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## KEEPING FAMILIES TOGETHER, SAVING MONEY, AND OTHER MOTIVATIONS BEHIND NEW CIVIL RIGHT TO COUNSEL LAWS

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*Several states have a statutory civil right to counsel in certain types of cases, but the legislative intent that led to the passage of these statutes has received little attention until now. Although many of these statutes concern child welfare—for example, keeping children out of foster care when possible—there is no reason to believe that a legislature’s willingness to expand or improve the right to counsel is necessarily limited to the child welfare arena. In passing these statutes, legislators were motivated by expectations of financial savings, a desire to fix failing state child welfare bureaucracies, and notions of fundamental fairness. These statutes bundled the civil right to counsel with larger pieces of societal reform legislation as a means to an end rather than an end in itself. Legislatures often provide funding for specific types of civil legal aid that have been shown to save government money or to have other beneficial effects. There are statutes providing for a right to counsel in cases concerning civil commitment, mandatory medical treatment, paternity, and other types of legal disputes. Civil right to counsel legislation may be more likely to succeed if it is part of broader legislation aimed at solving a social problem than if it is proposed as a stand-alone bill that lacks the same level of support. An examination of the civil right to counsel legislation as it pertains to child welfare reveals that there is no single path to success because varying political climates mean that a statute or political strategy that succeeds in one place may not succeed in another. Understanding the legislative motivations that led to the enactment of these statutes can prove useful to advocates who seek the expansion of the civil right to counsel.*

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## I. INTRODUCTION

In 2006, the American Bar Association's House of Delegates unanimously passed a landmark resolution, calling on states to provide a right to counsel in civil cases in which "basic human needs" are at stake.<sup>1</sup> In the years leading up to the resolution's passage, and since then, Alabama, Arkansas, Connecticut, Florida, Hawaii, Louisiana, Montana, New York, and Texas have enacted laws expanding the right to counsel in civil cases.<sup>2</sup> These new laws are diverse:

- Alabama and Louisiana expanded an existing right to counsel in termination of parental rights cases brought by the state to now also cover cases in which private parties seek to terminate parental rights.<sup>3</sup>
- Arkansas, Montana, and Texas joined other states in providing counsel for parents at the early stages of child abuse and neglect cases. Previously, these states had provided a right to counsel only at the later stages of these proceedings.<sup>4</sup>
- Arkansas, Connecticut, Hawaii, and Montana strengthened an existing right to counsel for parents in child abuse and

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1. ABA House of Delegates Resolution 112A (Aug. 7, 2006), reprinted in *Creating a Constitutional Right to Counsel in the Civil Context: ABA Resolution on Civil Right to Counsel* 15 TEMP. POL. & CIV. RTS. L. REV. 507, 508 (2006).

2. Act No. 2008-277, Ala. Acts 2008 (replacing ALA. CODE § 12-15-63(b) with § 12-15-305 (2008)); Law of Apr. 5, 2001, § 1, 2001 Ark. Acts 1267 (codified at ARK. CODE ANN. § 9-27-401(d) (2008)); Act of June 30, 2005, §§ 44-47, 2005 Conn. Acts 3 (Spec. Sess.) (codified at CONN. GEN. STAT. § 46b-123c (2008)); 2005 Fla. Laws. 245, S.B. 498 (codified at FLA. STAT. § 39.5075(5) (2005)); 2007 Haw. Sess. Laws 218 (codified at HAW. REV. STAT. § 571-87(b) (2008)); S.B. 758, 2008 Leg., Reg. Sess. (La. 2008) (enacted), available at <http://www.legis.state.la.us/billdata/streamdocument.asp?did=502952>; (codified at LA. CHILD. CODE ANN. art. 1245.1 (2008)); Montana Public Defender Act of 2005, 2005 Mont. Laws Ch. 449 (S.B. 146) §§ 4, 6, 8, 15 (codified at MONT. CODE ANN. §§ 41-3-425, 47-1-104 to 105, 47-1-202 (2007)); S.B. 8096, 2006 Leg., 229th Sess. (N.Y. 2006) (codified at N.Y. JUD. L. § 35(8) (Consol. 2009)); Act of June 6, 2005, §§ 1.06-07, 2005 Tex. Gen. Laws 268 (codified at TEX. FAM. CODE ANN. §§ 107.013, 107.015 (2008)).

3. Act No. 2008-277, Ala. Acts 2008 (replacing ALA. CODE § 12-15-63(b) with § 12-15-305 (2008)); LA. CHILD. CODE ANN. art. 1245.1 (2008).

4. Law of Apr. 5, 2001, § 1, 2001 Ark. Acts 1267 (codified at ARK. CODE ANN. § 9-27-401(d) (2008)); Montana Public Defender Act of 2005, 2005 Mont. Laws Ch. 449 (S.B. 146) § 15 (codified at MONT. CODE ANN. § 41-3-425); Act of June 6, 2005, §§ 1.06-07, 2005 Tex. Gen. Laws 268 (codified at TEX. FAM. CODE ANN. §§ 107.013, 107.015 (2007)); see also NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE (1998) (reporting that many states provide counsel to parents early on in a dependency matter).

neglect cases by taking various measures to improve the quality of representation provided.<sup>5</sup>

- Florida required the state government (or a nonprofit organization providing the state with foster care services) to retain an attorney to file a petition to adjust the immigration status of children who appear eligible for special immigrant juvenile status.<sup>6</sup> This is the first law of its kind in the nation.<sup>7</sup>
- New York provides counsel to parents in child custody proceedings pending in the state's trial courts of general jurisdiction.<sup>8</sup> Prior to the new legislation, New York provided a right to counsel only in those custody cases pending in family court.<sup>9</sup> New York is the only state with a right to counsel in all child custody cases.<sup>10</sup>

Although there is a growing body of law review articles regarding the civil right to counsel, until now the passage of these statutes has received little attention. Rather, most of the recent literature focuses on the potential for judicial expansion of the right.<sup>11</sup> This Article attempts to understand the reasons for legislative expansion of the right, and to draw some lessons for the future. Part II examines the legislatures' motivations for passing each statute. Part III explores motivations common to many of the bills, including expectations of financial savings, a desire to fix failing state child welfare bureaucracies, and notions of fundamental fairness. Part IV

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5. Law of Apr. 5, 2001, § 1, 2001 Ark. Acts 1267 (codified at ARK. CODE ANN. § 9-27-401(d) (2008)); Act of June 30, 2005, §§ 44-47, 2005 Conn. Acts 3 (Spec. Sess.) (codified at CONN. GEN. STAT. § 46b-123c (2008)); 2007 Haw. Sess. Laws 218 (codified at HAW. REV. STAT. § 571-87(b) (2008)); MONT. CODE ANN. §§ 47-1-104, 47-1-202 (2007).

6. 2005 Fla. Laws. ch.245, S.B. 498 (codified at FLA. STAT. ANN. § 39.5075(5) (2005)).

7. *Id.*

8. N.Y. JUD. L. § 35(8) (Consol. 2009).

9. N.Y. FAM. CT. ACT § 262(a)(iv) (Consol. 2006).

10. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 2006 CLEARINGHOUSE REV. 245, 252-62. Alaska provides a right to counsel for parents in custody cases where the opposing party is represented by a state-funded entity. ALASKA STAT. § 44.21.410(a)(4) (2009). In August 2007, a state trial court ruled that the Alaska Constitution required the extension of that right to parents who are unable to afford counsel where the opposing party is represented by a *private* attorney. *Gordanier v. Jonsson*, No. 3AN-06-8887 C1, Order (Alaska Super. Ct. Aug. 14, 2007). The case is currently on appeal to the state's supreme court, which has not yet issued its decision.

11. *But see* Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 697 (2006).

draws some lessons that may prove helpful to advocates wishing to heed the ABA's call to further expand the right to counsel in civil cases.

## II. THE GENESIS OF THE NEW LEGISLATION

### A. Alabama

Alabama's expansion of the right to counsel appears to be motivated entirely by constitutional concerns. Prior to 2008, the Alabama Code provided for a right to counsel for parents in dependency cases, including in termination of parental rights proceedings initiated by the state.<sup>12</sup> However, there was no statutory right to counsel in termination of parental rights proceedings initiated by private parties.<sup>13</sup> In 1996, the Alabama Supreme Court ruled, in a case in which a mother—not the state—sought to terminate a father's parental rights, that the right to counsel extended to such cases.<sup>14</sup> Twelve years later, in 2008, as part of a comprehensive revision of the state's Juvenile Justice Act, the legislature finally amended the law to clearly extend the right to counsel to such cases.<sup>15</sup>

### B. Arkansas

In 2001, Arkansas significantly strengthened its existing right to assigned counsel for parents in termination and dependency-neglect proceedings.<sup>16</sup> The parents' right to counsel in such cases had been in place since 1989.<sup>17</sup> At that time, it guaranteed representation to indigent parents and guardians in all proceedings to remove custody

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12. ALA. CODE § 12-15-63(b) (2008).

13. *Id.*

14. *K.P.B. v. D.C.A.*, 685 So.2d 750, 751–52 (Ala. Civ. App. 1996).

15. Act No. 2008-277, Ala. Acts 2008, (replacing ALA. CODE § 12-15-63(b) with § 12-15-305 (2008)). The delay in amending the law to conform to the supreme court's ruling appears to have resulted from the fact that between 2003 and 2008, the judiciary and legislature were involved in revising the Juvenile Justice Act. The process included the appointment of a Juvenile Code Revision Committee by the state's chief justice; review of draft legislation by the judiciary, various executive agencies, and several local nonprofits; and several years of debate within the legislature. ADMINISTRATIVE OFFICE OF THE COURTS, ALABAMA JUVENILE JUSTICE ACT OF 2008, H.B. 28/29–S.B. 33/34, ANNOTATED GUIDE, 47, 82 n.81, available at <http://www.alacourt.gov/pdfppt/AJJA2008rev1108.pdf>.

16. Law of Apr. 5, 2001, § 1, 2001 Ark. Acts 1267, H.B. 1550 (codified at ARK. CODE ANN. § 9-27-401(d) (2008)).

17. Law of 1989, § 15, 1989 Ark. Acts 273 (codified at ARK. CODE ANN. § 9-27-316(h) (2008)).

or terminate parental rights, but it did not necessarily ensure that parents would receive legal assistance during the other stages of a dependency-neglect case.<sup>18</sup> In 1997, the law was amended to provide for the award of grants to “legal service programs . . . to represent indigent custodial parents involved in dependency-neglect proceedings,” but the law still did not provide a right to counsel for parents involved in dependency proceedings concerning matters other than the removal of custody or termination of their parental rights.<sup>19</sup> Moreover, no funds were made available to pay for any counsel appointed when the parent was not represented by a legal services program. If counsel was appointed, it was provided either by an overworked, underfunded public defender system, or by a county struggling to find the necessary funds.

The 2001 amendments made three major changes.<sup>20</sup> First, access to appointed counsel for indigent parents was expanded to cover all dependency-neglect proceedings, not just removal of custody and termination of parental rights proceedings.<sup>21</sup> Second, in order to improve the quality of representation provided to parents, the Arkansas Supreme Court was given a mandate to “adopt standards of practice and qualifications of service for attorneys . . . appointed to provide legal representation for indigent parents or guardians in dependency-neglect cases.”<sup>22</sup> Finally, the amendments contemplated that appointed counsel would be reimbursed entirely by the state.<sup>23</sup>

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18. *Id.*; Telephone Interview with Connie Hickman Tanner, Director, Juvenile Division, Arkansas Judiciary (July 8, 2008).

19. 1997 Ark. Acts 1227 (amended 2001).

20. Law of Apr. 5, 2001, § 1, 2001 Ark. Acts 1267 (codified at ARK. CODE ANN. § 9-27-401(d) (2008)).

21. *Id.* This was accomplished by authorizing the Director of the Administrative Office of the Courts “to establish a program to represent indigent parents or guardians in dependency-neglect cases.” *Id.*

22. ARK. CODE ANN. § 9-27-401(d)(1)–(2). The Court subsequently issued an administrative order setting forth standards and qualifications. *See* Ark. S. Ct. Admin. Order No. 15 (2001).

23. Law of Apr. 5, 2001, ch. 27, § 1, 2001 Ark. Acts 1267 (codified at ARK. CODE ANN. § 9-27-401(d) (2008)). The language of § 9-27-401(d) has been tinkered with since adoption, and the section now incorporates a Supreme Court Administrative Order that explicitly sets forth standards and qualifications for attorneys in dependency-neglect proceedings. *Compare id.* with Ark. S. Ct. Admin. Order No. 15 (2001). In most respects, though, the parental right to counsel in such proceedings has remained essentially unchanged since 2001.

### 1. Motivation and Support for the 2001 Amendment

The 1997 and 2001 amendments were triggered by the 1997 publication of a federally funded assessment revealing serious deficiencies in Arkansas's system of representation in dependency-neglect proceedings.<sup>24</sup> Once the effort to improve this system got underway, two factors proved decisive in making legislation possible: (1) the identification of a separate funding stream to finance improved representation for parents; and (2) an aggressive advocacy effort drawing on judicial and legislative allies.

In 1994, the Arkansas Administrative Office of the Courts ("AOC") used federal funding from the Court Improvement Program to contract with Arkansas Advocates for Children and Families for an assessment of how Arkansas juvenile courts were handling dependency-neglect cases.<sup>25</sup> The resulting report, published in February 1997, revealed that both parents and children regularly failed to receive representation in dependency-neglect proceedings.<sup>26</sup> Findings also indicated that when representation was provided, it was often inadequate.<sup>27</sup> The report traced these problems to the county-based system of funding representation in dependency-neglect proceedings, in which either counsel was not appointed at all, or the courts made the appointments in an ad hoc, last-minute fashion.<sup>28</sup>

In response to this assessment, the Arkansas Supreme Court's Committee on Foster Care and Adoption and the Arkansas Judicial Council (a group consisting of all circuit and appellate judges that acts as the official representative of the state's judiciary and puts together a package of legislation for each legislative session)<sup>29</sup> worked together to draft legislation to improve the representation provided to parents by appointed counsel. During 1997, the

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24. Connie Hickman Tanner et. al, Ark. Sup. Ct. Ad Hoc Comm. on Foster Care and Adoption and the CIP Reassessment Team, Arkansas Court Improvement (CIP) Reassessment Report 1 (Oct. 2005), *available at* [http://courts.state.ar.us/pdf/cip\\_final\\_report.pdf](http://courts.state.ar.us/pdf/cip_final_report.pdf); *see* Donna L. Gay, Report of the Arkansas Supreme Court Ad Hoc Committee on Foster Care and Adoption Assessment 78-84 (Administrative Office of the Courts 1997), *available at* <http://courts.state.ar.us/juvenile/documents/1997%20Report%20of%20AR%20Supreme%20Court%20Ad%20Hoc%20Committee.pdf>.

25. GAY, *supra* note 24, at 3.

26. *Id.* at 38, 43-44, 48.

27. *Id.*; *see also* Telephone Interview with Connie Hickman Tanner, *supra* note 18.

28. GAY, *supra* note 24, at 46-48.

29. Arkansas Judiciary, Information About the Arkansas Judicial Council, [http://courts.state.ar.us/judicial\\_council/index.cfm](http://courts.state.ar.us/judicial_council/index.cfm) (last visited Aug. 9, 2009).

substantive laws were changed, but it was not until 2001 that the state actually began to provide funding to support these changes.<sup>30</sup>

Advocates were told by partners in the Arkansas Senate that the bill was unlikely to succeed, given the difficulty of finding funding and the poor prospects of any initiative that purported to defend the rights of parents in dependency-neglect proceedings. Problems with funding, though, were addressed by increasing court filing fees by \$25 in civil cases. These funds were designated to flow into an Administration of Justice fund wholly dedicated to funding counsel for indigent parents.<sup>31</sup>

The bill's supporters also began an advocacy campaign to persuade legislators to support their initiative. The backers first won the support of the Arkansas Bar Association and the Arkansas Advocates for Children and Families, and found several senators who were willing to sponsor the legislation. Then, in the run-up to the vote on the bill, the coalition supporting the legislation developed talking points and financial projections and made frequent visits to lawmakers.<sup>32</sup>

Several arguments appear to have carried the day. The bill's backers explained to lawmakers that it would help children stay with their parents, if possible, rather than in the foster care system, and that this outcome would be more likely if parents were provided with counsel. Second, the bill's backers noted that the state could save money by providing parents with counsel earlier in dependency-neglect cases, in order to prevent children from being wrongfully taken from their parents. The backers stated that this would, in turn, both reduce litigation costs and eliminate the need to pay for the foster care of wrongfully taken children. This point militated strongly in favor of more comprehensive access to counsel, rather than the appointment of counsel only in termination proceedings.<sup>33</sup> Finally, the bill's proponents explained that it would actually save districts money to have these appointments funded at the state level rather than at the county level, as was then the practice. County-specific financial projections were prepared for meetings with legislators to help make this point. There did not appear to have

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30. Telephone Interview with Connie Hickman Tanner, *supra* note 18.

31. *Id.*

32. *Id.*

33. *Id.*

been any organized opposition to the 2001 amendment.<sup>34</sup> As a consequence of the advocacy efforts, the proposed amendments were eventually enacted without opposition.<sup>35</sup>

## 2. Stakeholders Believe the Legislature's Predictions Were Correct

In the years following the enactment of the new legislation, Arkansas's decision to strengthen the system for providing representation to parents in dependency cases seems to have had at least some of the effects hoped for by the legislature. Based on interviews with AOC staff, judges, attorneys, child welfare caseworkers, parents, and CASA directors, among others, a 2003 report by a consultant to the U.S. Department of Health and Human Services concluded that these "stakeholders consistently agreed that, if implemented appropriately, the program leads to positive outcomes for children and families. Specifically, stakeholders believe that the indigent parent counsel program can lead to expedited permanency for children while maintaining their safety."<sup>36</sup>

As the legislature had hoped, strengthening the system of providing representation to parents did lead to more children staying with, or returning to, their parents. Stakeholders reported that parents were better able to comply with court orders because their attorneys explained the terms of the orders to them.<sup>37</sup> With counsel, parents were also able to obtain services they needed in order to keep or retain custody of their children.<sup>38</sup> And, as the legislature had hoped, improving representation helped judges avoid removing children from their homes unnecessarily because "judges receive[d]

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34. *Id.*

35. In the Senate, the bill passed 34–0; in the House, the bill passed 90–0. J. of Ark. State 83rd Gen. Assembly, 2001 Regular Sess., at 5903.

36. U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2 FEASIBILITY OF EVALUATING THE STATE COURT IMPROVEMENT PROGRAM: FINAL REPORT II.B (2003), *available at* [http://www.acf.hhs.gov/programs/cb/pubs/statecip/volume2/ar\\_2b.htm](http://www.acf.hhs.gov/programs/cb/pubs/statecip/volume2/ar_2b.htm).

37. *Id.* ("[A]ttorneys are able to explain the legal requirements to parents thereby increasing their understanding of the system requirements and increasing their compliance with court orders.").

38. *Id.* ("[S]takeholders agreed that through their work with parents, attorneys are able to identify problems earlier in the case and request court orders for services to address those problems, monitor the provision of services, and hold the child welfare agency accountable. Consequently, parents are able to access needed services sooner.").



more and better information related to the case which improve[d] judicial decision making.”<sup>39</sup>

### *C. Connecticut*

In 2005, the Connecticut legislature greatly strengthened the right of parents and children to counsel in child welfare proceedings by creating an independent commission to appoint and oversee attorneys.<sup>40</sup> Several different factors led to the introduction and passage of this legislation. First, a 1996 report conducted at the behest of the Connecticut judiciary found that the representation provided to parents and children failed to meet national standards.<sup>41</sup> At the time, the judiciary was responsible for contracting with and appointing attorneys. The appointed attorneys had varying levels of experience, and some were recent graduates.<sup>42</sup> Although judges were encouraged to proactively oversee and guide attorneys, judges were reluctant to overstep their traditional roles.<sup>43</sup> Additionally, the report found that the appointed attorneys lacked the oversight, training, access to legal research materials and experts, compensation, and time to provide the requisite level of representation.<sup>44</sup>

Second, a group convened by the Chief Court Administrator issued a report in 2001 recommending that appointed counsel receive training and be evaluated periodically, and that the state adopt performance standards to govern their work.<sup>45</sup>

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39. *Id.*

40. Act of June 30, 2005, §§ 44–47, 2005 Conn. Acts 3 (Spec. Sess.) (codified at CONN. GEN. STAT. § 46b-123c (2008)); *see also* CONN. GEN. STAT. § 46b-123d (2008) (discussing the appointment and oversight of attorneys).

41. *See generally* MUSKIE SCHOOL OF PUBLIC SERVICE, CONNECTICUT COURT IMPROVEMENT PROGRAM REASSESSMENT 4, 43–47 (2007), available at <http://muskie.usm.maine.edu/Publications/cf/CTCIPFinalReport07.pdf> (comparing the representation provided to the representation described in NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES (1995)).

42. *Id.*

43. *Id.*

44. *Id.*

45. Christina D. Ghio, *Legislation Will Improve Representation for Abused and Neglected Children*, CONN. LAW., Aug.-Sept. 2005, at 1, available at <http://www.kidscounsel.org/americanlawyerjulaug05cdg.pdf> (discussing State of Connecticut Judicial Branch, Legal Representation of Children and Parents in Juvenile Matters Discussion Group, Findings and Recommendations (Oct., 2001)); *see also* COMM. ON THE QUALITY OF REPRESENTATION OF CHILDREN AND FAMILIES, RECOMMENDATIONS TO THE COMMISSION ON CHILD PROTECTION AND THE CHIEF CHILD PROTECTION ATTORNEY 10–11 (2006), available at <http://www.ct.gov/ccpa/lib/>

Finally, in 2004, a group of attorneys handling dependency cases filed a federal lawsuit, claiming that the level of representation being provided violated the rights of parents and children.<sup>46</sup> Although the lawsuit was dismissed on standing grounds in 2005—a few weeks after the bill’s introduction—the judge hearing the case noted that “it may very well be that an administrative or legislative review of the issues raised in this suit may be an appropriate course.”<sup>47</sup>

In 2005, in response to these reports and the 2004 lawsuit, the University of Connecticut School of Law’s Center for Child Advocacy drafted, and the House Judiciary Committee introduced, Connecticut House Bill 6871.<sup>48</sup> The bill created the independent Commission on Child Protection to provide oversight of the system of providing representation to parents and children.<sup>49</sup> The Commission would appoint a Chief Child Protection Attorney, who would be responsible for contracting with and assigning lawyers to cases, setting training and caseload standards, and providing training to appointed counsel.<sup>50</sup>

The Judicial Branch, the Office of the Attorney General, the Pro Bono and Children’s Law Committees of the Connecticut Bar Association, and the Juvenile Matters Trial Lawyers Association all supported the legislation.<sup>51</sup> At a Judiciary Committee hearing, every speaker was in favor of the bill.<sup>52</sup> There were many common themes. Several supporters claimed that as a result of insufficient funding, there were too few attorneys, with each attorney handling too many cases.<sup>53</sup> The quality of the work was too often poor, and there was a high turnover rate among these attorneys.<sup>54</sup> Most of the attorneys

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ccpa/Recommendations\_to\_Child\_Protection\_Attorney\_Final.doc (discussing the same report from the State of Connecticut Judicial Branch).

46. *Juv. Matters Trial Lawyers Ass’n. v. Jud. Dep’t.*, 363 F. Supp. 2d 239, 242 (D. Conn. 2005).

47. *Id.*

48. Ghio, *supra* note 45, at 1.

49. *Id.*

50. CONN. GEN. STAT. §§ 46b-123c, 46b-123d (2009).

51. Ghio, *supra* note 45, at 1.

52. Judiciary Comm. R. on H.B. 6871 (Apr. 6, 2005), available at <http://www.cga.ct.gov/2005/jfr/h/2005HB-06871-R00JUD-JFR.htm>.

53. *Id.*

54. *Id.*

had limited experience and training.<sup>55</sup> Several speakers suggested that there needed to be higher standards in place and more training.<sup>56</sup> Another common theme was a lack of oversight of the appointed attorneys.<sup>57</sup> There were complaints that there was a lack of supervision and too much secrecy.<sup>58</sup> The speakers wanted more monitoring and evaluations.<sup>59</sup>

The only concerns raised about the bill were practical and institutional concerns. The Chief Public Defender supported the idea but was pleased that his office would not be responsible for providing representation in these cases.<sup>60</sup> The Chief Public Defender stated that his office did not have the resources or experience to effectively represent families in legal family proceedings.<sup>61</sup> Additionally, he did not want to see the office's already limited funds being divided between two important needs.<sup>62</sup> A judge who served as Chief Court Administrator for Juvenile Matters suggested that the budgetary process for the new commission should be separate from the judiciary to avoid conflicts of interest.<sup>63</sup> He also stated that the judiciary did not have enough space to house the contracted attorneys.<sup>64</sup> Aside from this testimony, there was no public controversy regarding the need to allocate additional funding for representation in child welfare cases.

#### *D. Florida*

In 2005, Florida enacted the first statute in the nation that requires the provision of counsel for children involved in the immigration system, obligating the state to prepare and file a petition for special immigrant juvenile status for children eligible for that status.<sup>65</sup> A recipient of special immigrant juvenile status is

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. Act of June 17, 2005, § 5, 2005 Fla. Laws 245 (codified at FLA. STAT. § 39.5075(5) (2005)).

immediately eligible to apply for legal permanent residency, which will allow the juvenile to legally remain in the United States and work, pay in-state college tuition, and naturalize after five years.<sup>66</sup>

Federal law permits a child to obtain special immigrant juvenile status once a state court has determined that (1) the child is dependent due to abuse, abandonment, neglect, or a similar status under state law; (2) the child is “eligible . . . for long-term foster care,” meaning that there is no realistic likelihood that the child will be returned to one or both parents; and (3) obtaining special immigrant juvenile status would be in the child’s best interests.<sup>67</sup> Consequently, the state statute requires the state to petition for that status only when a state court has made such a finding.<sup>68</sup> The statute requires the state’s Department of Children and Families or a community-based foster care provider to file the petition either “directly or through volunteer or contracted legal services.”<sup>69</sup> In effect, the statute requires the provision of an attorney to file the petition on behalf of the child.

The right to counsel provision was part of a larger bill requiring the Department of Children and Families (and the nonprofit groups with which it contracts) to do several other things to ensure that children eligible for special immigrant juvenile status would be able to get it.<sup>70</sup> The legislation was motivated by concerns that dependent immigrant children were aging out of foster care and ending up homeless, destitute, and unable to pay taxes as a result of their irregular immigration status and consequent lack of access to

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66. Center for Human Rights and Constitutional Law, Unaccompanied Minors Project, Special Immigrant Juvenile Status (Oct. 20, 2007), <http://immigrantchildren.org/SIJS/>; HEALTH & HUMAN SERVS. S. APPROPS. COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT FOR SB498, at 3 (Fla. 2005), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=2005s0498.ha.doc&DocumentType=Analysis&BillNumber=0498&Session=2005>.

67. Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J) (2006).

68. FLA. STAT. § 39.5075(5) (2005).

69. *Id.* A committee report clarifies that however the petition is filed, it must be done through an attorney. S. JUD. COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT FOR SB498, at 4 (Fla. 2005), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=2005s0498.ju.doc&DocumentType=Analysis&BillNumber=0498&Session=2005> [hereinafter JUD. COMM., SENATE STAFF ANALYSIS].

70. For example, the bill requires the state to identify whether children who have been adjudicated dependent are U.S. citizens, and if they are not, to evaluate whether they are eligible for special immigrant juvenile status. JUD. COMM., SENATE STAFF ANALYSIS, *supra* note 69, at 3–4.

employment and government services.<sup>71</sup> Senator Margolis, the bill's primary sponsor, likely had a natural interest in this problem because she represents Miami-Dade County, which has the largest immigrant population in Florida.<sup>72</sup>

The legislative committees reviewing the bill noted that it carried an additional benefit of generating federal funding to pay for the care of children in state custody who had received special immigrant juvenile status. The committees noted that the state was entirely responsible for paying for the care of children without that status.<sup>73</sup>

The most serious opposition to the legislation came from the nonprofit organizations that provide foster care in Florida and, under the bill, are responsible for filing petitions for special immigrant juvenile status on behalf of immigrant children. These organizations worried that the additional responsibility would tax their already limited resources by adding to caseworkers' duties and requiring them to pay the attorneys who would work to prepare the petitions.<sup>74</sup> Senator Margolis was able to defuse these concerns before the bill came up for a vote, in part by noting that each county would be able to decide for itself the role that its nonprofit groups would play in preparing the petitions.<sup>75</sup> The lack of other significant opposition may also be explained by the fact that the right to counsel provision codified an administrative rule that, since 1995, had required the state child welfare agency to file for special immigrant juvenile

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71. Telephone Interview with Kele Williams, Assistant Professor, Univ. of Miami School of Law (June 10, 2008); JUD. COMM., SENATE STAFF ANALYSIS, *supra* note 69, at 3, 5.

72. Telephone Interview with Kele Williams, *supra* note 71. Senator Margolis worked with child welfare advocates in the community to develop the bill. Bernard Perlmutter, Director of the Children and Youth Law Clinic at the University of Miami School of Law, coordinated the effort, and the Florida Immigrant Advocacy Center ("FIAC") played an important role in drafting the bill and reviewing it to ensure its feasibility. Telephone Interview with Deborah Lee, Attorney, Fla. Immigrant Advocacy Center (July 21, 2008).

73. JUD. COMM., SENATE STAFF ANALYSIS, *supra* note 69, at 5 n.11; HEALTH & HUMAN SERVS. S. APPROPS. COMM., *supra* note 66, 5 n. 11. It is unclear what federal funding the state was referring to. A 2008 federal law does provide that "[s]ubject to the availability of appropriations, if State foster care funds are expended on behalf of a child" who is not in federal custody, and who has received special immigrant juvenile status, "the Federal Government shall reimburse the State in which the child resides for such expenditures by the State." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, § 235(d)(4)(B) (2008).

74. Telephone Interview with Kele Williams, *supra* note 71.

75. *Id.*

status.<sup>76</sup> Ultimately, both the House and Senate versions of the bill passed out of committee with no nay votes and then passed unanimously in both the House and the Senate.<sup>77</sup>

### *E. Hawaii*

In 2006, a study conducted by the Hawaii State Judiciary found that a lack of adequate funding for the representation of parents and children in dependency cases was hurting the state's ability to recruit and retain advocates and to provide quality representation.<sup>78</sup> In response, the judiciary drafted a bill increasing the hourly compensation rate for child welfare attorneys and guardians ad litem.<sup>79</sup> Members of the judiciary testified in support of the bill, and it passed without opposition.<sup>80</sup>

### *F. Louisiana*

In 2008, Louisiana enacted a law requiring the appointment of counsel for a parent facing the termination of his or her parental rights through an adoption proceeding brought by a family member.<sup>81</sup> Prior to that date, there was a statutory right to counsel for parents facing the termination of their rights in state-initiated proceedings,

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76. FLA. ADMIN. CODE ANN. r. 65C-9.003 (2008); see also Carolyn S. Salisbury, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration?*, 50 U. MIAMI L. REV. 633, 640–45 (1996) (explaining the history of the administrative rule); Angela M. Elsperger, *Florida's Battle with the Federal Government Over Immigration Policy Holds Children Hostage: They Are Not Our Children!*, 13 LAW & INEQ. 141, 168 (1994) (same).

77. Florida Senate, Senate 0498: Relating to Immigrant Children/Residency Status, [http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI\\_Mode=ViewBillInfo&BillNum=0498&Year=2005&Chamber=Senate#Analysis](http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=0498&Year=2005&Chamber=Senate#Analysis) (last visited Mar. 15, 2009); Florida House of Representatives, HB 809—Residency Status of Dependent Immigrant Children, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=16447&SessionId=38> (last visited Mar. 15, 2009); SB 498—Immigrant Children/Residency Status, <http://www.myflorida.house.gov/Sections/Bills/billsdetail.aspx?BillId=15602&SessionId=38> (last visited Mar. 15, 2009).

78. National Child Welfare Resource Center on Legal and Judicial Issues, State Summary: Hawaii, <http://www.abanet.org/abanet/child/statesum/sumboth.cfm?state=HI> (last visited Mar. 15, 2009).

79. *Id.* Prior to the passage of the legislation, attorney compensation was set at \$40 per hour for out-of-court work and \$60 per hour for in-court work. The 2007 legislation, and a 2008 clarification, raised the in-court rate to \$90 per hour and the out-of-court rate to \$60 per hour. 2008 Haw. Sess. Laws 201 (codified at HAW. REV. STAT. § 571-87(b) (2008)); 2007 Haw. Sess. Laws 218 (codified at HAW. REV. STAT. § 571-87(b) (2008)). Both the 2007 and 2008 measures left in place preexisting caps on the total amount that appointed counsel could charge.

80. CLAYTON HEE, COMM. ON JUDICIARY AND LABOR, REPORT ON HB 1211 (Haw. 2007).

81. LA. CHILD. CODE ANN. art. 1245.1 (2008).

but not for parents facing the termination of their rights in proceedings initiated by private individuals.<sup>82</sup> The statute passed both houses of the legislature with no opposition.

The bill was prompted by a woman whose parental rights had been terminated in a proceeding in which she was unrepresented. The woman complained to State Senator Sharon Weston Broome, who sought advice from Jeffrey Wittenbrink, a former civil legal aid attorney and a member of the National Coalition for the Civil Right to Counsel. Wittenbrink drafted a bill, which Senator Broome introduced in the spring of 2008. The bill passed the Senate Judiciary Committee, but when it reached the Senate floor, a member of the committee gutted the bill, stripping it of everything except a notice provision (in other words, completely removing the right to counsel provision). The senator who sponsored the amendment said he was doing so because the state had just reformed its indigent defense system and did not have any funding left over to expand the civil right to counsel.<sup>83</sup> The bill then went to the House and passed out of committee, still without the right to counsel provision. Eventually, Wittenbrink was able to persuade legislators that the bill would cost the state very little because there are very few contested involuntary adoptions each year (less than twenty-five per year in Baton Rouge), and because judges would have the option of requiring the petitioning party to pay the cost of the attorneys for the parent and child.<sup>84</sup> The stricken language was put back in, and it remained in the final language of the bill that was signed on July 7, 2008.<sup>85</sup>

### *G. Montana*

In 2005, Montana enacted legislation establishing a right to counsel for parents and guardians in all abuse and neglect proceedings.<sup>86</sup> The legislation expanded the existing right to counsel, which had provided parents with a right to counsel in abuse and neglect cases only when (a) a request was made for a determination that preservation or reunification services need not be provided, or

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82. LA. CHILD. CODE ANN. art. 1016 (2008).

83. Telephone Interview with Jeffrey Wittenbrink (May 22, 2008).

84. *Id.*

85. LA. CHILD. CODE ANN. art. 1245.1 (2008).

86. MONT. CODE ANN. § 41-3-425 (2007).

(b) a petition for termination of parental rights was filed.<sup>87</sup> The legislation also attempted to improve the quality of parents' representation in abuse and neglect cases by, among other things, requiring the newly appointed statewide public defender to (a) handle mandated abuse and neglect cases, and (b) establish and follow standards for the qualification and training of public defenders, and policies and procedures for handling conflicts of interest, excessive caseloads, and financial eligibility determinations.<sup>88</sup>

The idea of expanding the right to counsel to cover all phases of an abuse and neglect case, and improving the quality of appointed counsel, came from Chuck Hunter, the Division Administrator of the Child and Family Services Division of Montana's Department of Health and Human Services. During a meeting of the state legislature's Children, Families, Health and Human Services Interim Committee, Representative Bob Lawson asked Hunter what could be done about the perception by some parents involved in abuse or neglect cases that they could not communicate with the Division, and that their points of view were not being heard. Hunter responded that counsel should be appointed at a very early stage of the proceeding, and that a group of public defenders familiar with child and family services law should provide representation.<sup>89</sup> The legislature passed a resolution to study the matter based on Hunter's suggestion.<sup>90</sup>

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87. *Id.* §§ 41-3-422(11), 41-3-607(42) (2002). Courts had discretion to appoint counsel earlier in the case. *Id.* § 41-3-422(11). In some counties, courts appointed counsel earlier, but in other counties, courts did not. SUSAN BYORTH FOX, STAFF OF CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVS. INTERIM COMM., 58TH LEG., RECOMMENDATIONS TO THE LAW AND JUSTICE INTERIM COMMITTEE, STUDY FOR A STATEWIDE PUBLIC DEFENDER COMMISSION 2 (Mont. 2004), available at [http://leg.mt.gov/content/Committees/interim/2003\\_2004/child\\_fam/work\\_plan/L&JRECS\\_HJ3.pdf](http://leg.mt.gov/content/Committees/interim/2003_2004/child_fam/work_plan/L&JRECS_HJ3.pdf) [hereinafter FOX, RECOMMENDATIONS ON A STATEWIDE PUBLIC DEFENDER SYSTEM].

88. Montana Public Defender Act of 2005, §§ 4, 6, 8 (codified at MONT. CODE ANN. §§ 47-1-104 to -105, -202 (2007)).

89. CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVS. INTERIM COMM., STUDY PLAN FOR H. J. RES. NO. 3, at 2 (Mont. 2003), available at [http://leg.mt.gov/content/Committees/interim/2003\\_2004/child\\_fam/work\\_plan/HJR3\\_STUDY\\_PLAN.pdf](http://leg.mt.gov/content/Committees/interim/2003_2004/child_fam/work_plan/HJR3_STUDY_PLAN.pdf) [hereinafter STUDY PLAN]; SUSAN BYORTH FOX, CHILDREN, FAMILIES, HEALTH AND HUMAN SERVS. INTERIM COMM., MINUTES FOR FINAL MEETING 5 (Mont. 2002), available at [http://leg.mt.gov/content/committees/interim/2001\\_2002/child\\_fam/minutes/c\\_f\\_82302.pdf](http://leg.mt.gov/content/committees/interim/2001_2002/child_fam/minutes/c_f_82302.pdf) [hereinafter FOX, MINUTES FOR FINAL MEETING].

90. FOX, MINUTES FOR FINAL MEETING, *supra* note 89, at 17; STUDY PLAN, *supra* note 89, at 2.



Lawson's question and the legislature's eagerness to do something to improve parents' representation were prompted at least in part by a group of parents who had lost their parental rights. Some claimed that Montana's Child Protective Services was part of a government conspiracy to remove children from their homes. The parents were very active in both the capital and the western part of the state.<sup>91</sup>

By the time the legislature passed the bill, it had before it several pieces of information that may have motivated it to heed Hunter's suggestion. First, a legislative committee reported that providing counsel for parents earlier in the process would help parents in their efforts to get their children back, lead to more frequent reunification of families, and speed up resolution of abuse and neglect cases.<sup>92</sup> The committee backed up this assertion with several sources: (1) "anecdotal information from a 1996 court assessment that earlier representation of parents resulted in faster resolution of the case";<sup>93</sup> (2) information from the Yellowstone Family Treatment Court "that court-appointed counsel for parents did not have to result in a more adversarial process if defense counsel was part of a treatment team and that it also could result in faster resolution of a case";<sup>94</sup> and (3) a Washington State pilot project that found that providing better representation to parents reduced the time between the state's filing of a petition and the end of the case by 23.6 percent, and increased the rate of reunification by 53.3 percent.<sup>95</sup>

Second, the legislature may have relied on testimony regarding two cases involving inadequate representation. In one case, inadequate representation had caused a child to spend two years in

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91. Telephone Interview with Susan Byorth Fox, Executive Dir., Legislative Servs., Mont. Legislature (Oct. 23, 2008).

92. See, e.g., FOX, RECOMMENDATIONS ON A STATEWIDE PUBLIC DEFENDER SYSTEM, *supra* note 87, at 3, 15–16 (reporting that appointing counsel earlier "could lead to a faster resolution when the parent fully understands the timelines and requirements of any treatment plan or other requirements to reunify the family").

93. *Id.* (citing MONT. SUPREME COURT, OFFICE OF THE COURT ADM'R, ASSESSMENT AND RECOMMENDATIONS FOR IMPROVING CHILD ABUSE AND NEGLECT PROCEEDINGS IN MONTANA COURTS 14–15 (1996)).

94. *Id.* at 15.

95. *Id.* at 16; see also NATIONAL COUNCIL OF 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>.

foster care unnecessarily. In another, inadequate representation caused the state to spend almost \$1 million on unnecessary mental health services.<sup>96</sup>

Third, in addition to noting the beneficial effects of providing representation, the committee pointed to the fact that national standards published by the U.S. Department of Health and Human Services and by the National Council of Juvenile and Family Court Judges both support providing representation to parents at all stages of dependency cases.<sup>97</sup>

Finally, a legislative committee report characterized the proposed expansion of the right to counsel in civil cases as necessary to secure funding. In 2002, the ACLU had brought a lawsuit alleging that the state's system of providing representation to low-income people charged with crimes was unconstitutionally inadequate. According to the report, the lawsuit had the potential to drain resources away from representation for parents and children in abuse and neglect cases: "Any additional requirements burdening the state either as remedy to a lawsuit or a legislative proposal will compete for any resources needed for indigent defense in civil cases, as well as for the adequate funding of resources needed for child protection and representation."<sup>98</sup>

The Montana judiciary took an ambivalent position regarding the proposed expansion of the right to counsel in abuse and neglect cases. In response to a legislative audit that discussed the fact that parents in some counties received counsel throughout their abuse and neglect cases while others did not, Chief Justice Karla Gray wrote that although the appointment of counsel for all parents at the beginning of their cases is not constitutionally required, appointing counsel would lead to consistency. In addition, appointing counsel "might also be perceived as providing a more level playing field

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96. Hearing on S.B. 146 Before the S. Comm. on Finance and Claims, 59th Leg. 22–23 (Mont. 2005) (statement of Kande Matthew Jenkins, Advocate for Families Falsely Accused of Abuse & Neglect; Betsy Brandborg, State Bar of Montana; Pastor Cooke; and Melissa Worthan), available at [http://data.opi.mt.gov/legbills/2005/minutesPDF/Senate/050308FCS\\_Sm1.pdf](http://data.opi.mt.gov/legbills/2005/minutesPDF/Senate/050308FCS_Sm1.pdf).

97. FOX, RECOMMENDATIONS ON A STATEWIDE PUBLIC DEFENDER SYSTEM, *supra* note 87, at 3–5 (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STANDARDS FOR LEGAL REPRESENTATION OF CHILDREN, PARENTS AND THE CHILD WELFARE AGENCY (2003), and NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1995)).

98. STUDY PLAN, *supra* note 89, at 17.

between indigent parents, on the one hand, and the combined resources of the [agency] and county attorneys, on the other.”<sup>99</sup> However, she warned the legislature that “the costs of that representation . . . would be the State’s burden.”<sup>100</sup>

There was no public opposition to the expansion of counsel for abuse and neglect cases. Indeed, there was virtually no news coverage of the change, and very little discussion of it even in the committee hearings regarding the legislation. This is likely because the legislation containing the expansion of the right to counsel in abuse and neglect cases was part of a larger bill creating a statewide public defender to handle the criminal and civil cases in which a defendant has a right to counsel.<sup>101</sup> The creation of the statewide public defender system was the subject of much debate in the legislature and many newspaper articles.<sup>102</sup>

#### *H. New York*

In August 2006, the New York legislature enacted a bill providing parents with a right to counsel in custody disputes in the state’s supreme court (which is the state’s trial court of general

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99. Letter from Chief Justice Karla M. Gray to Legislative Auditor Scott Seacat 2–3, Aug. 15, 2002, reproduced in Montana Legislative Audit Division, Report to the Legislature, Performance Audit: Child Protective Services (H.R.J. Res. 32) app. B-15 (Oct. 2002), available at <http://www.leg.mt.gov/content/Publications/Audit/Report/02p-02.pdf> [hereinafter Letter from Justice Gray]. Justice Gray’s assertion that expansion was not constitutionally required is consistent with a 2001 Montana Supreme Court ruling which held that counsel should have been appointed for a minor who was the subject of a proceeding by the state to adjudicate her baby as a youth in need of care. In re A.F.C., 2001 MT 283, ¶ 51, 307 Mont. 358, ¶ 51, 37 P.3d 724, ¶ 51. The court did not define the outside parameters of the right to counsel in abuse and neglect cases, instead following the U.S. Supreme Court in ruling that the issue required a case-by-case determination. *Id.* at ¶ 44.

100. Letter from Justice Gray, *supra* note 99, at 3.

101. See Montana Public Defender Act of 2005, S.B. 146, 2005 Leg., Reg. Sess. (codified at MONT. CODE ANN. §§ 47-1-101 to -216 (2007)). The creation of the public defender to handle criminal cases was prompted by the ACLU’s indigent defense lawsuit, but the expansion of the civil right to counsel in abuse and neglect cases and the decision to charge the new public defender system with responsibility for handling those cases were not. See Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1498–99, 1502–07 (2006).

102. See, e.g., Kristin Inbody, *Legislative Cure for Public Defense System?*, QUEEN CITY NEWS, (Helena, Mont.), Mar. 23, 2005, available at <http://www.queencitynews.com/modules.php?op=modload&name=News&file=article&sid=3635>; Jennifer McKee, *Bill Would Provide Attorneys for Poor*, BILLINGS GAZETTE, Jan. 19, 2005, available at <http://www.billingsgazette.com/newdex.php?display=rednews/2005/01/19/build/state/30-attorneys.inc>.

jurisdiction).<sup>103</sup> There was a preexisting right to counsel for parents involved in custody disputes in family court.<sup>104</sup> The bill ensured that parents would have a right to counsel regardless of the court in which their cases are pending.<sup>105</sup>

The genesis for the new law seems to have been a law review article written in 2002 by Robert Elardo, the managing attorney of the Erie County Bar Association's Volunteer Lawyers Project. Elardo argued that by providing counsel to litigants in one court but not to litigants involved in identical proceedings in another court, the state violated the litigants' equal protection rights.<sup>106</sup> Other supporters of the bill included the New York State Unified Court System, local bar associations, civil legal aid groups, and advocates against domestic violence.

In addition to the equal protection argument put forward by Elardo, the bill's supporters argued that in custody and divorce proceedings where one party could afford a lawyer and the other could not, the moneyed party could push the proceeding from family court to supreme court to deny the less wealthy party access to counsel. A number of supporters noted that "injustice plays out most egregiously in domestic violence cases where abusers often control the family finances and can afford to retain private counsel," and the "[a]busers will use this advantage strategically to manipulate the situation."<sup>107</sup> The New York County Lawyers' Association argued that the provision of counsel in one venue but not in another led some parties to bifurcate their cases to resolve certain disputes in supreme court and others in family court, thus increasing the judiciary's overall costs. The association argued that providing a

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103. N.Y. JUD. L. § 35(8) (Consol. 2009).

104. N.Y. FAM. CT. ACT § 262(a)(iv) (Gould 1988).

105. In New York, the supreme court and the family court have concurrent jurisdiction over child custody cases. Robert M. Elardo, *Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts*, 29 FORDHAM URB. L.J. 1125, 1125–26 (2002).

106. *Id.*

107. Letter from Amy E. Schwartz, Empire Justice Center Domestic Violence Legal Program, to Governor Pataki, Bill Jacket, L. 2006, ch. 538, at 33–34 (Aug. 16, 2006); *see also* Letter from Catherine I. Douglass, Executive Director in Motion, to Governor Pataki, Bill Jacket, L. 2006, ch. 538, at 25 (Aug. 14, 2006).

right to counsel in both venues would reduce the burden on the judiciary.<sup>108</sup>

The only vocal opposition to the bill came from the New York State Association of Counties, which “strongly oppose[d]” the bill because of the financial burdens that would fall upon the counties, and because “the current method of providing indigent defense services in New York imposes a large unfunded mandate by the State upon its counties.”<sup>109</sup> The state budget agency and the New York Unified Court System contested this claim, arguing that the bill would not have a significant financial effect.<sup>110</sup> In any event, the legislature passed the bill.

### *I. Texas*

In 2005, revelations that children had suffered horrific parental abuse despite the involvement of the child welfare system prompted the Texas Legislature to broadly restructure the Texas child welfare system.<sup>111</sup> Among other things, the new law established a civil right to counsel in all cases in which the government is seeking conservatorship of a child (i.e., care, control, custody, or the right to determine the child’s placement), effectively expanding the civil right to counsel that had existed only in those dependency cases in which the government sought to terminate a parent’s rights.<sup>112</sup>

Parents’ rights advocates and the Texas-based Center for Public Policy Priorities had both urged the expansion of the right to

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108. Letter from Hon. Louise Gruner Gans, J.H.O., Chair, Family Court & Child Welfare Committee of the New York County Lawyers’ Association, to Richard Platkin, Counsel to the Governor, Bill Jacket, L. 2006, ch. 538, at 23–24 (Aug. 8, 2006).

109. Letter from Kenneth A. Crannell, Legislative Director at the New York State Association of Counties, to Richard M. Platkin, Counsel to the Governor, Bill Jacket, L. 2006, ch. 538, at 8–9 (July 18, 2006).

110. Letter from Michael Colodner, Counsel, State of New York Unified Court System, Office of Legislative Counsel, to Richard Platkin, Counsel to the Governor, Bill Jacket, L. 2006, ch. 538, at 7 (July 5, 2006); Budget Report on Senate Bill 8096, by Susan E. Knapp for John F. Cape, Director NYS Division of the Budget, Aug. 14, 2006, Bill Jacket, L. 2006, ch. 538, at 6.

111. Act of June 6, 2005, §§ 1.06–07, 2005 TEX. GEN. LAWS 268, S.B. 6 (codified at TEX. FAM. CODE ANN. §§ 107.013, 107.015 (2008)); *Protective Service Reform Passed by Senate*, TEXAS STATE SENATE NEWS, Mar. 3, 2005, available at <http://www.senate.state.tx.us/75r/senate/archives/Arch05/w030305a.htm>.

112. The 2005 parental right to counsel provision replaced statutory language that had required the court to appoint an attorney ad litem for an indigent parent only “[i]n a suit filed by a governmental entity in which termination of the parent-child relationship is requested.” 2005 Tex. Sess. Law Serv. 268 (West); TEX. FAM. CODE ANN. § 107.013(a), (c) (2007).

counsel.<sup>113</sup> In adopting the new legislation, the legislature apparently was motivated by a desire to ensure that children were removed from their homes only when necessary, both out of concern for the families and in a desire to save government funds. The Texas House Human Services Committee, which drafted the language expanding the right to counsel, noted that parents often lacked counsel at the hearings that determined whether their children should be removed from their custody.<sup>114</sup> The committee characterized the appointment of counsel for parents at those hearings as “essential for the operation of a balanced system.”<sup>115</sup> The committee acknowledged that there would be “a cost associated with this recommendation” but noted that having counsel present at those hearings “might result in fewer removals” and would save money for that reason.<sup>116</sup>

The legislature also appears to have been motivated by a desire to ensure that if children are removed, they will be placed with

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113. Telephone Interview with Tina Amberboy, Executive Director, Permanent Judicial Commission for Children, Youth, & Families, Supreme Court of Texas (June 12, 2008) (discussing involvement of parents’ rights groups); CTR. FOR PUB. POL’Y PRIORITIES, KINSHIP CARE IN TEXAS 6–7 (2004) (recommending that parents should be appointed counsel at removal hearings as a means to ensuring that children would be placed with relatives wherever possible), available at <http://www.cppp.org/files/4/kinship504.pdf> [hereinafter CTR. FOR PUB. POL’Y PRIORITIES]; H. COMM. ON CHILD WELFARE & FOSTER CARE, SELECT, 79TH H.R., INTERIM REPORT, at 83, 253 n.133 (Tex. 2004) (Rep. Suzanna Hupp), available at <http://hseweb.house.state.tx.us/committees/reports/78interim/childwelfare.pdf> (noting that Chris Branson, President, Family Rights Foundation, had advocated for appointment of counsel for parents) [hereinafter H. COMM. ON CHILD WELFARE & FOSTER CARE, INTERIM REPORT]; *Id.* at 75–76 (noting that the Center for Public Policy Priorities urged that counsel for parents be appointed earlier).

114. H. COMM. ON HUMAN SERVICES, 79TH H.R., INTERIM REPORT, at 135 (Tex. 2004) available at [http://www.house.state.tx.us/committees/reports/78interim/human\\_services.pdf](http://www.house.state.tx.us/committees/reports/78interim/human_services.pdf) [hereinafter H. COMM. ON HUMAN SERVICES, INTERIM REPORT].

115. *Id.* at 56 (stating that the failure to appoint counsel at the initial hearing “tips the balance in favor of the state”). This report appears to be the best available evidence of the legislature’s intent in passing this particular part of the statute. The relevant language originated in the House version of the bill. H.B. 6, 79th Reg. Sess., § 1.21. It was added to the Senate version—the one eventually signed by the Governor—at the end of the legislative process, via an amendment offered by Rep. Suzanna Hupp, a conservative Republican, who was chair of the House Committee on Human Services and who had chaired the Select Committee on Child Welfare and Foster Care, which wrote the relevant portion of the committee report. C.S.S.B.6, 79th Leg. §1, amend. 4 (as reported by Tex. H.J., Apr. 19, 2005), available at <http://www.journals.house.state.tx.us/hjrnl/79r/html/home.htm> [hereinafter C.S.S.B.6, amend. 4].

116. H. COMM. ON HUMAN SERVICES, INTERIM REPORT, *supra* note 114, at 135. The Center for Public Policy Priorities made a “back of the napkin calculation” that expanding the right to counsel to cover the initial removal hearings would cost approximately \$24 million more than the counties were already spending on parents’ attorneys. CTR. FOR PUB. POL’Y PRIORITIES, *supra* note 113, at 7. However, it is unclear whether the legislature and the counties were aware of that estimate. At any rate, neither entity ventured any guess as to what the cost would be.

relatives. In recommending that parents be appointed counsel earlier, the Texas House Select Committee on Child Welfare and Foster Care characterized this step as “key to improving outcomes for children” because “the role lawyers for parents play in advocating for kinship care” can directly affect the outcome of placement for children.”<sup>117</sup>

Though everyone affected by this legislation—attorneys, judges, parents’ rights advocates, county officials—agreed on the need for representation of indigent parents, some opposition to the amendments came from the counties. In Texas, court-appointed legal representation is county-funded, and the proposed amendments mandating earlier appointments were unaccompanied by additional state appropriations. Since Texas has no state or county income tax, it is difficult for county judges to manage their budgets while also ensuring that all litigants receive full due process protections. The counties felt that the new provisions would render their financial burdens insupportable—particularly given that they already were required to appoint and pay for attorneys ad litem for children in any suit filed by a governmental entity requesting termination or conservatorship of the child.<sup>118</sup> In order to reassure the counties, an early draft of the legislation required county clerks to impose a fee of up to \$15 on marriage license applicants to fund the costs of the appointed attorneys for indigent parents.<sup>119</sup> However, this provision was removed by the conference committee.<sup>120</sup>

Despite the counties’ opposition, the Texas legislature passed the bill. Because the bill included so many provisions, the ultimate roll call votes are not indicative of support for particular provisions. Nonetheless, it is notable that the bill passed in the Texas House by a margin of 124–20, with three abstentions, and then passed in the Texas Senate with thirty yea votes and only one nay vote. The Texas Governor signed the bill into law on September 1, 2005.<sup>121</sup>

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117. H. COMM. ON HUMAN SERVICES, INTERIM REPORT, *supra* note 114, at 75–76.

118. *Id.*; see also Jim Allison, *Anatomy of an Unfunded Mandate*, TEX. COUNTY PROGRESS (Aug. 30, 2005), available at <http://www.countyprogress.com/article.php?issue=13&category=4&article=65> (describing the position of the County Judges and Commissioners Association of Texas).

119. C.S.S.B.6, 79th Leg. §1, amend. 4, *supra* note 115, at 1881.

120. See Allison, *supra* note 118.

121. S.B.6, 79R 1984 UM-D (Tex. 2005), available at <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=SB6>.

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### III. COMMON THEMES

Although much of the literature regarding the civil right to counsel focuses on constitutional justifications for the right, constitutional concerns did not play a large role in most jurisdictions that have recently expanded the civil right to counsel. Alabama's statute appears to be the only one motivated primarily by constitutional concerns. Indeed, in Montana, the legislature expanded the right to counsel even after being explicitly told by Montana's Chief Justice that the expansion was *not* constitutionally required.<sup>122</sup>

Nonetheless, notions of fundamental fairness played a role in several expansions of the right to counsel. In Texas, the legislative committee that proposed the changes emphasized that without counsel, the proceedings were weighted against the parents.<sup>123</sup> In Montana, the legislature relied on the fact that standards promulgated by the U.S. Department of Health and Human Services and the National Council of Juvenile and Family Court Judges support providing representation to parents at all stages of dependency cases.<sup>124</sup>

Supporters of many successful pieces of legislation expanding the civil right to counsel argue that such legislation would have a positive financial impact or would lead to other outcomes beneficial to the larger society. The Arkansas, Montana, and Texas expansions of the right to counsel for parents in dependency cases apparently were premised on a belief that providing parents with counsel would decrease the number of children taken from their parents and speed the return of children to their parents, thus benefiting individual children and saving the government money.<sup>125</sup>

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122. See discussion *supra* Part II.G.

123. See discussion *supra* Part II.I.

124. MEMORANDUM FROM SUSAN BYORTH FOX, RESEARCH ANALYST TO THE CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVS. INTERIM COMM., 58TH LEG., (MONT.), HOUSE JOINT RESOLUTION NO 3: REPRESENTATION FOR PARENTS AND CHILDREN IN CHILD ABUSE AND NEGLECT CASES: ISSUES AND OPTIONS 2 (2004); FOX, RECOMMENDATIONS ON A STATEWIDE PUBLIC DEFENDER SYSTEM, *supra*, note 87, at 4 (citing U.S. Dep't of Health and Human Services, Standards for Legal Representation of Children, Parents and the Child Welfare Agency (June 20, 2003), and NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (1995)).

125. See discussion *supra* Parts II.B, II.G, II.I.



Sometimes, legislators anticipated financial savings because the legislation would shift costs from one governmental entity to some other governmental entity. In Florida, successful special immigrant juvenile status petitions would allow the state to use federal funds to pay for the care of children in its custody.<sup>126</sup> In Texas, the fact that counties, not the state, would be completely responsible for footing the bill for the new right to counsel may have made it easier for state legislators to pass the legislation while at the same time refusing to impose a marriage license filing fee that would have been used to offset the increased costs.<sup>127</sup>

Expectations of financial savings may explain why the civil right to counsel has been expanded in states with tight budgets, and even in states that have had to increase their spending on other kinds of mandated representation. For example, Arkansas expanded its right to counsel for parents in dependency cases at a time when tax revenues were \$23 million lower than had been anticipated.<sup>128</sup> Similarly, Montana expanded its right to counsel for parents in abuse and neglect cases at the same time it set up a potentially expensive statewide public defender system in response to an ACLU lawsuit. Indeed, the legislative committee responsible for the expansion of the civil right to counsel did so in part because it feared that the state's response to the ACLU lawsuit would otherwise divert funding from representation for parents and children in abuse and neglect cases.<sup>129</sup> Finally, Texas expanded the right to counsel for parents in abuse and neglect cases four years after it revamped its county-funded indigent defense system to provide, for the first time, some state funding for appointed counsel in criminal cases.<sup>130</sup>

In some places, reports describing the failings in a state bureaucracy sparked legislative action. The Texas right to counsel provision was enacted as part of a larger reform of the child welfare system prompted by journalism describing horrific child abuse occurring despite the supervision of child welfare workers. The

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126. See discussion *supra* Part II.G.

127. See discussion *supra* Part II.I.

128. Elizabeth I. Davis & Nicholas W. Jenny, *Weakest State Tax Revenue Growth in Over Seven Years*, 43 STATE REVENUE REPORT (Mar. 2001), at 11 tbl.8, available at [http://www.rockinst.org/government\\_finance/archive/pre\\_2004\\_state\\_revenue\\_reports.aspx](http://www.rockinst.org/government_finance/archive/pre_2004_state_revenue_reports.aspx) (follow SRR # 43: "Weakest State Tax Revenue Growth in Over Seven Years" hyperlink).

129. See discussion *supra* Part II.G.

130. See discussion *supra* Part III.

parental right to counsel reforms in Arkansas, Connecticut, and Hawaii were enacted as a direct result of reports describing the inconsistent assignment of, or poor quality of representation provided by, appointed counsel. In all three states, the reports were written to comply with the federal reporting requirements of the Court Improvement Program of the U.S. Department of Health and Human Services. And, in Montana, the genesis of the expansion of the right to counsel for parents was a suggestion made by a former head of Montana's Child and Family Services Division during a hearing regarding the abuse and neglect system.<sup>131</sup>

In the past few decades, lawyers have played a leading role in advocating both for the civil right to counsel and for increased funding for civil legal aid. The recent civil right to counsel statutes are no exception. Civil right to counsel advocates,<sup>132</sup> civil legal aid attorneys, and bar associations played a leading role in passing some of this legislation. For example, Jeffrey Wittenbrink, a member of the National Coalition for the Civil Right to Counsel and a former civil legal aid attorney, was a moving force behind the Louisiana legislation.<sup>133</sup> The Children and Youth Law Clinic at the University of Miami School of Law and the Florida Immigrant Advocacy Center ("FIAC") played key roles in the Florida legislation.<sup>134</sup> The University of Connecticut School of Law Center for Child Advocacy, the Connecticut Bar Association, and the Juvenile Matters Trial Lawyers Association were essential to the Connecticut legislation.<sup>135</sup> The New York City Bar Association, New York County Lawyers' Association, Empire Justice Center, and the New York Legal Assistance Group all supported the New York bill.<sup>136</sup>

Some groups that are less often involved in advocating for the civil right to counsel or for civil legal aid also played a key role.

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131. FOX, STUDY PLAN, *supra* note 89, at 2.

132. The current national civil right to counsel movement—at the center of which is the National Coalition for the Civil Right to Counsel—has been active only since approximately 2004. Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. 167, 168 (2006), available at <http://civilrighttocounsel.org/pdfs/gardner.pdf>.

133. See discussion *supra* Part II.F.

134. See discussion *supra* Part II.D.

135. See discussion *supra* Part II.C.

136. See discussion *supra* Part II.H.

Parents' rights groups were influential in Montana and Texas.<sup>137</sup> Advocates against domestic violence supported the New York bill.<sup>138</sup> A state legislative committee and a former head of Montana's Child and Family Services Division conceived of the idea in that state.<sup>139</sup> The judiciary took the lead in Arkansas, Connecticut, Hawaii, and New York.<sup>140</sup> The participation of these groups lends credence to Russell Engler's prediction that the civil right to counsel can be expanded when "powerful" and "entrenched interests" support the right, and that the judiciary in particular can come to understand that expansion of the right is in its interests.<sup>141</sup>

Several pieces of civil right to counsel legislation were enacted as part of a larger set of reforms. In Alabama and Texas, parents' right to counsel provisions were bundled into bills aimed at reforming the child welfare system and preventing child abuse.<sup>142</sup> In Montana, the expansion of the right to counsel for parents was part of a bill creating a statewide public defender system.<sup>143</sup> Florida's provision requiring the state to petition for special juvenile status for eligible children was part of a bill generally making it easier for immigrant children to acquire that status.<sup>144</sup>

Compared to the significant controversy that has accompanied some attempts to fund civil legal aid and indigent defense,<sup>145</sup> there was little controversy over most civil right to counsel provisions. Most were the subject of little or no notice in the media, and little or

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137. See discussion *supra* Parts II.G, II.I.

138. See discussion *supra* Part II.H.

139. See discussion *supra* Part II.G.

140. See discussion *supra* Parts II.B, II.C, II.E, II.H.

141. Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 702, 705 (2006); see also Deborah Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1023 (2004) ("Many judges are also concerned about public credibility, and would like to improve courts' capacity to cope with unrepresented or inadequately represented parties.").

142. See discussion *supra* Parts II.A, II.I; see also Act No. 2008-277, Ala. Acts 2008, HB 28 (replacing ALA. CODE § 12-15-63(b) with § 12-15-305 (2008)); Act of June 6, 2005, §§ 1.06-07, 2005 TEX. GEN. LAWS 268, S.B. 6 (codified at TEX. FAM. CODE ANN. §§ 107.013, 107.015 (2008))

143. See discussion *supra* Part II.G; see also MONT. CODE ANN. §§ 41-3-425, 47-1-104.

144. See discussion *supra* Part II.D; see also FLA. STAT. § 39.5075.

145. See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241, 241 (1998) (describing decades of debates over civil legal aid); Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (describing reluctance of legislatures to adequately fund indigent defense).

no negative testimony. Where there was negative testimony, it tended to focus on logistical issues—such as whether the public defender’s office, the judiciary, or another entity should provide or fund the representation—rather than on whether there should be a civil right to counsel at all.<sup>146</sup>

#### IV. LESSONS FOR THE FUTURE

Civil right to counsel legislation may be more likely to succeed if it is part of a larger piece of legislation aimed at solving a social problem than if it is a stand-alone bill. By bundling their right to counsel provisions with larger pieces of societal reform legislation, the legislators supporting many of the statutes discussed above made clear that the civil right to counsel is a means to an end—for example, keeping children out of foster care when possible—rather than an end in itself. Of course, legislators may simply have jumped at an opportunity to attach a right to counsel provision to a bill that was likely to move, which is also a good legislative strategy.

Legislatures are open to believing that providing a civil right to counsel in at least some types of cases will solve a social problem or avoid the need to spend government money. Proponents of the civil right to counsel should muster the best available evidence regarding the cost-effectiveness of appointing lawyers to represent low-income litigants. Analyses conducted by social scientists, such as the Washington study cited by the Montana legislature, should be used where they exist, and advocates should encourage social scientists to carry out additional relevant research. However, where the need for counsel is real and immediate, advocates should not wait for the results of such studies. Particularly where the cost savings are self-evident, legislatures can be persuaded to act based on statements by knowledgeable people or the experience in other jurisdictions.

Litigation can be an effective way of compelling legislatures to act. That was certainly the experience in Alabama. And in Connecticut, even though the court dismissed a case aimed at

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146. See, e.g., discussion *supra* Parts II.B (discussing the lack of organized opposition in Arkansas); II.C (demonstrating that in Connecticut, the public defender and the judiciary supported the bill while warning that they should not be expected to fund or provide space for civil counsel); II.D (demonstrating that in Florida, nonprofit foster care agencies did not want to be the ones to pay for providing counsel); II.E (discussing the lack of opposition in Hawaii); II.G (demonstrating that the Montana judiciary did not oppose bill but did warn about the cost); II.I (demonstrating that Texas counties supported reform but did not want to be the ones to pay for it).

improving the resources available to parents' counsel, the lawsuit brought attention to existing problems, and the legislature responded by creating the Commission on Child Protection. There are numerous other examples of a lawsuit, or the threat of one, playing the decisive role in persuading a legislature to act.<sup>147</sup> In the civil right to counsel arena, combining litigation with legislative advocacy is particularly important, because legislative buy-in is necessary to ensure that any right to counsel will be adequately funded.<sup>148</sup>

While lawyers' groups are natural, and often powerful, allies in the fight for a civil right to counsel, advocates should look elsewhere, too. The parents' rights groups, agency heads, and judicial entities that were influential in ensuring the passage of many of the statutes discussed in this Article may be possible allies in other jurisdictions, and for a right to counsel in other types of cases as well.

All of the statutes discussed in this Article concern child welfare. That is in part because of my research methods—I came across many of these statutes in the course of researching the federal Court Improvement Program, which provides funds to states to improve the way state courts handle abuse and neglect cases. It may also be because most of the civil right to counsel laws passed recently have been in the child welfare arena, but I do not know whether that is true.

More importantly, there is no reason to believe that a legislature's willingness to expand or improve the right to counsel is necessarily limited to the child welfare arena. There are statutes providing for a right to counsel in cases concerning civil commitment, mandatory medical treatment, paternity, and other types of legal disputes.<sup>149</sup> And just as evidence of potential cost savings was influential in the passage of many of the statutes examined here pertaining to child welfare, legislators can make similar arguments outside this arena as well. Legislatures often provide funding for specific types of civil legal aid that have been shown to save government money or to have other beneficial effects.

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147. See Engler, *supra* 11, at 707–09; see also Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons From Gideon v. Wainwright*, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 551–52 (2006).

148. Abel, *supra* note 147, at 552.

149. Abel & Rettig, *supra* note 9, at 245–48.

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For example, after a 1993 study calculated that New York City could save almost \$67 million by providing legal representation to low-income tenants in New York City facing eviction, the New York City Council started funding anti-eviction legal representation.<sup>150</sup>

An examination of the civil right to counsel legislation discussed herein reveals that there is no single path to success. Varying political climates mean that a statute or political strategy that succeeds in one place may not succeed in another. And, as the ABA resolution recommends, different jurisdictions pursue the right to counsel in different types of cases. In some types of cases, providing counsel is the right move morally, even when it will not save money or prevent other negative outcomes. Nonetheless, when the types of arguments and strategies that have proven successful in abuse and neglect, termination of parental rights, and special immigrant juvenile cases are available, advocates would be well advised to make such arguments.

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150. Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 710–11 (2006).