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NOVEMBER SESSION

No. 2011-0647

**IN RE: CHRISTIAN M.
IN RE: ALEXANDER M.**

**AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR
CHILDREN**

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**STATEMENT OF INTEREST OF AMICUS CURIAE - NATIONAL ASSOCIATION
OF COUNSEL FOR CHILDREN**

Founded in 1977, the National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The organization is multidisciplinary and has approximately 2000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. More information about the NACC can be found at www.naccchildlaw.org.

The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. Cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the

interests of the particular litigants; the argument to be presented must be supported by existing law or a good faith extension of the law; and there must generally be a reasonable prospect of prevailing.

The NACC submits this brief on behalf of the interests of children in having the best and most appropriate outcomes in child protective proceedings. The NACC believes that depriving parents of legal representation creates a high risk that the constitutionally-protected relationship between children and their parents will be erroneously disrupted. The NACC submits the brief to provide this Court with information about the important role that parents' counsel play in child protective proceedings to ensure that accurate decisions are reached.

ARGUMENT

On July 1, 2011, the New Hampshire legislature eliminated funding for court-appointed lawyers to represent indigent parents in child welfare cases. In doing so, New Hampshire became the first state in the country to strip parents of the right to counsel – an important procedural safeguard aimed at ensuring that courts reach accurate decisions involving the temporary or permanent placement of a child into foster care.

The issue before the Court is whether the New Hampshire Constitution permits the state to deprive parents of the right to counsel in cases in which the state forcibly removes children from the custody of their parents. Because depriving children from their parents implicates liberty interests protected by both the state and federal constitutions, this Court must assess whether denying indigent parents of the right to appointed counsel creates an unreasonably high risk that the liberty interest will be erroneously deprived.¹

This brief focuses on this narrow question and argues that a parent’s right to counsel is constitutionally-required in every child welfare case to prevent the erroneous placement of children into foster care and the potential permanent termination of a parent’s rights.

I. Providing Parents With The Right To Counsel Is Necessary To Prevent An Erroneous Deprivation Of A Liberty Interest

Child welfare proceedings affect one of the oldest and most fundamental

¹ *In re Richard A.*, 771 A.2d 572, 577 (N.H. 2001).

rights protected by the Constitution – that of parents to direct the care, custody and control of their children.² In these cases, the state seeks to infringe upon this right by involuntarily removing children from their homes, placing them in foster care, and, in many cases, requesting that the legal relationship between parents and children be permanently terminated. It is difficult to imagine a more serious consequence that can flow from a civil proceeding. Not surprisingly, child welfare cases – and the remedy they can inflict upon families – have been referred to by many as the equivalent of civil death penalty cases.³

On July 1, 2011, the New Hampshire Legislature abruptly stripped indigent parents of the right to court-appointed counsel and instead decided that indigent parents must navigate the child welfare system on their own without the assistance of a trained legal advocate. For at least four reasons, stripping indigent parents of the right to appointed counsel creates an unreasonably high risk that a protected liberty interest will be erroneously deprived.

First, child welfare proceedings are governed by a complex array of state and federal laws, with state and federal constitutional underpinnings, which requires the expertise of a trained lawyer to navigate. In addition to numerous New Hampshire

² See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

³ See, e.g., *M.E. v. Shelby Cnty. Dep’t of Human Res.*, 972 So. 2d 89, 102 (Ala. Civ. App. 2007); *In re Tammila G.*, 148 P.3d 759, 763 (Nev. 2006); *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004).

laws and other uniform state laws like the Interstate Compact on the Placement of Children,⁴ federal child welfare laws, which have proliferated over the past thirty-five years, guide these cases. The laws – which include, among others, the Child Abuse Prevention and Treatment Act,⁵ the Indian Child Welfare Act,⁶ the Adoption Assistance and Child Welfare Act,⁷ the Adoption and Safe Families Act,⁸ the Multiethnic Placement Act,⁹ and the Fostering Connections to Success and Increasing Adoptions Act¹⁰ – impose binding obligations on child welfare agencies and detail steps that agencies must take prior to interfering with a parent’s liberty interest on either a temporary or permanent basis. For example, child welfare agencies must make “reasonable efforts” to prevent the removal of a child from his or her parent and to reunify the child with the parent if the child is removed.¹¹ If a child has been removed, child welfare agencies must notify relatives and prioritize placement of the child with a relative.¹² Such a placement can reduce the chance an agency is able to seek a subsequent termination of that parent’s rights.¹³ Additionally, federal law requires that

⁴ N.H. Rev. Stat. Ann. § 170-A:1 *et seq.* (2011). In 2008, this Court determined that the Interstate Compact on the Placement of Children does not apply to placements of children in foster care with birth parents. *In re Alexis O.*, 959 A.2d 176 (2008). The complicated issue was brought to this Court’s attention by the mother’s counsel. *Id.*

⁵ 42 U.S.C. § 5101 *et. seq.*

⁶ 25 U.S.C. § 1901 *et. seq.*

⁷ 42 U.S.C. § 621 *et. seq.*

⁸ 42 U.S.C. § 670 *et. seq.*

⁹ 42 U.S.C. § 671 *et. seq.*

¹⁰ 42 U.S.C. § 621 *et. seq.*

¹¹ 42 U.S.C. § 671(a)(15).

¹² 42 U.S.C. § 671(a)(19); 42 U.S.C. § 671(a)(29).

¹³ 42 U.S.C § 675(5)(E).

a court consider the views of children prior to developing a permanency plan in the case.¹⁴

These are but a few of the requirements imposed by the federal government on state child welfare systems. Not surprisingly, the increased complexity of child welfare cases led the American Bar Association to approve a specialized certification in child welfare law, which is being administered by the NACC.¹⁵ Several legal textbooks have also been written summarizing the jurisprudence.¹⁶ Without the assistance of trained counsel, there is a high likelihood that the myriad statutory and constitutional rights protecting the liberty interests of parents and children will not be enforced.

Second, the inability of parents to navigate this complex web of state and federal laws is compounded by the fact that parents in these cases are often unsophisticated and uneducated and need counsel to guide them through the process.¹⁷ Indigent parents in particular face a host of challenges including poverty, a lack of education, mental illness, substance abuse, and incarceration which impede their ability to grasp

¹⁴ 42 U.S.C. § 675(5)(C).

¹⁵ More information about the specialized certification in child welfare law can be found at <http://www.naccchildlaw.org/?page=Certification>.

¹⁶ See, e.g., *Child Welfare Law & Practice* (Donald N. Duquette & Ann M. Haralambie eds., 2010); *Children and the Law* (Douglas E. Abrams & Sarah H. Ramsey eds., 2007).

¹⁷ See Kathleen Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 Fordham L. Rev. 2285, 2297 (1998) (observing that parents who are often poor, "undereducated and unworldly," are placed in the stressful situation of facing the loss of their children, while being "unfamiliar with the intricacies of the legal proceedings."). In her article, Bailie quotes a director of an organization that helps families deal with the child welfare bureaucracy, who states, "[e]verybody [in family court] uses a lot of shorthand, lingo and court terms. By the end of the day, the parents are not really quite clear what has happened." *Id.* at 2297 n. 95.

the proceedings.¹⁸ The sentiment expressed by the following parent whose child had been removed from her care typifies how many parents feel: “I didn’t know anything about a fact-finding hearing. I wasn’t told what my rights were. I wasn’t told the procedure of the court. I didn’t have any idea what was happening, and I was very much afraid, because the most important thing in my life had just been lost.”¹⁹ Simply put, this population is unlikely to be in a position to comprehend the legal framework governing child welfare cases or to possess the advocacy skills necessary to present information to the court relevant to the legal inquiry. Consequently, the absence of attorneys representing parents will deprive the trial court of crucial legal and factual information that is necessary to ensure that accurate decisions are reached.

Third, child welfare agencies are overwhelmed, often make errors in their decision-making, and have been found to violate state and federal child welfare laws. Across the country, many reports have detailed the overburdened state of child welfare agencies and the stresses faced by case workers making life-altering decisions.²⁰

¹⁸ See *Watson v. Div. of Family Servs.*, 813 A.2d 1101, 1110-11 (Del. 2002) (“The indigent parents of children who have been placed in foster care are not only without economic resources but are also often dysfunctional, usually due to parental substance abuse. Children cannot be safely and successfully reunited with their parents unless the conditions that led to the judicial determination of dependency and neglect are corrected permanently. Respected authorities have concluded that it is unrealistic to expect that these already challenged indigent parents will turn their lives around, especially on the accelerated ASFA time table, without an attorney to advocate their need for the reunification resources that are available through the DFS.”); *In re A.S.A.*, 852 P.2d 127, 129 (1993) (“Indigent parents often have a limited education and are unfamiliar with legal proceedings.”).

¹⁹ See Ann Moynihan *et al.*, *Parents and the Child Welfare System*, 70 *Fordham L. Rev.* 287, 330 (2001), quoting *Panel: Parents Speak (Excerpts)*, on file with the *Fordham Law Review* and available at <http://law2.fordham.edu/publications/articles/500flspub11515.pdf>.

²⁰ Caseworkers burn out and leave the profession in very high numbers. Ninety percent of state child welfare agencies report difficulty in recruiting and retaining workers. Sandra Stukes Chipungu and Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 *Future of Children* 83 (2004). The annual turnover rate in the child welfare workforce is 20 percent for public agencies and 40 percent

Turnover and burnout among case workers is very high and political pressures often influence the subjective decisions made by case workers.²¹ For example, statistics have revealed that after high-profile deaths of children in their homes or in foster care, rates of removal have skyrocketed.²² Similarly, in other states, the number of children entering foster care has sharply declined in a relatively short time period which suggests that many of these children did not need to be in care in the first instance and that states have not been making reasonable efforts to keep children out of care as the law requires.²³ Not surprisingly, at least fourteen state child welfare systems have been placed under federal court oversight due to their failure to meet the basic needs of foster children in their care.²⁴ And recent audits of state child welfare systems by the

for private agencies. The Annie E. Casey Foundation, THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITIONS OF THE FRONTLINE HUMAN SERVICE WORKFORCE (2003).

²¹ See Amy Sinden, "Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings, 11 Yale J.L. & Feminism 339, 354 (1999) ("The fallacy, of course, is that this claim treats the 'best interests of the child' as some objectively determinable absolute, when in fact it is an extremely malleable and subjective standard. In fact, the parent and the agency social worker may have two entirely different ideas of what is in the child's 'best interests.'"). Sinden argues that in child welfare proceedings "[w]here so much is at stake . . . the players in the system are all the more likely to make snap judgments based on gut feelings and instinct and to cut corners in an attempt to manipulate decisions to conform to their own view of the right outcome." *Id.* at 380.

²² See Petula Dworak, *Child Deaths Led To Excessive Foster Care Placements, Critics Say*, The Washington Post (January 8, 2009) (noting a 41% increase in foster care placements after a child fatality); Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 Fam. Ct. Rev. 3, 540, 542 (2004) (observing that "[d]efensive social work has flourished in the past 20 years, fueled by the news media's appetite for sensational child maltreatment stories as well as by laws that purposely magnify the public visibility of child maltreatment fatalities and near fatalities. This has led to a series of removal stampedes or 'foster care panics,' in which thousands of children have been swept up by child welfare authorities in the aftermath of high-profile child fatalities.").

²³ See, e.g., Erik Eckholm, *Florida Shifts Child-Welfare System's Focus To Saving Families*, N.Y. Times, July 24, 2009, at A12 (noting Florida's reduction of the number of children in foster care by 32 percent in less than three years).

²⁴ Many of the federal cases against state child welfare agencies have been litigated by Children's Rights, Inc., a non-profit organization based in New York. More information about the various consent decrees negotiated by Children's Rights can be found at <http://www.childrensrights.org/reform-campaigns/legal-cases/>.

federal government revealed that not one state in the country, including New Hampshire, had fully complied with federal child welfare mandates.²⁵ The harsh reality of the child welfare system is that mistakes are often made, and strong procedural safeguards need to be implemented to reduce the likelihood of these errors.

Finally, the concerns noted above are exacerbated by the incredible resource disparity in child welfare cases between the state and parents. The United States Supreme Court, in *Santosky v. Kramer*,²⁶ raised this concern and made the following observation:

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents.²⁷

²⁵ In the most recent federal audit, New Hampshire was found not to be in substantial conformity with any of the seven outcome measures required by the federal government. As a result of this failure to comply with basic measures, the State is now required to prepare a Program Improvement Plan. A state's failure to meet these standards could result in losing federal funding for its child welfare system. Results from New Hampshire's audit can be found at http://library.childwelfare.gov/cwig/ws/cwmd/docs/cb_web/Record?w=NATIVE%28%27DT+ph+is+%27%27State+by+State+Key+Findings+Report%27%27+and+STATE+%3D+%27%27New+Hampshire%27%27+and+RPERIOD+%3D+%27%272nd++Round+CFSR%27%27+and+DOC_AVAILABILITY+^%3D+%27%27Not+publicly+available+on+the+Children%27%27%27%27s+Bureau+website%27%27%27%29&m=1.

²⁶ 455 U.S. 745 (1982).

²⁷ *Id.* at 763.

If parents do not have the assistance of counsel, there is a serious risk that the information presented to courts will be one-sided and skewed in favor of state intervention, even when such intervention may not be constitutionally defensible. Without counsel, parents will likely be overwhelmed by the awesome resources that states possess.

These four factors – 1) the legal complexity of child welfare cases, 2) the fact that most parents in these cases are unsophisticated and uneducated, 3) the overwhelmed state of child welfare agencies and 4) the immense resource disparity between parents and the state – demonstrate why parents’ counsel is necessary to reduce the likelihood of an erroneous deprivation of a liberty interest. The next section argues that the interconnected nature of child welfare proceedings requires the appointment of counsel immediately upon the filing of a petition because the initial proceedings play a significant role in subsequent decisions on whether parental rights should be terminated.

II. Errors Made In The Initial Custody Deprivation Can Affect Subsequent Decisions Throughout The Case Including The Final Termination Of Parental Rights Decision.

To understand the gravity of the issue in this case, this Court must recognize that child protective cases are interconnected such that errors that occur early on can infect the entire proceeding and can result in the erroneous termination of a parent’s rights. As noted above, due to the fundamental rights at stake – a parent’s right to direct the upbringing of his or her child – child welfare cases must observe strict procedural requirements. Cases begin with the filing of a petition containing allegations that a

parent abused or neglected a child. The petition may contain a request that a child be removed immediately, and if removal is requested or has already occurred, a hearing must be held quickly to make initial decisions concerning the authorization of the petition, immediate placement of the child, parenting time between the child and the parent, and other issues. Parents are entitled to a full trial to adjudicate the allegations in the petition against them. If the parent loses the trial or enters into a plea, the court obtains jurisdiction over the child and the case moves to the dispositional phase.

The first hearing after the adjudication trial is the dispositional hearing at which the court determines the placement of the child and based on the reasons for the adjudication, orders the parent and agency to comply with a case service plan that outlines the steps that need to be taken to reunify the family and bring the case to closure. Subsequent dispositional review hearings are held to review the child's placement, assess the parties' compliance with the service plan and determine whether any changes need to be made. For example, at each of these hearings, parents may request more extensive visitation with their child, a different placement for their child, or additional services to help them regain custody. Similarly, the child welfare agency or prosecuting attorney may request that visits be terminated, that a child remain in foster care, or that new services not be offered to parents because the services exceed the agency's obligations. Review hearings are continuous in nature in the sense that each builds on decisions made at previous hearings.

If a child has been in foster care for approximately twelve months, federal law requires courts to convene a permanency planning hearing at which the trial court must

determine the future plan for the child.²⁸ At this hearing, the court, based on documentary evidence, live testimony and the arguments of the parties, determines whether reunification remains a viable goal and if not, establishes an alternate goal which may include adoption, guardianship or another planned permanent living arrangement. Typically, the court makes this determination based on the parent's progress, the needs of the child, and the length of the child's stay in foster care. A parent's failure to comply with the court-ordered service plan is the predominant reason for a goal change in the child welfare case, which can then result in the termination of services to reunify the family. Additionally, if a child has been in foster care for fifteen of the last twenty-two months, federal law requires the state to file a petition to terminate parental rights unless one of a number of exceptions applies.²⁹

The filing of a termination of parental rights ("TPR") petition triggers additional procedural safeguards. The parent is afforded a trial on the petition allegations, and the Constitution mandates that the state prove parental unfitness by clear and convincing evidence prior to permanently severing the parent-child relationship.³⁰ Most frequently, the evidence introduced by the state at the TPR hearing consists of historical information detailing the reasons why the child entered the foster care system and the parent's compliance, or lack thereof, with the court-ordered service plan. Orders and

²⁸ 42 U.S.C. § 675(5)(C).

²⁹ 42 U.S.C. § 675(5)(E). States may opt not to file a petition to terminate parental rights if the child is in a relative's care, the agency has documented a compelling reason that the termination of parental rights would not be in the child's best interests or if the state has not provided necessary services to the family. *Id.*

³⁰ *Santosky*, 455 U.S. at 747-748 ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

findings of fact from each review hearing may be submitted into evidence. The overriding determinant in most cases is an assessment of the parent's progress between the adjudication hearing and the TPR hearing. If parental rights are terminated, the child becomes a permanent ward of the court and the parent becomes a legal stranger to the child.

This cursory overview of the child welfare process demonstrates the intertwined nature of the proceedings. What occurs at one hearing lays the foundation for each subsequent hearing. The facts proven at the adjudication hearing provide the justification for the case service plan ordered at the dispositional hearing. Evidence of the parent's and agency's willingness to comply with the terms of the plan, which is reviewed at every hearing, determines whether the child will come home or will enter another permanent living arrangement. The events that occur during the time when the plan is in effect constitute the primary evidence introduced at the TPR hearing.³¹ As the Colorado Court of Appeals aptly observed:

Proceedings in dependency or neglect affect important rights so there must be substantial compliance with statutory requirements for the conduct of those proceedings. The statutorily prescribed periodic judicial review of an out-of-home placement proceeding is an important proceeding to the parties. This is so because the trial court considers the propriety of continued deprivation of custody, often together with the parties' performance under the provisions

³¹ See, e.g., *Hughes v. Div. of Family Servs.*, 836 A.2d 498, 507 (Del. 2003) ("We have acknowledged that the factual basis for terminating parental rights is often the conduct that occurs during the time frame between the commencement of a dependency and neglect proceeding and a judicial determination that a termination proceeding is in the child's best interest."); *White v. Dep't of Rehabilitative Servs.*, 483 So. 2d 861, 865 (Fla. Dist. Ct. App. 1986) ("Dependency disposition hearings and dependency disposition orders . . . order the parents to enter into a performance agreement which, when unperformed, leads directly to, and in combination with the adjudicated facts underlying the original dependency petition and order, is the basis for, a later petition for termination of parental rights.").

of the court approved treatment plan. . . . [T]hese proceedings may form a foundation for and presage the filing of a motion for termination of the parent-child legal relationship.³²

Because subsequent orders in the case are built upon earlier decisions, an error that occurs at an early hearing can contaminate the entire case and can lead to an erroneous termination of parental rights. Consider the following example. A caseworker erroneously denies placement with relatives for a child in foster care because of incorrect information about the relatives' criminal history. The child instead enters stranger foster care and remains there for several years. The relatives lack standing in the child protection case to raise their concerns. At the TPR hearing, the parents assert that termination is not warranted because the child could be and should have been placed with relatives, an exception to the federal mandate requiring a termination petition when a child has been in foster care for fifteen months.³³ The court, however, rejects the argument stating that the child's best interests are not served by moving her at the current time due to her bond with her foster parents. The parents'

³² See also *R.V. v. Commonwealth of Kentucky*, 242 S.W.3d 669, 672 (Ky. Ct. App. 2008) ("Clearly, the proceedings in a dependency action greatly affect any subsequent termination proceeding. Indeed, in the case at bar, the cabinet changed its goal from returning A.J.V. to his parents to permanent placement with his foster family. The district court approved that goal change. Although, in theory, the goal could change again, back to reunification, it is clear that a district court's approving adoption as a permanency goal significantly increases the risk that parental ties will be severed."); *In re D.M.K.*, 2010 Mich. App. LEXIS 1352 at *11 (Mich. Ct. App. 2010) ("These initial hearings allow the parties to become familiar with the parents' abilities and deficits, the child's needs, and the efforts necessary for reunification. In a sense, the initial dispositional hearings form the cornerstones of the succeeding review hearings, the permanency planning phase, and the ultimate decision to terminate parental rights."); *In re J.J.L.*, 223 P.3d 921, 924 (Mont. 2010) ("Adjudication hearings 'must determine the nature of the abuse and neglect and establish facts that resulted in state intervention and upon which disposition, case work, court review, and possible termination are based.'").

³³ See 42 U.S.C. § 671(5)(E).

rights are subsequently terminated due to the early error committed by the worker. It is too late to right the wrong.

A second example further illustrates this point. At a review hearing, the judge inappropriately engages in *ex parte* communications with a teenager in foster care who tells the judge that she does not want to visit with her mother. During the meeting, the child does not reveal that she is angry with her mother because of her removal from the home. Based on this, the judge summarily suspends visitation without making a finding that visitation would harm the child, as required by the statute. No “reasonable efforts” are made to address the child’s discomfort with the visits, and the child and parent do not see each other for the entire duration of the case. Frustrated by the fact that she hasn’t seen her child in several years, the mother does not show up to the final TPR hearing.

At the hearing, the court makes a finding that termination is in the child’s best interests solely because the child wants her mother’s rights terminated since they have no relationship. The court also notes the mother’s absence from the hearing in its findings. The erroneous termination of visits, based on the improper conversations between the judge and the child, and the failure to make efforts to maintain the parent-child relationship at the outset of the case preordained the findings made by the judge at the final TPR hearing.

These examples are intended to illustrate a very basic point. Errors in child protective proceedings have a compounding effect since all future decisions build upon

each finding and order made at prior hearings.³⁴ Errors such as unnecessary removal, failure to explore relative placement, inappropriate suspension of visits, or false allegations of substance abuse or mental illness, affect both short- and long-term decisions in the case, the parties' involvement in the case plan, and the relationships between parents and children. When errors during earlier hearings go unchallenged, by the time of the final TPR hearing, it may be very difficult, if not impossible, to mitigate or assess the precise impact of the error because that error may have affected the entire direction of the case. Thus, unsurprisingly, state policymakers, courts and commentators have all emphasized the important role that parents' counsel play, especially early on in a child welfare case, to reduce the likelihood that this type of contamination will occur. The next section discusses this role.

III. Parents' Counsel Play A Crucial Role In Reducing Errors In Child Welfare Cases.

The overwhelming majority of states provide indigent parents with the right to appointed counsel either through statute, court rule or the state's constitution. In only two states – New Hampshire and Mississippi – do trial courts lack the ability to appoint counsel in dependency proceedings. Nationally, best practices support providing parents with counsel immediately after the state files a petition alleging abuse or

³⁴ See *In re Grannis*, 680 P.2d 660, 665 (Or. Ct. App. 1984) (observing that “there is some possibility that the findings and disposition will affect the mother’s interests in future proceedings in this case and in ancillary proceedings.”). See also *In re Mason*, 782 N.W.2d 747 (Mich. 2010) (finding that depriving the father of the right to participate in review hearings required reversal and noting that “the court and the DHS were ready to move on to the termination hearing” because the father “missed the crucial, year-long review period, during which the court was called upon to evaluate the [father’s] efforts” due to the child welfare agency’s errors.).

neglect, if not earlier. And no state, until New Hampshire, has stripped this procedural safeguard from parents after making it part of its laws.

Parents' attorneys play a pivotal role in these cases. Similar to criminal defense attorneys, they protect their clients from unjust accusations, ensure that parents receive due process protections, and help ensure that the entire judicial process affords families a fair opportunity to take advantage of its protections and services.³⁵ Like attorneys in other contexts, parents' lawyers assist courts in establishing historical facts.

But unlike lawyers in other contexts, parents' counsel also help to create the record that the court then relies upon in making future decisions. In situations where temporary removal occurs, advocacy by parents' counsel can expedite the safe reunification of the family by facilitating the prompt delivery of appropriate services to the family, advocating for extensive visitation between the parent and the child, and counseling parents about the ramifications of the choices they must make, which may increase compliance with court directives. Parents' lawyers also participate in administrative meetings with caseworkers, where significant decisions are made about the services offered to parents. And in situations where the parent is unable to care for the child, a parent's lawyer can serve the client by arranging for another temporary or permanent legal placement, such as a guardianship, which will advance the parent's interests. In these and other ways, attorneys for parents can dramatically affect the course of a child welfare case.

³⁵ See Richard Cozzola and Andrya Soprych, *Representing Parents in Civil Child Protection Cases*, 31 A.B.A. Fam. Advoc. 22 (2009); Mich. State Court Admin. Office, *Parents' Attorney Protocol* (July 2008), available at www.michbar.org/childrens/pdfs/ParentsAttorneysProtocol.pdf.

Statistics corroborate the enormous impact parents' attorneys can have in a case. A study conducted by the Washington Office of Public Defense found that improved parent representation increased reunifications by over 50%, decreased the rate of termination of parental rights by 44%, and expedited the court process significantly.³⁶ Similarly, clients served by the Center for Family Representation in New York City, a law office advocating for parents, reunified parents with their children in foster care after an average of 4 months compared to a statewide average of nearly years.³⁷ Strong advocacy on behalf of parents furthers the best interests of children and improves outcomes for both children and their families.³⁸

The crucial role that parents' counsel play in all stages of a child welfare case has been well-documented in state and national standards of practice, articles, and court opinions, among other sources. For example, the Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases adopted by the American Bar Association urges courts to "ensure [that] appointments are made when a case first comes before the court, or before the first hearing, and last until the case has been

³⁶ See Jason A. Oetjen, Nat'l Council for Juvenile and Family Court Judges, *Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation* (2003), available at <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/watabriefcolorfinal%5B1%5D.pdf>.

³⁷ See Ctr. for Family Representation, *2009 Accomplishments*, http://www.cfrny.org/2009_accomp.asp (last visited Jan. 27, 2011).

³⁸ See also Justice Bobbe J. Bridge and Joanne I. Moore, *Implementing Equal Justice for Parents in Washington: A Dual Approach*, 53 Juv. and Fam. Ct. J. 31, 40 (2002) ("Improving equal justice for parents serves our judicial system's values of fairness as well as both the spirit and letter of our dependency and termination laws. Improving equal justice for parents is a necessary step in implementing two primary purposes of the Adoption and Safe Families Act: timely permanence for children and a preference for safe reunifications as the first choice for permanency.").

dismissed from the court's jurisdiction."³⁹ The highly-regarded Resources Guidelines issued by the National Council of Juvenile and Family Court Judges emphasize that "[b]ecause of the critical strategic importance of the preliminary protective hearing, it is essential that parents have meaningful legal representation at the hearing."⁴⁰ And the Pew Commission on Children in Foster Care concluded that "[t]o safeguard children's best interests . . . children and their parents must have a direct voice in court, effective representation, and the timely input of those who care about them."⁴¹

Courts have made similar observations. For example, in *Watson v. Division of Family Services*,⁴² the Delaware Supreme Court acknowledged that "[i]f an attorney is only appointed to represent an indigent parent after the petition to terminate has been filed then the outcome is almost inevitable."⁴³ Similarly, in *R.V. v. Commonwealth*,⁴⁴ the Kentucky Court of Appeals observed that the "termination proceeding was incurably tainted by the failure of the district court to provide counsel for the parents at all critical

³⁹ Am. Bar Ass'n, Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases 7, available at <http://www.abanet.org/child/clp/ParentStds.pdf>. These standards were drafted by child welfare experts.

⁴⁰ Nat'l Council of Family and Juvenile Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, 34 (1995), available at <http://www.ncjfcj.org/content/blogcategory/369/438/>.

⁴¹ The Pew Comm'n on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care* 18 (2004), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_final_051804.pdf. See also Donald N. Duquette & Mark Hardin, *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of Health and Human Services, VII-1 (1999), available at <http://ia700208.us.archive.org/15/items/guidelinesforpub00duqu/guidelinesforpub00duqu.pdf> ("Children's interests are not well served unless all parties have good legal representation. . . . 'Given that attorneys and other advocates often determine what information a judge is presented with, it is vital that all parties in child abuse and neglect cases have adequate access to competent representation so that judges can make informed decisions.'")

⁴² 813 A.2d 1101 (Del. 2002).

⁴³ *Id.* at 1106.

⁴⁴ 242 S.W.3d 669, 673 (Ct. App. Ky. 2008).

stages of the underlying dependency proceeding.”⁴⁵ And in the case of *In re Hudson Morgan*,⁴⁶ in which the Michigan Supreme Court reversed a TPR decision because the trial court failed to appoint counsel for a mother in a timely manner, Justice Maura Corrigan, in a concurring opinion, articulated the ways in which the earlier appointment of counsel could have affected the case. Justice Corrigan wrote:

[C]ounsel for respondent could have challenged the evidence presented by the DHS and could have called and cross-examined the individuals who prepared the many reports DHS witnesses referenced in their testimony at these hearings. Instead, once these proceedings were set in motion by respondent’s invalid plea, the DHS was allowed to present unchallenged hearsay evidence, including the results of respondent’s drug screenings, psychologists’ reports pertaining to respondent and the children, and statements of respondent’s therapist, through the testimony of DHS workers. Other witnesses did not appear at the hearings. No one was subjected to cross-examination. The DHS built a record of respondent’s failed drug tests and struggles to maintain employment and appropriate housing over the course of more than two years, while respondent never challenged the veracity of that evidence or offered any evidence of her own. By the time counsel was appointed to represent respondent two weeks before the termination trial, the DHS had built an extensive record against respondent, and there was little counsel could do to remedy the harm.⁴⁷

It is evident that best practices in child welfare cases mandate the early appointment of counsel and that, for the most part, states have responded by guaranteeing this right to indigent parents. The extreme and rash decision made by the

⁴⁵ *Id.* at 673.

⁴⁶ 763 N.W.2d 618 (Mich. 2009).

⁴⁷ *Id.* at 625-26. See also *In re Children of S.A.W.*, A09-0517, A09-0533, 2009 Minn. App. Unpub. LEXIS 1089, at *40 (Minn. Ct. App. 2009) (expressing deep concern about parents being “thrown, without representation, into the complex and fast-paced environment of statutes, rules, case plans, and time-critical rehabilitation efforts that are the focus of juvenile-protection proceedings.”).

New Hampshire Legislature runs contrary to what the experts in the field have determined is required to prevent the erroneous separation of children from their parents and should be struck down by this Court.

CONCLUSION

Because depriving indigent parents of the right to appointed counsel creates an unreasonably high risk that children will be removed from their parents - either on a temporary or permanent basis - this Court should hold that the New Hampshire Constitution requires the appointment of counsel to indigent parents in all child welfare cases. Adopting this position will bring New Hampshire in line with the national consensus on the important role that parents' counsel play in these cases and will ensure that the best outcomes for children will be reached.

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