

THE RIGHT TO COUNSEL FOR CHILDREN IN DEPENDENCY CASES

The fundamental rights of abused and neglected children are at stake in child welfare proceedings. Dependency courts have the power to remove a child from her home, determine where she will live, and decide whether she will ever see her family again. But abused and neglected children in dependency cases do not have a constitutional right to counsel. It's time to end this injustice.

National Association of Counsel for Children created this infographic as a practical tool to help children's attorneys make the argument for a child's right to counsel in dependency proceedings.

THE JOURNEY TO JUSTICE



Case law and legislation provide the foundation for establishing a child's constitutional right to counsel in dependency proceedings. These laws and decisions are guideposts on our journey to justice.

1967

IN RE GAULT



The United States Supreme Court struck down the *parens patriae* authority of the Juvenile Court in the context of delinquency adjudication, declaring that, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹

The Court guaranteed children the right to counsel in delinquency cases, but did not address a child's right to counsel in dependency proceedings.

In 2012 **45%**
of all Colorado juvenile cases had no
defense attorney.²



CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA)

CAPTA requires that "in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem...shall be appointed to represent the child in such proceedings."³ But not all GALs are trained attorneys. Many are lay advocates and lack the training necessary to navigate the complex world of child welfare law.

Even with CAPTA's mandate many children still go without the statutorily required representation. In Florida, only 80% of abused and neglected children receive CAPTA-mandated GAL.⁴



1974

1976

MATHEWS v. ELDRIDGE



Mathews is not a child welfare case. It's a constitutional law case. In *Mathews*, the Supreme Court adopted a three-prong test for analyzing procedural due process claims. The *Mathews* test applies to the argument for a child's right to counsel in dependency proceedings because right to counsel is a procedural due process right. According to *Mathews*, the court must consider:



"The private interests that will be affected."⁵



"The risk of erroneous deprivation" of the private individual's interest "through the procedures used" and the probable benefits of additional procedural requirements.⁶



The government's interest, including "fiscal and administrative burdens" that might result from additional procedural requirements.⁷



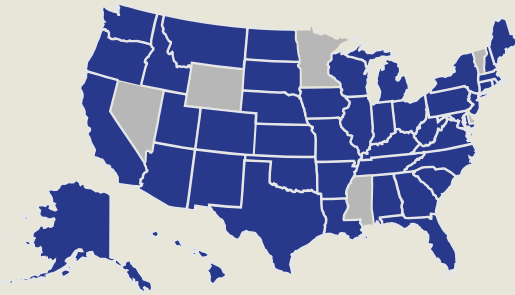
LASSITER v. DEPARTMENT OF SOCIAL SERVICES

1981

The Supreme Court held that states are not constitutionally required to provide counsel for indigent parents in all termination of parental rights cases (TPR)⁸ but that there may be some termination cases in which the nature of the allegations and evidence presented give rise to a due process right to counsel.⁹

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states have established an absolute right to counsel for indigent parents in termination of parental rights proceedings.¹⁰

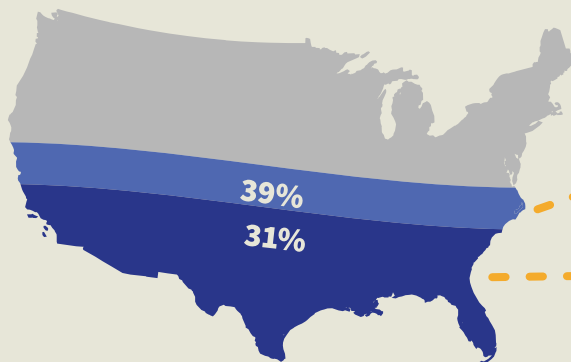


2005

KENNY A. v. PERDUE



Kenny A. is big. The United States District Court in the Northern District of Georgia concluded that children who are the subjects of dependency proceedings have a procedural due process right to a lawyer.¹¹ This was the first time a federal court had addressed the issue of effective assistance of counsel for children in a dependency context.



Despite the encouraging ruling in *Kenny A.*, more than **39%** of states do not require that all abused and neglected children have legal representation.¹²

Only **31%** of states mandate the appointment of client-directed representation for the child.¹³

MAKING THE ARGUMENT

So how do you put it all together and make the argument for an abused or neglected child's right to counsel? We're glad you asked.



Start with *Kenny A. v. Perdue*

In *Kenny A.*, the court found that a child has “fundamental liberty interests” at stake in deprivation and TPR proceedings, including “safety, health, and well-being,” and “an interest in maintaining the integrity of the family unit and in having a relationship with [the child’s] biological parents.”¹⁴ A child’s liberty interests remain at stake even after the state has taken custody.

“At that point, a ‘special relationship’ is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.”¹⁵ After establishing the child’s liberty interests, the court applied the *Mathews* test to determine whether children in dependency cases have a due process right to an attorney. Your argument should track *Kenny A.*’s analysis.

“The private interests that will be affected.”¹⁶

Children have “fundamental liberty interests in health, safety, and family integrity,”¹⁷ and a physical liberty interest. “Foster children in state custody are subject to placement in a wide array of different types of foster care placements, including institutional facilities where their physical liberty is greatly restricted.”¹⁸ Dependency cases affect a child’s private interest in liberty, health, safety, and family integrity.

“The risk of erroneous deprivation” of the private individual’s interest “through the procedures used” and the probable benefits of additional procedural requirements.¹⁷

The risk of erroneous decisions in juvenile court—absent counsel for children—is unacceptably high because of the “imprecise substantive standards” used in deprivation proceedings and because DFCS routinely makes errors regarding what is best for children in its custody.²⁰ “[O]nly the appointment of counsel can effectively mitigate the risk of significant errors.”²¹

The government’s interest, including “fiscal and administrative” burdens that might result from additional procedural requirements.²²

The State has an interest in serving as *parens patriae* for children who are before the juvenile court on deprivation matters. “The government’s overriding interest is to ensure that a child’s safety and well-being are protected.”²³ “[S]uch protection can be adequately ensured only if the child is represented by legal counsel throughout the course of deprivation and TPR proceedings.”²⁴ “This fundamental interest far outweighs any fiscal or administrative burden that a right to appointed counsel may entail.”²⁵



Broaden the Argument

Kenny A. is a good start. But it only gets us so far. Attorneys need a broader argument for a child’s right to counsel. They must tackle the problematic holding in *Lassiter* head-on and bolster the *Mathews* arguments. Here’s how:

Lassiter held **parents** do not have an absolute constitutional right to an attorney in a TPR.²⁶ But according to *Kenny A. v. Perdue*, the scope of a child’s liberty interests is broader in every phase of a dependency proceeding: children must have a lawyer the entire time – from preliminary hearings all the way through TPR.²⁷

The Court Will Ask: Why does *Kenny A.* require counsel for children in dependency proceedings when the same right is not guaranteed for parents?

Your Answer: Children’s liberty interests are different from parents’ liberty interests in **degree**. Children in dependency proceedings are less equipped to deal with trauma than adults, and once separated from their parents, children are exposed to the potential failings of the child welfare system. Children live the trauma of removal.

Children’s liberty interests are also different from parents’ liberty interests in **kind**. A child’s liberty interests may not be fully co-extensive with a parent’s interests prior to separation. Once a child is remanded to state custody, a “special relationship”²⁸ is established that, “gives rise to a host of substantive rights that can best and in most cases only be protected with vigilant advocacy in the context of the ongoing juvenile court proceeding.”²⁹

Lassiter held that a TPR proceeding is not so inherently complex that lack of counsel for **parents** results in undue risk of an erroneous decision.³⁰ But *Kenny A.* held, “that there is something about all aspects of the dependency process – including hearings at which termination of parental rights was not even an issue – that renders too great of a risk of erroneous decisions to withhold counsel from **children**.”³¹

The Court Will Ask: Can these two positions be reconciled?

Your Answer: Yes. Children are different. The law often considers them incompetent. To a child, all points of law are troublesome, “and a child-client could and should never be judged to have failed to ‘make an effort’ to participate in the proceedings in the way the Supreme Court judged Ms. *Lassiter*.”³²

The Court Will Ask: Why does the State’s *parens patriae* interest require the appointment of counsel for children when the State is already represented by counsel who could presumably serve that interest?

Your Answer: It’s a two-parter.

First, the State’s attorney typically only defends one element of the State’s *parens patriae* interest: the State’s interest in ensuring the well-being of **all children** in its custody.³³ This means operating a system that is as cost-effective and efficient as possible – often to the exclusion of the State’s *parens patriae* interest in protecting each **individual child**.³⁴ The State has a pressing interest in establishing a process to allow for case-by-case exceptions.³⁵ The best way to accomplish this is through the use of independent counsel for children.

Second, society has an even broader interest in preserving the dignity of children as parties in the decision-making process.³⁶ The only way to serve this interest is to give children the opportunity to identify their goals, beliefs, and wishes for dependency litigation with the help of independent counsel.³⁷

ALL THE RIGHT SKILLS

Child welfare law is an extremely complex area of legal practice. Dependency attorneys must master a number of multidisciplinary skills. Child welfare lawyers possess a legal expertise not held by lay advocates and knowledge of childhood dynamics and the foster care system that distinguishes them from fellow attorneys.

Expert Trial Skills

Knowledge of the Law:
CAPTA, ICWA, ASFA,
PSTSFA, ADA, etc.



Client Counseling:
Trauma-Informed,
Age-Appropriate Guidance



Zealous Advocacy:
Rigorous Legal Analysis,
Expert Trial Skills



Child Welfare Skills³⁸



Knowledge of Medicine, Mental
Health, and Child Development



Understanding of Complex Child
Welfare Funding Streams



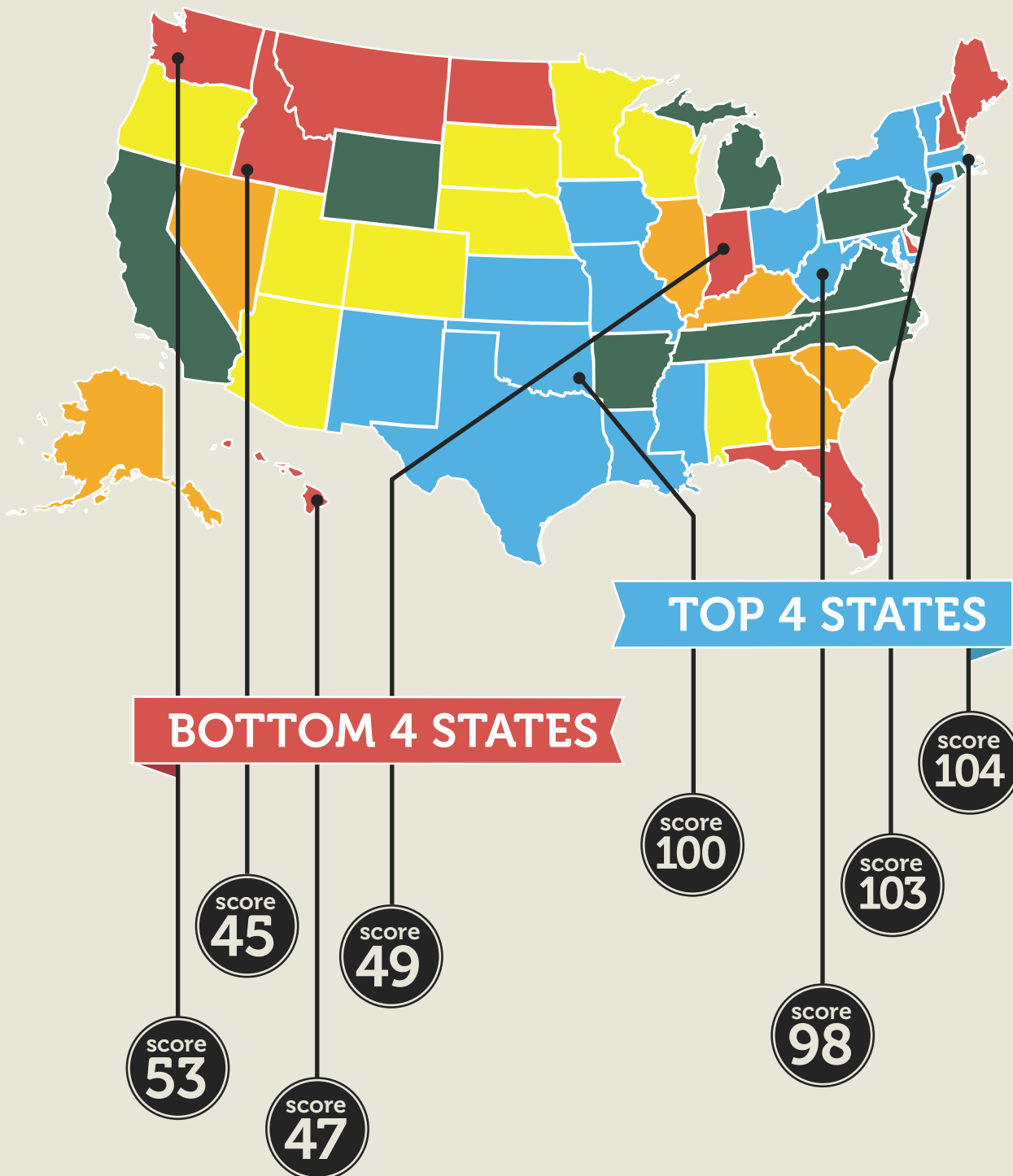
Insight Into Various Treatment and
Placement Options

GRADING THE STATES

Guided by the belief that children in abuse and neglect cases have a basic right to effective counsel, First Star and the Children's Advocacy Institute (CAI) published three editions of A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children. The third edition, published in 2012, grades each of the 50 states on a variety of important criteria relevant to a child's right to counsel.

And the results are in.

A (90-Above) **B** (80-89) **C** (70-79) **D** (60-69) **F** (59-Below)



REFERENCES

1. *In re Gault*, 387 U.S. 1, 13 (1967).
2. *Kids Without Counsel: Colorado's Failure to Safeguard Due Process for Children in Juvenile Delinquency Court*, COLORADO JUVENILE DEFENDER COALITION (Mar. 31, 2015), http://cjdc.org/wp/wp-content/uploads/2013/10/Kids-Without-Counsel_Final.pdf.
3. 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2010).
4. Christine Stapleton, *Will Child Killings Stop?*, PALM BEACH POST, Mar. 9, 2014, at 1A.
5. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
6. *Id.*
7. *Id.*
8. Donald N. Duquette & Ann M. Haralambie, CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 246 (2nd ed. 2010).
9. *Id.* at 246.
10. Wendy C. Sotolongo, *The Importance of the Right to Counsel in an Abuse/Neglect/Dependency and Termination of Parental Rights Proceedings in North Carolina*, NCIDS (April 2011); *In re T.M.*, 319 P.3d 338 (Haw. 2014), http://www.ncids.org/ParentRepresentation/News_Updates/ImportanceRightToCounsel.pdf
11. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).
12. FIRST STAR & THE CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN (3rd ed. 2015) available at: <http://www.firststar.org/wp-content/uploads/2015/02/First-Star-Third-Edition-A-Childs-Right-To-Counsel.pdf>
13. *Id.*
14. *Kenny A.*, 356 F. Supp. 2d at 1360.
15. *Id.*
16. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
17. *Kenny A.*, 356 F. Supp. 2d at 1360.
18. *Id.* at 1360-61.
19. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
20. *Kenny A.*, 356 F. Supp. 2d at 1361 (citing *Santosky v. Kramer*, 455 U.S. 745, 762 (1982)).
21. *Kenny A.*, 356 F. Supp. 2d at 1361.
22. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).
23. *Kenny A.*, 356 F. Supp. 2d at 1361.
24. *Id.*
25. *Id.*
26. *Lassiter v. Dep't. of Soc. Serv. Of Durham Cnty., N.C.*, 452 U.S. 18, 31-21 (1981).
27. *Kenny A.*, 356 F. Supp. 2d at 1361.
28. *Id.* at 1360.
29. Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 679 (2006).
30. *Lassiter*, 452 U.S. at 31-33.
31. Pitchal, *supra* note 13, at 683.
32. *Id.* at 684.
33. *Id.* at 689.
34. *Id.*
35. *Id.* at 690.
36. *Id.* at 693.
37. Pitchal, *supra* note 13, at 693.
38. Duquette & Haralambie, *supra* note 8, at 166-67.