigants that are self-representing, . . . [t]his has an upside and a downside . . . . Sometimes [pro se litigants] do themselves more harm than good when they represent themselves, but they do not have access to representation or do not qualify for aid.”<sup>109</sup>

While Ohio has rejected a categorical rule requiring the appointment of counsel for indigent parents in all custody

101. *Liming*, 979 N.E.2d at 306.

102. *Id.* See also discussion of *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011), *supra* notes 28 and 29 and accompanying text.

103. *Liming*, 979 N.E.2d at 306.

104. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*3 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *rev. denied*, 11 N.E.3d 286 (Ohio 2014).

105. *Id.* at 4.

106. *In re A.G. B.*, 878 N.E.2d 49, 53 (Ohio Ct. App. Sept. 5, 2007).

107. AM. BAR ASS'N TASK FORCE, *supra* note 54, at 16. Notably, the ABA filed an amicus brief in *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18 (1981) advocating that “in order to minimize [the risk of error] and ensure a fair hearing, procedural due process demands that counsel be made available to parents, and that if the parents are indigent, it be at public expense.” *Id.* at 2, 3. See ABA Brief as Amicus Curiae Supporting Petitioner, *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340036, at \*3-\*4.

108. HOUSE CIVIL & COMMERCIAL LAW COMM., *supra* note 57, at Mar. 22, 1994 report.

109. Peck, *supra* note 56, at 47; see also Appellate Br., *In re Marriage of King v. King*, 174 P.3d 659 (Wash. 2007) (No. 79978-4), 2006 WL 5109904, at \*1 (highlighting statement made by indigent mother during custody removal proceeding: “I’m a good mother; I’m a lousy lawyer.”); *Powell v. Ala.*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

proceedings,<sup>110</sup> it at one time recognized this right.<sup>111</sup> Although the right to counsel statute now reads that no entitlement to appointed counsel exists,<sup>112</sup> court appointed representation arguably still remains available at a judge's discretion.<sup>113</sup>

*B. Limited Jurisdiction: Interpretations and Misinterpretations by Ohio Courts*

While some interpretations of Ohio statutory law may exclude the appointment of counsel in cases where a child is not ward of the state,<sup>114</sup> the Ohio Fourth District Court of Appeals' holdings in *In re T.C.K.*<sup>115</sup> and *In re A.G.B.*<sup>116</sup> highlight the unsettled nature of Ohio juvenile courts' appointments of counsel to indigent parties in so-called private action custody cases.

In *In re T.C.K.*, the Fourth District found that “[n]either appellant nor the child ha[d] a right to appointed counsel in a private custody matter between a parent and a non-parent and in which the state [did] not seek a termination of parental rights.”<sup>117</sup> The court documented that the county children services agency previously had placed T.C.K. in the paternal aunt's legal custody,<sup>118</sup> but that this case arose from the aunt's custody petition.<sup>119</sup> Nonetheless, the trial court appointed a guardian ad litem to represent the child's best interests in response to the aunt's private-party petition for legal custody.<sup>120</sup>

In *In re A.G.B.*, the father, as a private party actor, filed an emergency custody complaint against the child's mother alleging that A.G.B. was an abused, neglected, and dependent child.<sup>121</sup> Even

110. See OHIO REV. CODE ANN. § 2151.352, as amended.

111. See discussion of *Asberry v. Payne*, 693 N.E.2d 794, 798-99 (Ohio 1998), *supra* text accompanying notes 32 and 37.

112. See OHIO REV. CODE ANN. § 2151.352.

113. See HOUSE CIVIL & COMMERCIAL LAW COMM., H.R. CON. R. 38 COMM. REP. (Mar. 29, 1994), *available at* [http://www.rotundacollection.com/Hannah/Report\\_CommitteeReport.aspx?id=109&ps=true&HL=True](http://www.rotundacollection.com/Hannah/Report_CommitteeReport.aspx?id=109&ps=true&HL=True) (arguing that while there is no right to court appointed counsel in private cases . . . “the [proposed] rule does not preclude counsel, but gives judges discretion.”); see also *State ex rel. McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 986 N.E.2d 925, 930 (Ohio 2013) (finding the issue “susceptible of different interpretations.”).

114. See OHIO REV. CODE ANN. § 2151.23(A)(2).

115. No. 13CA3, 2013 WL 4477400 (Ohio 4th Dist. Ct. App. Aug. 12, 2013).

116. 878 N.E.2d 49 (Ohio Ct. App. Sept. 5, 2007).

117. No. 13CA3, 2013 WL 4477400, at \*6.

118. *Id.* at \*1, \*2 (presumably pursuant to OHIO REV. CODE ANN. § 2151.353(A)(3) as outlined in S. 238, 126th Gen. Assemb., Reg. Sess. (Ohio 2006); see discussion *infra*, at notes 154 and 155).

119. *In re T.C.K.*, No. 13CA3, 2013 WL 4477400, at \*8.

120. *Id.* at \*1, \*6.

121. 878 N.E.2d 49, 51, 54 (Ohio Ct. App. Sept. 5, 2007) (noting that the father's complaint was filed pursuant to OHIO REV. CODE ANN. § 2151.23(A)(1), the subsection purportedly reserved for filings

though the county children services agency did not initiate the proceedings, the magistrate appointed counsel to represent the mother,<sup>122</sup> and, on remand, was required to appoint a guardian ad litem for the child.<sup>123</sup> The mother's failure to request appointment of a guardian ad litem did not waive the juvenile court's mandatory duty to appoint one under statute.<sup>124</sup> Judge Harsha "regretfully" concurred in the judgment, yet nonetheless agreed that the child was entitled to the services of guardian ad litem despite the mother's belated request.<sup>125</sup> According to Judge Harsha, "[w]ere we to decide that the mother couldn't raise the child's right, by whom and how would that interest gain protection?"<sup>126</sup> Judge Abele dissented, noting that the "filing and presentation of the case did not involve the local public children services agency."<sup>127</sup> In his opinion, the statute should "not apply to 'private' custody disputes."<sup>128</sup>

Similar to the father in *In re A.G.B.*, the great-grandparents in *In re B.B.* alleged neglect, abuse, and sexual abuse in their emergency petition and amended petition for custody.<sup>129</sup> Pursuant to the Ohio statute concerning the appointment of guardians ad litem,<sup>130</sup> a guardian shall be appointed to protect the interests of an "alleged abused or neglected child."<sup>131</sup> Yet the Third District reasoned that because the "case was not filed as a dependency, abuse, or neglect proceeding,"<sup>132</sup> and because the trial court never *adjudicated* the children as abused, neglected, or dependent, this somehow precluded the court from appointing counsel.<sup>133</sup> The juvenile court and Third District thus erred in myopically severing the method of filing from the statute governing appointment of guardians ad litem.<sup>134</sup>

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by children services agencies).

122. *Id.* at 51, 54.

123. *Id.* at 54.

124. *Id.* at 53.

125. *Id.* at 54 (Harsha, J., concurring).

126. *Id.* *But see In re T.C.K.*, No. 13CA3, 2013-WL-4477400, at \*5 (Ohio 4th Dist Ct. App. Aug. 12, 2013) (finding that mother "lacks standing to raise an error relating to the child's waiver of counsel."); *In re B.B.*, Nos. 13-13-36, 13-13-37, at 8 n.3 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *rev. denied*, 11 N.E.3d 286 (Ohio 2014) (questioning the parents' standing to argue against the trial court's failure to appoint a guardian ad litem).

127. *In re A.G.B.*, 878 N.E.2d at 54 (Abele, J., dissenting).

128. *Id.* at 55.

129. *In re B.B.*, Ohio 3d Dist. Ct. App. at 2.

130. OHIO REV. CODE ANN. § 2151.281(B)(1) (West 2014).

131. *Id.* (emphasis added); *see also* the third sentence of Ohio R. Juv. P. 4(A) ("When the complaint alleges that a child is an abused child, the court *must* appoint an attorney to represent the interests of the child.") (emphasis added).

132. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*4 (emphasis added).

133. *Id.* at \*8.

134. According to the simplified logic of the Third District, "In *In re A.G.B.*, the father filed a complaint pursuant to *R.C. 2151.27(A)(1)* alleging that A.G.B. was an *abused, neglected, and dependent*

As reasoned by the Third District in *In re B.B.*, “the trial court never invoked its jurisdiction pursuant to R.C. 2151.23(A)(1) to adjudicate B.B. and D.B. abused, neglected, or dependent children. Thus, the grant of custody to [the great-grandparents] was not based on a *finding* of abuse, neglect or dependency,”<sup>135</sup> nor were the children wards of the state.<sup>136</sup> Because the great-grandparents filed the complaint for legal custody alleging that the children’s parents were unfit parents, under the court’s strict interpretation of Ohio statutory law, this fell within an exception to the rule entitling indigent parties to appointed counsel.<sup>137</sup>

Although the county children services agency did not initiate the custody action,<sup>138</sup> this case, similar to *In re A.G.B.* and *In re T.C.K.*, nonetheless concerned allegations of abuse and neglect.<sup>139</sup> Because a parent has a “fundamental liberty interest . . . in the care, custody, and management of [his or her] child,”<sup>140</sup> the ramifications of loss of custody apply “equally in the context of an abuse or neglect proceeding in which a parent may potentially lose custody of his or her child to a children services agency *or* to an individual.”<sup>141</sup> An indigent parent’s fundamental right to appointed counsel should not hinge on distinguishing custody actions brought by private parties from those brought by children services agencies.

Notably, the Ohio statute governing the filing of juvenile court complaints<sup>142</sup> states that complaints may be brought by “*any person* having knowledge of a child who appears . . . to be [] unruly, abused, neglected, or dependent . . . .”<sup>143</sup> It appears that the Third District conflated the statutory jurisdiction of the juvenile court<sup>144</sup> with the statutory guidelines for filing a complaint.<sup>145</sup> As a result, the Third District erroneously distinguished the facts and circumstances of *In*

*child.* Here, the [great-grandparents] filed a complaint for legal custody pursuant to R.C. 2151.27(A)(2) alleging that [the children’s parents] were *unfit parents.*” *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*8, \*9 (emphasis in original) (internal citations omitted). Therefore, the court refused to appoint counsel for the parents or a guardian ad litem for the children.

135. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*6 (emphasis added).

136. See OHIO REV. CODE ANN. § 2151.23(A)(2).

137. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*7.

138. *Id.* at \*2. Frankly, this writer is surprised the State was not involved due to the nature of the allegations.

139. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*2. See also *In re A.G.B.*, 878 N.E.2d 49, 54 (Ohio Ct. App. Sept. 5, 2007).

140. *In re A.G.B.*, 878 N.E.2d at 53 (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

141. *Id.* (emphasis added).

142. OHIO REV. CODE ANN. § 2151.27 (West 2014).

143. OHIO REV. CODE ANN. § 2151.27(A)(1) (emphasis added). Moreover, the language of (A)(2) addresses habitual truancy, which is inapplicable here.

144. OHIO REV. CODE ANN. § 2151.23(A)(1)–(2).

145. OHIO REV. CODE ANN. § 2151.27(A)(1)–(2).

*re A.G.B.* and the principles of its holding from *In re B.B.*,<sup>146</sup> and, at the very least, failed to appoint a guardian ad litem for the children.

*C. What is in a Name? When Legal Custody Converts to Permanent Custody for Unrepresented Parents in Custody Removal Hearings*

As recognized by Justice O'Neill, "It is undisputed that parents are appointed counsel in permanent-custody cases . . . It makes no sense to deny parents that same right in legal custody cases . . . In both cases, the parents' fundamental right to raise their own children is being abrogated."<sup>147</sup> The Third District, however, emphasized that the great-grandparents "were not given permanent custody of B.B. and D.B., but rather a grant of legal custody."<sup>148</sup> The right to counsel, however, should not turn on the civil label attached.

Permanent custody is defined as "a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations . . . and *divests the natural parents* or adoptive parents of *all parental rights*, privileges, and obligations, including all residual rights and obligations."<sup>149</sup> On the other hand, legal custody is "a legal status that vests in the custodian the right to have physical care and control of the child . . . *all subject to any residual parental rights*, privileges, and responsibilities."<sup>150</sup>

"The important distinction" for the Third District was that "an award of legal custody does not divest parents of their residual parental rights, privileges, and responsibilities."<sup>151</sup> In contrast, a parent cannot regain custody of a child after a trial court has awarded permanent custody of that child to a public children services agency or a private child placing agency. It is the permanent nature of this loss of a fundamental right that makes it appropriate to equate an award of permanent custody to the "death penalty in a criminal case."<sup>152</sup> Yet, read in conjunction with the statute governing the disposition of abused, neglected, or dependent children,<sup>153</sup> Ohio's legislature intended for even legal custody to be permanent.

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146. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*8 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *rev. denied*, 11 N.E.3d 286 (Ohio 2014).

147. *In re B.B.*, 11 N.E.3d 286 (Ohio 2014).

148. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*6.

149. OHIO REV. CODE ANN. § 2151.011(B)(32) (West 2014) (emphasis added).

150. OHIO REV. CODE ANN. § 2151.011(B)(21) (West 2014) (emphasis added).

151. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*6 (internal citations omitted).

152. *In re B.C.*, 21 N.E.3d 308, 313 (Ohio 2014) (citing *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991)).

153. OHIO REV. CODE ANN. § 2151.353(A)(3)(b) (West 2014).

Ohio Senate Bill 238, for example, specifically permitted a child protection agency to file a complaint requesting *legal custody* be granted to a person other than the person from whom the child is being removed.<sup>154</sup> Moreover, the identified legal custodian must sign a statement of understanding “that legal custody of the child in question is *intended to be permanent*.”<sup>155</sup> The legal distinction between permanent custody and legal custody, therefore, is “susceptible of different interpretations.”<sup>156</sup>

Illustrating this point, the great-grandparents in *In re B.B.* requested termination of visitation altogether between the children and both parents, and the trial court ordered that the father have no contact with his children.<sup>157</sup> Applying Justice Blackmun’s dissent in *Lassiter*, the great-grandparents’ “aim [thus was] not simply to influence the parent-child relationship, but to *extinguish* it.”<sup>158</sup> In this circumstance, loss of even legal custody certainly resembles an indeterminate prison sentence. An award of permanent custody to a children services agency, therefore, may not be the only type of custody award which—in effect—terminates parental rights.

While the restraint placed upon one’s superior parental right theoretically is not as great as the severance of that right, when legal custody becomes a permanent placement—and when visitation rights are terminated as in *In re B.B.*—it is. Moreover, because no child placement agency was involved in *In re B.B.*, alternative procedural safeguards, described by the United States Supreme Court in *Turner*,<sup>159</sup> and echoed by the Ohio Supreme Court in *Liming*<sup>160</sup> and *In re B.C.*,<sup>161</sup> arguably are absent. For instance, no permanency planning guidelines for visitation or reunification existed, nor the requirement to appear back before the court for follow up or monitoring, nor were the best interests of the children reviewed by a

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154. See S. 238, 126th Gen. Assemb., Reg. Sess. (Ohio 2006), available at [http://archives.legislature.state.oh.us/BillText126/126\\_SB\\_238\\_EN\\_N.pdf](http://archives.legislature.state.oh.us/BillText126/126_SB_238_EN_N.pdf); OHIO LEGIS. SERV. COMM’N, REVISED FINAL ANALYSIS 21 (Sep. 21, 2006), available at <http://www.lsc.state.oh.us/analyses126/06-sb238-126.pdf>; see also OHIO REV. CODE ANN. § 2151.353(A)(3).

155. OHIO REV. CODE ANN. § 2151.353(A)(3)(b) (emphasis added); see also S. 238, 126th Gen. Assemb., Reg. Sess. (Ohio 2006).

156. *State ex rel. McQueen v. Cuyahoga Cty.* Court of Common Pleas, Probate Div., 986 N.E.2d 925, 930 (Ohio 2013).

157. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*2, \*3 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *rev. denied*, 11 N.E.3d 286 (Ohio 2014).

158. *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting) (emphasis added).

159. See generally discussion of *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011), *supra* notes 28 and 29 and accompanying text.

160. See *Liming v. Damos*, 979 N.E.2d 297, 309 (Ohio 2012); *supra* text accompanying note 98.

161. See *In re B.C.*, 21 N.E.3d 308, 312, 315 (Ohio 2014); *supra* text accompanying note 79.

Foster Care Review Board or investigated by a Court Appointed Special Advocate (CASA) volunteer.<sup>162</sup>

Significantly, although the *Turner* Court did not find that the Due Process Clause guaranteed “the provision of counsel where the opposing parent or other custodian . . . is *not* represented by counsel,”<sup>163</sup> the great-grandparents in *In re B.B.*, in contrast, filed their petition by and through counsel.<sup>164</sup> Although a child support matter, the United States Supreme Court’s reasoning in *Turner* extends to *In re B.B.*, because B.B.’s and D.B.’s parents faced a represented opponent in court and lost custody of their children.<sup>165</sup> The magistrate in *In re B.B.* should have balanced this inequity in favor of appointing counsel.

According to the Third District, however, “at any time in the future, either parent may petition the trial court for a modification of custody.”<sup>166</sup> Yet, the Ohio statute controlling custody modifications and children’s best interests<sup>167</sup> effectually prohibits a court from returning custody to the parents in *In re B.B.* unless the parents can prove that the great-grandparents no longer can provide a safe, stable placement for B.B. and D.B. The statute directs that a court “shall *not* modify” a prior custody decree unless it finds that “a change has occurred in the circumstances of the child [or] the child’s *residential* parent . . . and that the modification is necessary to serve the best interest of the child.”<sup>168</sup> The great-grandparents are the residential parents of B.B. and D.B. Thus, the standard for returning custody of the children to their natural parents, without the great-grandparents’ consent, requires more than B.B.’s and D.B.’s natural parents showing a change in their own ability and desire to care for and protect their children.<sup>169</sup>

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162. This writer formerly worked as a juvenile court Family Services Officer, facilitated Foster Care Review Boards, and served as a CASA volunteer at the Davidson County Juvenile Court in Nashville, Tennessee. She writes from the lens of her previous experience in these roles.

163. *Turner*, 131 S.Ct. at 2520 (emphasis added).

164. *See* Mem. Supp. Jurisdiction, *supra* note 13, at 2.

165. *Id.*

166. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*6 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *review denied*, 11 N.E.3d 286 (Ohio 2014) (referencing *In re Hockstock*, 781 N.E.2d 971, 979 (Ohio 2002)); *see also In re Keylor*, No. 04 MO 02, 2005 WL 775890, at \*15 (Ohio 7th Dist. Ct. App. March 30, 2005) (DeGenaro, J., dissenting) (opining that an award of legal custody to a non-parent simply “limits [a parent’s parental] rights until the parent can successfully demonstrate to a court that [he or she] should regain custody.”) (emphasis in original).

167. OHIO REV. CODE ANN. § 3109.04 (West 2014).

168. OHIO REV. CODE ANN. § 3109.04(E)(1)(a) (emphasis added).

169. *See* OHIO REV. CODE ANN. § 3109.04(E)(1)(a)(ii). *But see In re Keylor*, No. 04 MO 02, 2005 WL 775890, at \*15 (Ohio 7th Dist. Ct. App. March 30, 2005) (DeGenaro, J., dissenting) (opining that an award of legal custody to a non-parent simply “limits [a parent’s parental] rights until the parent can successfully demonstrate to a court that [he or she] should regain custody.”).

Moreover, the court severed all visitation between the father and both children.<sup>170</sup> Although B.B.'s and D.B.'s parents “may petition the trial court for a modification of custody,”<sup>171</sup> under the circumstances—and in light of statutory directive<sup>172</sup>—reunification seems unlikely. Indeed, the Supreme Court of Ohio has held that “the natural rights of a parent are not absolute, but are always subject to the ultimate welfare of the child . . . .”<sup>173</sup>

While an award of legal custody textually may limit a parent's rights<sup>174</sup> until he or she can demonstrate to a court that custody should be returned, considering the high standard and difficulty of ever regaining custody,<sup>175</sup> custody removal petitions—no matter how couched—should trigger a parent's right to court appointed counsel. The distinction between legal custody and permanent custody, in this sense, is illusory. In his dissent in *Lassiter*, Justice Stevens advances one step further and opines that “the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the society benefits.”<sup>176</sup>

#### IV. CONCLUSION

Ohio currently recognizes the right to counsel in civil custody cases, but no right to court appointed counsel. Although the right to counsel statute limits an indigent party's entitlement to court appointed representation,<sup>177</sup> the statute's wording does not foreclose case-by-case attorney appointments at the court's discretion.<sup>178</sup> Because the Ohio Supreme Court has not decided the right to appointed counsel in civil custody suits since its 1998 decision in *Asberry*,<sup>179</sup> which was superseded by statute in 2005,<sup>180</sup> the issue

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170. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*3.

171. *Id.* at \*6 (emphasis added).

172. OHIO REV. CODE ANN. § 3109.04(E)(1)(a).

173. *In re B.C.*, 21 N.E.3d 308, 313 (Ohio 2014) (internal quotation marks omitted (citation omitted)).

174. See OHIO REV. CODE ANN. § 2151.011(B)(21).

175. See OHIO REV. CODE ANN. § 3109.04(E)(1)(a); *supra* note 167 and accompanying text.

176. *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 59-60 (1981) (Stevens, J., dissenting).

177. OHIO REV. CODE ANN. § R.C. 2151.352.

178. See HOUSE CIVIL & COMMERCIAL LAW COMM., *supra* note 113 and accompanying text, at Mar. 29, 1994 report (arguing that while there is no right to court appointed counsel in private cases . . . “the [proposed] rule does not preclude counsel, but gives judges discretion.”)

179. 693 N.E.2d 794 (Ohio 1998), *superseded by* 2005 amendment to OHIO REV. CODE ANN.

remains open to varying interpretations by Ohio's lower courts.<sup>181</sup>

As applied to *In re B.B.*, although court appointed counsel may not have changed the outcome of the custody hearing,<sup>182</sup> the United States and Ohio Supreme Courts have recognized that due process is “flexible and calls for such procedural protections as the particular situation demands.”<sup>183</sup> The parents and children in *In re B.B.* lacked an adequate remedy in the ordinary course of law to challenge the juvenile court's refusal to appoint counsel.<sup>184</sup> Specifically, the juvenile court's no contact order terminated the father's visitation with his children.<sup>185</sup> This should have triggered the right to appointed counsel, or at the very least, a guardian ad litem for the children, to ensure that the alternative procedural safeguards recognized in *Turner*, *Liming*, and *In re B.C.* were satisfied.<sup>186</sup> The Third District thus applied an overly exacting analysis of Ohio statutory law limiting the appointment of counsel in civil custody suits when refusing to recognize a right to court appointed representation for B.B., D.B., and their parents. The court's decision ignores more recent case law which champions balancing factors to determine a violation of fundamental fairness, and which likely would support court appointed representation for the parents and children in *In re B.B.*, as well as other future parties similarly situated.

Ohio's highest court “sits to settle the law, not to settle cases,” and does not engage in an exercise in “‘error correction’ regarding the

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§ 2151.352.

180. See H.R. 66, 126th Gen. Assemb., Reg. Sess. (Ohio 2005) discussed at *supra* notes 42, 44, and accompanying text.

181. See discussion of State *ex rel.* McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div., 986 N.E.2d 925, 930 (Ohio 2013), *supra* note 156 (finding that the issue was “susceptible of different interpretations” by different courts).

182. See *Lassiter v. Dept. of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 33 (1981) (holding that the failure to appoint counsel does not presumptively deny the parent of constitutional rights where the presence of counsel could not have made a determinative difference).

183. *In re B.C.*, 21 N.E.3d 308, 312 (Ohio 2014) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

184. See State *ex rel.* *Asberry v. Payne*, 693 N.E.2d 794, 798 (Ohio 1998), *superseded by* 2005 amendment to OHIO REV. CODE ANN. § 2151.352 (finding that the grandmother “lacked an adequate remedy in the ordinary course of law to challenge [the juvenile court judge's] refusal to appoint her counsel” in the custody proceeding); State *ex rel.* *McQueen v. Cuyahoga Cty. Court of Common Pleas, Probate Div.*, 986 N.E.2d 925, 931 (Ohio 2013) (recognizing that appellant “lacked an adequate remedy in ordinary course of law to challenge the probate court's refusal to appoint counsel for him.”).

185. *In re B.B.*, Nos. 13-13-36, 13-13-37, at \*3 (Ohio 3d Dist. Ct. App. Feb. 3, 2014), *review denied*, 11 N.E.3d 286 (Ohio 2014).

186. See generally discussion of *Turner v. Rogers*, 131 S.Ct. 2507, 2520 (2011), *supra* notes 28 and 29; *Liming v. Damos*, 979 N.E.2d 297, 309 (Ohio 2012), *supra* note 98; and *In re B.C.*, 21 N.E.3d 308, 312 (Ohio 2014), *supra* note 79.

application of settled law to the facts of [a particular] case.”<sup>187</sup> In addition to challenging the Third District’s flawed analysis in *In re B.B.*, this Comment highlights the unsettled application the Ohio’s juvenile rules of court and statutory law controlling the appointment of counsel in private party custody complaints, especially those alleging dependency, abuse, and neglect. This Comment further advocates that recent United States and Ohio Supreme Court decisions concerning the appointment of counsel in other civil contexts create a path for indigent litigants in private custody cases to receive an attorney paid for by public funds. “If permanent custody is the family law equivalent of the death penalty in criminal cases[,and] legal custody is the equivalent of an indeterminate prison sentence,”<sup>188</sup> what alternative procedural safeguards currently are in place for indigent Ohio parents in private action custody proceedings?

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187. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 727 N.E.2d 1265, 1276 (Ohio 2000) (Cook, J., concurring and citing Ohio Const. Art. IV, § 2).

188. *In re Keylor*, No. 04 MO 02, 2005 WL 775890, at \*15 (Ohio 7th Dist. Ct. App. March 30, 2005) (DeGenaro, J., dissenting).