No. 15-_____

In the Supreme Court of the United States

VANESSA G.,

Petitioner,

–v–

TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Tennessee Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The petitioner is Ms. Vanessa G., the respondent mother and appellant in the courts below.

The respondent is the State of Tennessee Department of Children's Services, the petitioner and appellee in the courts below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Petitioner Vanessa G. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court is reported at 2016 LEXIS 49 (Tenn., Jan. 29, 2016). (App.20a-92a). The opinion of the Tennessee Court of Appeals is reported at 2014 Tenn. App. LEXIS 674 (Tenn. Ct. App. Oct. 21, 2014). (App.1a-17a).

JURISDICTION

The Tennessee Supreme Court entered its order on January 29, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Consistent with this Court's Rule 29.4, a copy of this petition has been served on the Attorney General of Tennessee.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

- **U.S. Const. amend. XIV, § 1**

Section 1 of the Fourteenth Amendment to the United States Constitution states in pertinent part

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]

- **Tennessee Constitution Article 1, § 8**

Article 1, Section 8 of the Tennessee Constitution states in pertinent part

> no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

- **Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii)**

Tennessee Code Annotated Section 37-1-126(a)(2)(B)(ii) states in pertinent part

> a parent is entitled to representation by legal counsel at all stages of any proceeding under this part in proceedings involving termination of parental rights[.]

STATEMENT OF THE CASE

This Court has held that a parents' right to the care and custody of their child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due Process Clauses of the federal and state constitutions. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The right is not absolute, however, as the State has the authority as *parens patriae* to protect children from serious harm committed by parents and to terminate a child's relationship with his or her parent forever if that harm is proven. *Santosky v. Kramer*, 455 U.S. 745 (1982). Given the significant implications of such a proceeding, this Court has held a hearing involving termination of parental rights must be fundamentally fair. *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 25-26 (1981).

In this case, the mother's children were removed based upon allegations of sexual abuse. (App.2a). In response to these allegations, her appointed counsel advised her to waive her right to a trial resulting in a finding of severe child abuse against her. (App.2a). The Tennessee Department of Children's Services eventually filed a Petition for Termination of Parental Rights. (App.3a). Following the hearing on that petition, the trial court terminated the mother's parental rights based upon mental incompetence as well as two other grounds. (App.3a). To support this finding, the State presented several witnesses including an expert witness on the issue of the mother's alleged mental incompetence. (App.34a, 37a). The mother's trial counsel appealed; however, he failed to raise any argument

regarding the grounds of mental incompetence. (App.10a). Due to this failure, the Tennessee Court of Appeals found that the mother waived the mental incompetence ground and upheld the termination based upon the child's best interest. (App.10a). After the Tennessee Court of Appeals' Order was entered, the mother's appointed attorney immediately withdrew.

Mother appealed *pro se* to the Tennessee Supreme Court asking for review and claiming ineffective assistance of counsel. The Tennessee Supreme Court granted certiorari to review the federal constitutional question raised in the mother's brief and appointed the mother new counsel. (App.18a). Upon granting certiorari, and based upon the issues presented by the mother, the Tennessee Supreme Court raised the federal constitutional question regarding due process and asked both the mother and the State to brief the issues of "(1) whether the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel; AND (2) if so, what procedure and standard should the Court adopt to review that claim." (App.18a). Ultimately, the parties and the Court relied upon the Federal and State Constitutions in determining whether due process under the Fourteenth Amendment requires effective assistance of counsel. *See* (App.68a-69a).

In her brief to the Tennessee Supreme Court, the mother argued that she is entitled to effective assistance of counsel pursuant to Tennessee statute, the Tennessee Constitution, and the Federal Constitution, and that she should thus be allowed to challenge the termination of her parental rights based upon ineffective assistance of counsel. Specifically, the mother stated in her brief

and most succinctly in her reply brief "because there is a constitutional right to assistance of counsel, there is a constitutional right to effective assistance of counsel." Petitioner's Reply Brief before Tennessee Supreme Court, p. 3. The State relied upon a statutory argument and argued that a statutory right to appointed counsel does not give rise to a right to effective representation of counsel, but conceded that if a parent is constitutionally entitled to the appointment of counsel based upon the *Lassiter* balancing test, the parent is constitutionally entitled to the effective assistance of counsel. (App.58a). In both arguments brought before the lower court, both sides raise the constitutional question of whether a parent is entitled to ineffective assistance of counsel under the Fourteenth Amendment.

Relying upon this Court's decisions in *Lassiter* and *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 511 (1982), the Tennessee Supreme Court in a 3-2 split decision found although *Lassiter* requires state courts to ensure parents receive fundamentally fair procedures in termination proceedings, "nothing in *Lassiter* requires the state courts to import criminal law concepts of ineffective assistance of counsel or to assess counsel's performance by standards developed in the criminal law context." (App.60a). Therefore, the Court ruled that Tennessee parents are not entitled to effective assistance of counsel in termination of parental rights proceedings.

In arriving at its conclusion, the Tennessee Supreme Court stated "[t]he United States Supreme Court has held that, in the absence of a Sixth Amendment right to counsel, there is no constitutional

right to effective assistance of counsel, even in proceedings where counsel is appointed by the court." (App.59a-60a). It bases this conclusion on four precedents from this Court.

The first case relied upon by the lower court was *Pennsylvania v. Finley* in which this Court held there is no right to counsel or effective assistance of counsel in post-conviction proceedings. *Id.*, 481 U.S. 551, 554-55 (1987). The second case analyzed was *Ross v. Moffitt* in which this Court held there is no constitutional right to appointed counsel for discretionary appeals. *Id.*, 417 U.S. 600, 610 (1974). Following *Ross*, the next case analyzed was *Wainwright v. Torna* in which this Court held that because there is no constitutional right to counsel for discretionary appeals, there is no right to effective assistance of counsel in discretionary appeals. *Id.*, 455 U.S. 586, 588 (1982). Finally, the Tennessee Supreme Court relied upon the decision in *Lehman v. Lycoming Cnty. Children's Servs. Agency* in which this Court held that a parent may not use the federal writ of *habeas corpus* to mount collateral attacks on state judgments terminating their parental rights. *Id.*, 458 U.S. 502, 511 (1982).

Given these decisions, the Tennessee Supreme Court found that a parent is not entitled to effective assistance of counsel in a termination of parental rights proceeding. The Tennessee Supreme Court went on to find there were already enough procedural safeguards in place to ensure that a parent receives fundamental fairness. Those safeguards include the burden of proof placed upon the State to prove grounds for termination by clear and convincing evidence, and

the ethical obligations appointed counsel has to "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" and to "act with reasonable diligence and promptness in representing a client." (App.63a-64a).

In its decision, the Tennessee Supreme Court never addressed whether the appellant mother was constitutionally entitled to appointed counsel pursuant to *Lassiter*. Instead, it stated that even assuming the mother was entitled to appointed counsel under *Lassiter*, *Lassiter* only requires state courts to ensure that parents receive fundamentally fair procedures. (App.60a). Given this, the majority of the Tennessee Supreme Court felt fundamental fairness in a termination of parental rights proceeding does not include effective assistance of counsel.

The dissenting opinion authored by the Chief Justice of the Tennessee Supreme Court and joined by another justice, stated that "providing counsel for an indigent parent but not requiring counsel to render effective representation is an empty gesture." (App.83a-84a).

Unlike the majority, the Chief Justice applied the *Lassiter* factors as well as other factors under Tennessee law and found that the mother was constitutionally entitled to appointed counsel in a proceeding attempting to terminate her parental rights. (App.89a). Those factors included the following: "(1) the State presented expert testimony to supports its case, making representation by counsel important for the mother to effectively question the veracity of that testimony; (2) the mother had uncommon difficulty in

dealing with life and life situations, having a long history of family problems, drug dependency and abuse, and mental illness; (3) the issues and procedures involved in the termination hearing were difficult and complex, particularly given the State's allegation of the mother's mental incompetency and introducing expert medical testimony; (4) the parental termination hearing would have likely been a distressing and disorienting situation for the mother; and (5) an order terminating the mother's parental rights would have been permanent and irrevocable." (App.89a).

In arriving at the conclusion that the mother was entitled to appointed counsel, the dissent quoted the State's own argument that "it is generally accepted that where the *Lassiter* . . . due process analysis establishes a federal constitutional right to counsel, due process also entitles the parent to have a right to effective counsel." (App.90a). The dissent went on to distinguish the majority's analysis wherein the majority claimed the right to counsel in a termination proceeding was analogous to the right to counsel in a post-conviction proceeding. As stated by the dissent, "[a] petitioner pursuing a petition for post-conviction relief has already been tried and convicted, most likely received at least one tier of appellate review, and otherwise afforded the full panoply of procedural protections required by the Tennessee and United States Constitutions. The post-conviction petitioner initiated the action, and if he loses, his position remains essentially the same." (App.90a) (relying upon *Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010). Parents in a termination proceeding, however, are on a different footing. If a parent in a termination

proceeding loses, their rights to their children are forever terminated. (App.91a).

Finally, the dissent argued that Tennessee should join the majority of states who recognize that a parent has the right to effective assistance of counsel in a parental rights termination proceeding. This is based upon the fact that thirty-one (31) out of thirty-two (32) states that had previously addressed this issue prior to Tennessee found that parents are entitled to effective assistance of counsel. (App.62a-63a).

The majority disagreed and found Tennessee should be the thirty-third state to decide the issue, but only the second to hold parents are not entitled to effective representation in termination proceedings. Tennessee now joins the state of Nebraska. *See In re Azia B.*, 626 N.W.2d 602, 612 (Neb. App. 2001). The majority based its decision upon the fact that allowing parents to collaterally attack the judgment below with claims of ineffective assistance of counsel would "compromis[e] the interests of children in permanency and safety." (App.91a). According to the majority, the safeguards in place are enough to provide fundamental fairness.

The appellant mother now appeals that decision arguing that the most basic principles of due process and fundamental fairness require effective assistance of counsel in a termination of parental rights case.

REASONS FOR GRANTING THE PETITION

The Tennessee Supreme Court's decision conflicts with the decisions of thirty-one other states. In contrast with Tennessee, those other states have expressly found that when a parent is faced with the termination of his or her constitutionally protected parental rights, the parent is entitled to effective assistance of counsel. The Tennessee decision further cannot be reconciled with this Court's precedents requiring fundamental fairness in a termination of parental rights proceeding.

I. THE TENNESSEE DECISION CONFLICTS WITH THIRTY-ONE OTHER STATES INCLUDING FIVE OF TENNESSEE'S CONTIGUOUS STATES

In making its decision, the Tennessee Supreme Court admits it joins the minority of only one other state out of thirty-three who have decided this issue. Out of those thirty-three states, only Tennessee and Nebraska have held parents are not entitled to effective assistance of counsel in a termination proceeding. As a result, should a parent cross the border from either Alabama, Arkansas, Georgia, Missouri or North Carolina and cross into Tennessee, the parent suddenly receives less constitutional protection regarding his or her parental rights. (*See e.g., S.C.D. v. Etowah Cnty. Dep't of Human Res.*, 841 So.2d 277, 279 (Ala. Civ. App. 2002); *Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005); *In re A.R.A.S.*, 629 S.E.2d 822, 825 (Ga. Ct. App. 2006); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989); *In re S.C.R.*, 679 S.E.2d 905, 909 (N.C. Ct. App. 2009)).

In each of those contiguous states, the courts have held a parent is entitled to effective representation in a termination proceeding. Alabama courts have held based upon a due process analysis, "inherent to a parent's right to legal representation in a deprivation hearing is the right to effective assistance of counsel." *S.C.D. v. Etowah Cnty. Dep't of Human Res.*, 841 So. 2d 277, 279 (Ala. Civ. App. 2002). North Carolina courts have held because a statute guarantees a parent's right to counsel, "[i]f no remedy were provided a parent for inadequate representation, the statutory right to counsel would become an 'empty formality.'" *In re Oghenekevebe*, 473 S.E.2d 393, 396 (N.C. Ct. App. 1996) (*citing In re Bishop* 92 N.C.App. at 664-65, 375 S.E.2d 676, 678 (1989)). Arkansas' courts have held because the Arkansas legislature has "recognized the fundamental nature of a parent's right over a child, as the procedure established for termination of that right expressly includes the right to counsel at every stage of the proceeding," the court does "not hesitate to conclude that the legislature intended the right to counsel for parents in termination proceedings to include the right to effective counsel." *Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005). The Georgia courts have held "it is thus quite evident that the entire legislative scheme written into the pertinent provisions of the Juvenile Code was intended to provide an indigent parent effective representation at all stages of any proceeding involving the termination of that parent's right to his or her child." *In re A.H.P.*, 500 S.E.2d 418, 421-422 (GA Ct. App. 1998) (*citing Nix v. Dept. of Human Resources*, 225 S.E.2d 306 (GA 1976). The Missouri Courts have held the statute appointing

counsel in termination proceedings "implies a right to effective assistance of counsel; otherwise the statutory right to counsel would become an empty formality." *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989). The Missouri case shows the epitome of ineffective assistance of counsel considering the parents' counsel barely said a word during the termination proceeding, called no witnesses, conducted no cross-examination, and offered no proof whatsoever. *Id.*

Indeed, the majority of states which have addressed this issue have found parents are entitled to effective representation of counsel in termination proceedings. *See e.g., S.C.D. v. Etowah Cnty. Dep't of Human Res.*, 841 So. 2d 277, 279 (Ala. Civ. App. 2002) (quoting *Crews v. Houston Cnty. Dep't of Pensions & Sec.*, 358 So.2d 451, 544 (Ala. Civ. App. 1978)); *Chloe W. v. Dep't of Health & Soc. Servs., Office of Children's Servs.*, 336 P.3d 1258, 1265 (Alaska 2014); *Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005); *In re Darlice C.*, 129 Cal.Rptr.2d 472, 475 (Cal. Ct. App. 2003); *People ex rel. C.H.*, 166 P.3d 288, 290 (Colo. App. 2007); *State v. Anonymous*, 425 A.2d 939, 943 (Conn. 1979); *In re R.E.S.*, 978 A.2d 182, 189 (D.C. Ct. App. 2009); *J.B. v. Fla. Dep't of Children and Families*, 170 So.3d 780, 790 (Fla. 2015); *In re A.R.A.S.*, 629 S.E.2d 822, 825 (Ga. Ct. App. 2006); *In re RGB*, 229 P.3d 1066, 1090 (Haw. 2010); *In re M.F.*, 762 N.E.2d 701, 709 (Ill. App. Ct. 2002); *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992) (citing *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986)); *In re Rushing*, 684 P.2d 445, 448-49 (Kan. Ct. App. 1984); *In re Adoption/Guardianship of Chaden M.*, 30 A.3d 935, 942 (Md. 2011); *In re Adoption of Azziza*, 931 N.E.2d 472, 477 (Mass. App. Ct. 2010) (citing *In re Stephen*,

514 N.E.2d 1087, 1090-91 (Mass. 1987); *In re Trowbridge*, 401 N.W.2d 65, 66 (Mich. Ct. App. 1986); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989); *In re A.S.*, 87 P.3d 408, 412-13 (Mont. 2004); *In re Guardianship of A.W.*, 929 A.2d 1034, 1037 (N.J. 2007); *In re Jessica F.*, 974 P.2d 158, 162 (N.M. Ct. App. 1998); *In re Elijah D.*, 902 N.Y.S.2d 736, 736 (N.Y. App. Div. 2010); *In re S.C.R.*, 679 S.E.2d 905, 909 (N.C. Ct. App. 2009); *In re K.L.*, 751 N.W.2d 677, 685 (N.D. 2008); *In re Wingo*, 758 N.E.2d 780, 791 (Ohio Ct. App. 2001); *In re D.D.F.*, 801 P.2d 703, 707 (Okla. 1990); *In re Geist*, 796 P.2d 1193, 1200 (Or. 1990); *In re Adoption of T.M.F.*, 573 A.2d 1035, 1040 (Pa. Super. Ct. 1990); *In re Bryce T.*, 764 A.2d 718, 722 (R.I. 2001); *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003); *In re E.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994); *In re Moseley*, 660 P.2d 315, 318 (Wash. Ct. App. 1983); *In re M.D.(S).*, 485 N.W.2d 52, 55 (Wis. 1992).

In arriving at its conclusion, the Tennessee Supreme Court ignores the reasoning of cases from thirty-one other states upholding the right to effective assistance and instead relies upon the single outlier which held parents are not entitled to effective representation—Nebraska. *See In re Azia B.*, 626 N.W.2d 602, 612 (Neb. App. 2001). Whereas all other states with a reported decision on the issue devoted a majority of their opinions to discussing the statutory, constitutional, and public policy implications of effective assistance in a termination proceeding, Nebraska devoted a singular paragraph in which their entire argument is summed up as "without Nebraska statutory or case law authority to do so, we decline to recognize the claim of ineffective assistance of counsel in a civil action." *Azia B.*, 626 N.W.2d at

612. Tennessee thus relies on the reasoning of only one state court decision, which has no legal analysis other than the illogical fact that because this is an issue of first impression, it cannot be law.

Furthermore, the Tennessee decision means that should a parent decide to cross the border from either Arkansas, Georgia, Alabama, Missouri or North Carolina, and enter Tennessee's jurisdiction, a mother or father will be given far less constitutional protection if the state tries to terminate his or her parental rights. This is especially true in this case considering the case occurred in Maury County, Tennessee—a county less than fifty (50) miles from the Alabama border.

Given the significant constitutional implications involved and the fact that the majority of states have decided this issue contrary to Tennessee, the issue is ripe and a decision from this Court would provide uniformity for the States and further provide an answer to a question which impedes upon one of the most fundamental of liberties.

II. THE TENNESSEE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S PREVIOUS DECISIONS REGARDING FUNDAMENTAL FAIRNESS IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING

In each state where this issue has been presented, a recurring question presents itself—are parents entitled to effective representation of counsel in a termination proceeding considering such a case is civil in nature? The primary argument against providing effective assistance of counsel in these

situations is that criminal defendants are the only defendants entitled to effective representation pursuant to the Sixth and Fourteenth Amendments because they are the only defendants who may be subjected to losing their physical liberty. Based upon that argument, a person who may spend a few days in jail is entitled to more constitutional protection than a parent who will forever lose their fundamental constitutional right to parent their child at the hands of the State. Such an argument is contrary to the implications of *Lassiter* and its progeny.

In a termination proceeding, both the State's interest and the parent's interest are compelling. The State bears the interest of protecting the welfare of the child and the parent bears the interest "in the accuracy and justice of the decision to terminate his or her parental status." *Lassiter*, 452 U.S. at 27-28. As stated by the *Lassiter* Court, "the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." *Id.* at 28.

In order to create this equal contest, the next natural question is whether the State's interest would also be served by the appointment of ineffective assistance of counsel? This Court has consistently maintained that fundamental fairness demands certain rights for parents in termination proceedings. In the 1982 case of *Santosky v. Kramer*, this Court was faced with the issue of the proper burden of proof in a termination proceeding. There, this Court held "the Due Process Clause of the Fourteenth Amendment

demands more than [a preponderance of the evidence]. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Santosky*, 455 U.S. 745, 747-748 (1982). In the 1996 case of *M.L.B. v. S.L.J.*, this Court held the state must bear the costs of providing a transcript of a termination proceeding so that a parent may have equal access to the appellate courts. *Id.*

In each case, the majority relies upon rulings from criminal jurisprudence and in each case, the dissent consistently argues that imputing criminal principles into civil termination cases will open the floodgates for criminal principles in all civil cases. *See e.g. M.L.B.*, 519 U.S. at 127 (*stating* "[r]espondents and the dissenters urge that we will open floodgates if we do not rigidly restrict *Griffin* to cases typed 'criminal.'"). Indeed, the majority in the Tennessee case below stated "nothing in *Lassiter* requires state courts to import criminal law concepts of ineffective assistance of counsel or to assess counsel's performance by standards developed in the criminal law context." (App.60a). Given this, the Tennessee Supreme Court has adopted this court's dissenters' argument that parents cannot be entitled to effective assistance of counsel simply because it is a criminal concept. Fundamental fairness dictates otherwise.

Under *Lassiter* and its progeny, the primary constitutional question is not whether a parent is entitled to the same protections of a criminal defendant. Instead, it is whether a parent is deprived of the constitutionally mandated fundamental fairness

of the Fourteenth Amendment when that parent is deprived of effective representation. The answer to that question should be a resounding yes, particularly given the facts of the case at issue.

In the Tennessee case, appointed counsel advised the mother to waive her right to a trial based upon sexual abuse allegations and allowed his client to suffer a severe abuse finding depriving her of her children for several years. Furthermore, appointed counsel waived any argument regarding mental incompetence on appeal of the termination proceeding and thus waived the grounds for termination. The Tennessee decision states that parents do not need effective counsel and may be protected by the safeguards of the rules of ethics; however, the majority ignores the reality that a bar complaint or a malpractice lawsuit are both too late and cannot restore a family due to an attorney's incompetence. Instead, such a complaint would only provide monetary damages. In this case, even if the mother filed a complaint against her appointed attorney and was successful, she would still never see her child again.

The mere appointment of counsel in a termination proceeding cannot lead to *Lassiter*'s statement that the contest of interests in a termination proceeding should be equal. In the majority of termination cases, the petitioner is the State which has access to unlimited resources including investigators, doctors, experts, case workers, attorneys, paralegals, *etc*. The attorney who is appointed for an indigent parent in these kinds of proceedings must overcome this imbalance with his or her knowledge of the law and his or her ability to present the law to the court.

Without the assistance of effective counsel, an indigent parent will not know that they have access to funds to obtain their own expert or have knowledge regarding legal defenses which can be used to counter the State's arguments. Based upon the Tennessee decision below, a parent facing the termination of their parental rights is only entitled to a warm body with a law license sitting next to them. If the warm body is ineffective and does not know the law, the Tennessee Court believes that the proceeding is still fundamentally fair because counsel was appointed.

In justifying this conclusion, the Tennessee Supreme Court equates termination proceedings to post-conviction proceedings where this Court has stated criminal defendants are not entitled to effective representation of counsel. (App.59a-60a). (*citing Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987)(holding that there is no right to counsel or effective assistance of counsel in post-conviction proceedings); *Wainwright v. Torna*, 455 U.S. 586, 588 (1982)(stating that because there is no constitutional right to counsel for discretionary appeals, there is no right to effective assistance of counsel in such appeals); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974)(holding that there is no constitutional right to appointed counsel for discretionary appeals).

In each of these examples, this Court held the defendants were not entitled to appointed counsel under the Constitution, and thus they were not entitled to effective representation of counsel. In relying upon this Court's precedents, the Tennessee Supreme Court found if a parent is not entitled to appointed counsel under the Sixth Amendment, they

cannot be entitled to effective counsel. The Tennessee Supreme Court ignores the fact, however, that parents are entitled to appointed counsel under the Fourteenth Amendment if the *Lassiter* factors are met. The Tennessee Supreme Court further ignores the fact that post-conviction relief is a criminal defendant's second bite at the apple. As stated by the dissent in the Tennessee decision, "[a] petitioner pursuing a petition for post-conviction relief has already been tried and convicted, most likely received at least one tier of appellate review, and otherwise afforded the full panoply of procedural protections required by the Tennessee and United States Constitutions." (App.91a).

In the case at bar, the termination proceeding was the first time in which the State asked that the mother's rights to her child be terminated. Significantly, it was the first and only opportunity offered to the mother to defend herself against charges brought by the State which could forever sever her relationship with her child. This is the trial stage of the proceeding, yet the Tennessee Supreme Court equated it to post-conviction relief given the fact that it is not criminal in nature. No decision had been made by the fact-finder, yet the Tennessee Supreme Court believed that the mother is not entitled to effective representation because she is not facing time in prison.

The Tennessee Supreme Court further ignores this court's precedents which impute criminal concepts into termination proceedings due to the very nature of these proceedings. Specifically, under *M.L.B. v. S.L.J.*, this Court stated "[i]n accord with the

substance and sense of our decisions in *Lassiter* and *Santosky*, we place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'" *Id.*, 519 U.S. at 110 (*citing Griffin v. Illinois*, 351 U.S. 12, 24 (1956). In *M.L.B.*, this court held indigent parents in a termination proceeding are entitled to a copy of a transcript of the trial proceedings for appellate purposes at the expense of the state. *M.L.B.*, 519 U.S. at 128. Also under *M.L.B.*, this court held "termination decrees 'work a unique kind of deprivation. In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship.'" *M.L.B.*, 519 U.S. at 127-128 (*citing Rivera v. Minnich*, 483 U.S. 574, 580 (1987). Like criminal cases, termination proceedings are quasi-criminal in nature due to the very allegations which lead to the removal of the child and the implications of forever severing a child from his or her family. Given the tremendous power of the state to forever take a child away, it is illogical to appoint an attorney who will not provide effective assistance of counsel.

The decision below is contrary to the ruling in *Lassiter* and contrary to the fundamental fairness right guaranteed under the Fourteenth Amendment.

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE, AND THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING IT

Since *Lassiter* was decided in 1981, the majority of states now require appointment of counsel either

by state constitution, statute, rule or case law. Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge of Appellate Courts*, 6 J. App. Prac. & Process 179 (Fall 2004), (App.97a). Tennessee is among that majority wherein Tennessee requires appointment of counsel in both dependency and neglect proceedings and termination proceedings. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii). The question of whether appointed counsel should be effective has now been presented in thirty-three states and decided differently in two out of thirty-three.

This question will continue to be raised in other states until it is decided by this Court. Since *Lassiter*, states are now required to file more termination proceedings. Under Federal law, when a child has been in foster care for twelve months, a permanency hearing must be held to determine whether the child will be returned to the parents or the state should proceed with terminating parental rights. 42 U.S.C. § 675(5)(C). Furthermore, should a child reside in state custody for fifteen (15) months or longer, the state is mandated by federal law to file a termination unless certain exceptions are met. 42 U.S.C. § 675(5)(E). As a result of this mandate, the states are filing more termination actions and respondent parents are beginning to mount challenges of ineffective assistance of counsel on a more regular basis.

This case presents a proper vehicle for deciding this issue. The issue of whether parents are entitled to effective representation was presented to the Tennessee Supreme Court at the court's own request. In their grant of certiorari, the Tennessee Supreme Court asked the parties to brief the issue of "whether

the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel." (App.18a). Both the majority and the dissent show the competing sides of this important issue and both show the logic behind each side. The case is thus equally balanced and would allow this Court an opportunity to review this important issue which the state courts are split upon, and decide whether *Lassiter* should be extended to include a parent's right not only to appointed counsel, but to effective assistance by that counsel in a proceeding seeking to terminate that parent's fundamental parental rights forever.

CONCLUSION

For the foregoing reasons, the appellant mother's petition for certiorari should be granted.

Respectfully submitted,

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APRIL 22, 2016

APPENDIX TABLE OF CONTENTS

OPINION OF THE COURT OF APPEALS OF TENNESSEE (OCTOBER 21, 2014)

COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

IN RE CARRINGTON H., ET AL.

No. M2014-00453-COA-R3-PT

Appeal from the Juvenile Court for Maury County
No. 90576, 90577 George L. Lovell, Judge

Before: W. Neal McBRAYER, J., Delivered the Opinion of the Court, in Which Frank G. CLEMENT, JR., P.J., M.S., and Andy D. BENNETT, J., Joined

I. Factual and Procedural Background

This case concerns the termination of the parental rights of Vanessa G. ("Mother") to her child, Carrington H.[1] By the time this matter came on for trial, Carrington's family had been receiving services from the Tennessee Department of Children's Services ("DCS") for over ten years. Shortly before Carrington's birth in 2004, the juvenile court found his five siblings to be dependent and neglected.

[1] The petition for termination of Mother's parental rights originally concerned both Carrington H. and a sibling, Charles H. However, Charles H. has reached the age of majority and is no longer a subject of this proceeding.

Despite a finding that, at the time of removal, the home "was in such a condition as to make it unsafe and unsanitary for the children to reside there," the children were allowed to remain in the home with Mother and their father, Christopher H. ("Father").

Soon after his birth, DCS placed Carrington and his siblings in protective custody. On January 6, 2006, the juvenile court found probable cause to determine that the children were dependent and neglected. The juvenile court granted physical custody to the children's maternal aunt and maternal grandmother. Mother was granted supervised visitation with the four oldest children every weekend and with Carrington and another sibling every other weekend. The court later returned the children to Father's custody and suspended Mother's visitation for a period of time.

On July 13, 2007, DCS filed a petition to adjudicate dependency and neglect based on allegations of sexual abuse perpetrated by Mother. The juvenile court suspended all visitation between Mother and children on August 8, 2007. Mother waived the adjudicatory hearing, and the court ordered that the children would remain in the custody of Father, who by this time was divorced from Mother.

At some later date, not specified in the record, Mother regained her visitation privileges. However, following a review that took place in November 2009, the juvenile court ordered that Mother have no contact or visitation with her children until such time as they "on their own volition, request such visitation."

Carrington and the other children were removed from Father's custody on December 18, 2009, following allegations of child abuse by Father. Three days later,

DCS filed yet another petition to adjudicate the children dependent and neglected. On September 8, 2011, Father pleaded guilty to child abuse. Ultimately, the children were found to be dependent and neglected and ordered to remain in DCS custody. The court ratified the last permanency plan for Carrington's family on December 1, 2011.

On October 24, 2013, DCS filed a petition to terminate Mother's and Father's parental rights.[2] The Maury County Juvenile Court conducted a one-day trial on December 20, 2013. In support of its petition, DCS presented four witnesses: (1) a counselor service worker for the Department of Human Services; (2) Ms. Elysse Beasley, Mother's psychotherapist; (3) Mother's therapist at Centerstone; and (4) Mr. Richard Walker, Carrington's clinical social worker. Mother did not put on any proof.

On February 27, 2014, the juvenile court entered an order terminating Mother's parental rights to Carrington. As grounds for termination, the juvenile court found that Mother: (1) failed to substantially comply with the reasonable requirements in the permanency plan; (2) failed to remedy the conditions that led to the child's removal or other conditions that, in all reasonable probability, would subject the child to further abuse and neglect; and (3) was incompetent to adequately provide for the further care and supervision of the child because of her impaired mental condition. The juvenile court also found termination of

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[2] Based upon his stated intention to surrender his parental rights to Carrington upon the final termination of Mother's rights, DCS voluntarily dismissed the petition against Father.

Mother's parental rights to be in the child's best interest.

Mother raises two issues on appeal. First, Mother argues that the trial court erred in finding that she failed to substantially comply with the permanency plan and that the conditions that led to the child's removal persist. Second, Mother argues that the trial court erred when it determined that termination of Mother's parental rights was in the child's best interest.

II. Analysis

A. Standard of Review

Termination of parental rights is one of the most serious decisions courts make. As noted by the United States Supreme Court, "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *Santosky v. Kramer*, 455 U.S. 745, 787 (1982). Terminating parental rights has the legal effect of reducing the parent to the role of a complete stranger and of "severing forever all legal rights and obligations of the parent or guardian." Tenn. Code Ann. § 36-1-113(l)(1) (Supp. 2013).

A parent has a fundamental right, based in both the federal and State constitutions, to the care, custody, and control of his or her own child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995). While this right is fundamental, it is not absolute. The State may interfere with parental rights through judicial action in some limited circumstances.

Santosky, 455 U.S. at 747; *In re Angela E.*, 303 S.W.3d at 250.

Our Legislature has identified those situations in which the State's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth the grounds upon which termination proceedings may be brought. Tenn. Code Ann. § 36-1-113(g). Termination proceedings are statutory, *In re Angela E.*, 303 S.W.3d at 250; *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004), and parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

To terminate parental rights, a court must determine by clear and convincing evidence that at least one of the statutory grounds for termination exists and that termination is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). This heightened burden of proof is one of the safeguards required by the fundamental rights involved, *see Santosky*, 455 U.S. at 769, and its purpose "is to minimize the possibility of erroneous decisions that result in an unwarranted termination of or interference with these rights." *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010); *see also In re Angela E.*, 303 S.W.3d at 250; *In re M.W.A.*, 980 S.W.2d at 622. "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d at 596 (citations

omitted). Unlike the preponderance of the evidence standard, "[e]vidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable." *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005). The party seeking termination has the burden of proof. *Id.*

Appellate courts first review the trial court's findings of fact in termination proceedings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Next, "[i]n light of the heightened burden of proof in [termination] proceedings . . . the reviewing court must then make its own determination regarding whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, provide clear and convincing evidence that supports all the elements of the termination claim." *In re Bernard T.*, 319 S.W.3d at 596-97. Appellate courts review the trial court's conclusions of law *de novo* without any presumption of correctness. *In re J.C.D.*, 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007) (citing *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993)).

B. Statutory Grounds for Terminating Mother's Parental Rights

The juvenile court relied on three statutory grounds for terminating Mother's parental rights to Carrington: (1) substantial noncompliance with the permanency plan; (2) persistent conditions; and (3)

incompetency to adequately care for the child. Mother appeals the trial court's decision on only two of the three statutory grounds, leaving the court's finding of incompetency unchallenged.

DCS argues that, because Mother did not appeal the incompetency ground, the trial court's finding on that ground is final, and we need not examine the other two grounds. In support of this proposition, DCS cites *In re Alexis L.*, No. M2013-01814-COA-R3-PT, 2014 WL 1778261 (Tenn. Ct. App. Apr. 30, 2014). In that case, the trial court found five statutory grounds to terminate the mother's parental rights, but she appealed only four of the grounds. *Id.* at *2. We concluded that the mother's failure to appeal a ground for termination waived that issue, and as a result, the trial court's finding regarding that ground was final. *Id.* Because only one statutory ground need be found for termination, we declined to examine the other grounds and moved directly to an analysis of whether termination was in the child's best interests. *Id.* at *1.

Generally, courts address only the issues raised by the parties. *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012); Tenn. R. App. P. 13(b). Party control over issue presentation is considered a defining characteristic of the American adversarial system. *See U.S. v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., dissenting). However, courts may sometimes engage in a sua sponte review of issues not raised by the parties on appeal. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Blumberg Assocs. Worldwide, Inc. v. Brown & Brown of Conn.*, 84 A.3d 840, 855-69 (Conn. 2014); *Bell v. Todd*, 206 S.W.3d 86, 90-91 (Tenn. Ct. App. 2005); *Heatherly v. Merrimack Mut. Fire Ins. Co.*, 43 S.W.3d 911, 916 (Tenn. Ct. App.

2000). For example, our courts have considered justiciability issues even when parties have not presented such issues for review. *See, e.g., Scales v. Winston*, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988) (jurisdiction); *Osborn v. Marr*, 127 S.W.3d 737, 740 (Tenn. 2004) (standing); *Hooker v. Haslam*, 437 S.W.3d 409, 433 (Tenn. 2014) (mootness). In addition to justiciability questions, Tennessee Rule of Appellate Procedure 13(b) recognizes that appellate courts may review issues not raised by the parties in certain circumstances:

> Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process.

Tenn. R. App. P. 13(b). Despite possessing the discretion to review an issue not raised by the parties on appeal, "this discretion [should] be sparingly exercised." Tenn. R. App. P. 13(b) cmt.

Yet, in the context of parental termination cases, on occasion we have reviewed all the grounds relied upon by the trial court to terminate parental rights, even if the parent did not appeal every ground. *See, e.g., In re Anya G.*, No. E2013-02595-COA-R3-PT, 2014 WL 4233244 (Tenn. Ct. App. Aug. 27, 2014) (reviewing the ground of abandonment, although the mother did not appeal that ground); *In re Justin K*, No. M2012-01779-

COA-R3-PT, 2013 WL 1282009 (Tenn. Ct. App. Mar. 27, 2013) (examining whether termination was in the children's best interests due to the "gravity of the determination," even though the parent did not brief the issue); *In re L.M.W.*, 275 S.W.3d 843 (Tenn. Ct. App. 2008) (discussing two grounds for termination despite Father's concession in his brief that the grounds were established); *cf. In re L.L.F.*, No. M2007-01656-COA-R3-PT, 2008 WL 555700 (Tenn. Ct. App. Feb. 29, 2008) (reviewing the statutory ground the mother appealed, but acknowledging that the mother did not appeal all grounds for termination). We are also mindful of our Supreme Court's instruction that we should review every ground relied upon by the trial court to terminate parental rights in order to prevent "unnecessary remands of cases." *In re Angela E.*, 303 S.W.3d 240, 251 n.14 (Tenn. 2010).

However, our supreme court's direction in *In re Angela E.*, 303 S.W.3d 240 (Tenn. 2010), does not mandate review of every ground for termination of parental rights relied upon by the trial court irrespective of whether an appeal is taken from every ground. See, e.g., *In re Kyla P.*, No. M2013-02205-COA-R3-PT, 2014 WL 4217412, at *3 (Tenn. Ct. App. Aug. 26, 2014) (addressing only whether termination was in the child's best interests where the father did not appeal any statutory grounds); *In re A.T.S.*, No. M2004-01904-COA-R3-PT, 2005 WL 229905, at *3 (Tenn. Ct. App. Jan. 28, 2005) (examining only whether termination was in the child's best interests where the mother did not appeal the statutory ground). The danger of "unnecessary remand" from

the Supreme Court is largely eliminated[3] where the issue cannot be raised by the parties in any future appeal. *See State v. West*, 19 S.W.3d 753, 756-57 (Tenn. 2000) (declining to examine a claim because it was not raised on direct appeal). In this situation, the trial court's determination that one statutory ground for termination is satisfied is final. Therefore, review of the alternative grounds becomes unnecessary because the outcome of such a review would not change the presence of at least one ground for terminating parental rights. Declining to undertake such a review honors the principle that courts review only those issues raised by parties and is in keeping with the requirements of Rule 13(b).

Here, the trial court's finding of Mother's incompetency is final because Mother failed to raise this issue on appeal. *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (citing *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 401 (Tenn. Ct. App. 2006)); *In re Alexis L.*, 2014 WL 1778261 at *2. Because only one statutory ground is necessary for termination, we move directly to whether termination of Mother's parental rights is in the child's best interests.

C. Best Interest of Carrington

Mother argues that the evidence did not clearly and convincingly demonstrate that it was in Carrington's best interest for Mother's parental rights

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[3] The danger of unnecessary remand cannot be completely eliminated because the Supreme Court possesses the same discretion to consider issues not raised on appeal. Tenn. R. App. P. 1, 13(b).

to be terminated. The focus of the best interest analysis is on what is best for the child, not what is best for the parent. In re Marr, 194 S.W.3d 490, 499 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). Tennessee Code Annotated section 36-1-113(i) (2010) lists nine factors that courts may consider in making a best interest analysis. Not every factor enumerated in the statute applies to every case because the facts of each case can vary widely. *In re William T.H.*, No. M2013-00448-COA-R3-PT, 2014 WL 644730, at *4 (Tenn. Ct. App. Feb. 18, 2014). The juvenile court determined that it was in Carrington's best interest for Mother's parental rights to be terminated based on the following five statutory factors:

> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> [. . .]
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the

child's emotional, psychological and medical condition;

[. . . .]

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child.

Tenn. Code Ann. § § 36-1-113(i)(1), (2), (4), (5), (8). We consider each factor relied upon by the trial court in turn.

The juvenile court found that Mother had not made such an adjustment of her circumstances, conduct, or conditions so as to make it safe and in the child's best interest to be in her home. *See* Tenn. Code Ann. § 36-1-113(i)(1). Mother stopped going to counseling sessions, abandoning attempts to address her behavioral and mental health issues. Her counselor, Ms. Beasley, testified that Mother had not made significant adjustments from 2009 to 2013, despite counseling and treatment during that period. Mother was hospitalized multiple times since the permanency plan was created in 2011, including one six-day period in 2011 because she was threatening to harm herself with razor blades. Mother was also admitted to Rolling Hills Treatment Center in 2012 where she was treated for "polysubstance dependence, depression, suicidal ideation, and [abuse of the drug Xanax] . . . ."

Additionally, Ms. Beasley testified that Mother has histrionic personality disorder, which is "very, very, very difficult to treat . . . ." Individuals with histrionic personality disorder tend to have dramatic personalities; intense, unstable relationships; attention-

seeking behaviors; rapid shifting of emotions; and often demonstrate rash decision-making and suicide attempts. From 2009 to 2013 when Ms. Beasley treated Mother, Ms. Beasley saw "very little movement or change in . . . her emotions, the way she handled things, her depression, her anger." Although Mother is in remission on substance abuse issues, the evidence showed that she has not so adjusted her behavioral, mental health, or personality issues in order to provide a safe, stable home for Carrington.

The juvenile court also determined that Mother also failed to effect a lasting adjustment after reasonable efforts by DCS. *See* Tenn. Code Ann. § 36-1-113(i)(2). DCS provided a litany of services to Mother over the past ten years: "ongoing services through DCS and CASA, therapeutic visitation, services through Mule Town Network, Strengthening Families Program, broker daycare, services through Maury Cares for Kids, services through Kids First, services through Strengthening Families, assistance with daycare, sex abuse counseling, Child Advocacy Center services, anger management, parenting, [ ], services through Arnell's Counseling, counseling and medication management through Centerstone, services through Tennessee Family and Child Alliance (TFCA), Quarterly Progress Reports and Foster Care Review Board meetings, Child and Family Team Meetings to develop permanency plans as well as financial assistance for counseling, groceries, and transportation." Even with all of these services, Ms. Beasley and the counselor service worker concluded that Mother has failed to effect a lasting adjustment. Mother has made commendable progress in recovering from substance

abuse, but the evidence showed she continues to struggle with emotional and mental stability.

Next, the juvenile court found that there was no meaningful relationship between Mother and Carrington. *See* Tenn. Code Ann. § 36-1-113(i)(4). Mother claims the juvenile court erred in considering this factor because Mother had no opportunity to develop a meaningful relationship with Carrington because she was prohibited from visiting him unless he requested visitation.[4] We do have concerns about allowing a child of Carrington's age to be the sole decision-maker in whether visitation should occur. However, the lack of a meaningful relationship between Mother and Carrington is undisputed. Carrington has lived in foster care since December 21, 2009, and Mother has had no contact with him since at least 2012.

Tennessee Code Annotated section 36-1-113(i)(4) requires the court to determine whether parent and child have a meaningful relationship, not to analyze why such a relationship may or may not exist. *See In re Adoption of J.A.K.*, No. M2005-02206-COA-R3-PT, 2006 WL 211807, at *6 (Tenn. Ct. App. Jan. 26, 2006) (stating that the court is not to consider whether the mother should have another chance to establish a relationship with child, but rather, what effect termination would have on the child). Regardless of the wisdom of any visitation order, the absence of a meaningful relationship would significantly hinder Mother's ability to parent and care for Carrington. *See State Dep't of Children's Servs. v. D.G.B.*, No. E2001-

[4] It is unclear from the record whether Carrington's consent was always a condition to visitation with Mother.

02426-COA-R3-JV, 2002 WL 31014838, at *9 (Tenn. Ct. App. Sept. 10, 2002) (discussing the meaningful relationship factor in light of the Legislature's ultimate goal to return the child to his parent's care).

Moreover, the juvenile court determined that returning Carrington to Mother's care was likely to have a "detrimental/negative effect on the child's emotional, psychological, and medical condition." *See* Tenn. Code Ann. § 36-1-113(i)(5). Carrington's counselor, Mr. Walker, testified that Carrington has been diagnosed with reactive attachment disorder, attention deficit disorder, and oppositional defiant disorder. Reactive attachment disorder usually develops in young children whose basic attachment patterns have been severely disrupted so that they have trouble forming and sustaining future attachments. In order for Carrington to develop properly, Mr. Walker stated that Carrington needs "a home that is stable, and no matter how upset he gets, no matter how hard he tests the attachments, they don't break." Mr. Walker further testified that Carrington's behavioral problems arise and intensify when he is faced with "the threat of an impending move." During these periods, his behavior is "so off the charts the foster parents said they could not manage him." Mr. Walker testified that Carrington became oppositional and combative, while also becoming "extremely clingy to the foster parents . . . he knew, at some level, that he was at the brink of being moved."

Long-term foster care is disfavored by public policy and is seldom in the best interest of the child. *In re C.B.W.*, No. M2005-01817-COA-R3-PT, 2006 WL 1749534, at *8 (Tenn. Ct. App. June 26, 2006). Here, Carrington has been in and out of foster care since

April 2005. Carrington's counselor recommends that he be placed in a permanent living situation in order for his behavioral and emotional condition to improve. Although reunification with biological parents is always a goal, the best interest of the child is paramount. Carrington needs a safe, permanent home free of abuse and emotional instability.

Finally, the juvenile court found that Mother's mental and emotional status would prevent Mother from effectively caring for and parenting Carrington. *See* Tenn. Code Ann. § 36-1-113(i)(8). Mr. Walker testified that living with Mother, who suffers from histronic [sic] personality disorder, would be a home environment that "would be almost the exact opposite of what [Carrington] needs." If Carrington were to be under Mother's care, Mr. Walker testified that Mother's mental and emotional status would "reinforce his attachment disorder . . . because it would be such a yo-yo experience." Mr. Walker also testified that even visitations with Mother "would be disruptive to [Carrington]." The effect of Mother's mental and emotional status on Carrington would result in Carrington becoming "oppositional, uncooperative, rebellious, verbally and physically resist[ant] [to] any efforts to manage him, [ ], . . . resist[ant] [to] any direction being given to him . . . [and] virtually and completely uncooperative." In sum, the evidence showed that Mother's mental and emotional status would have a deleterious effect on Carrington's well-being.

As noted above, the list of statutory factors to consider in a best interest analysis is not exhaustive, and we do not need to "find the existence of each enumerated factor before [we] may conclude that

[termination] is in the best interest of a child." *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005). Here, we conclude there is clear and convincing evidence that the termination of Mother's parental rights is in the child's best interest. The evidence does not preponderate against the findings of the trial court.

III. Conclusion

The juvenile court's judgment terminating Mother's parental rights to Carrington H. is affirmed. Costs of this appeal shall be taxed to Mother.

/s/ W. Neal McBrayer
Judge

PER CURIAM OPINION OF THE SUPREME COURT OF TENNESSEE GRANTING CERTIORARI (JANUARY 28, 2015)

SUPREME COURT OF TENNESSEE,
AT NASHVILLE

IN RE CARRINGTON H., ET AL.

No. M2014-00453-SC-R11-PT

Upon consideration of the application for permission to appeal of the mother, Vanessa G., and the record before us, the application is granted.

In addition to the other issues raised in Vanessa G.'s pro se application for permission to appeal, the Court is particularly interested in briefing and argument on the following questions: (1) whether the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel; and (2) if so, what procedure and standard should the Court adopt to review that claim? *See generally* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179 (Fall 2004).

It appearing to the Court that the appellant is presently without counsel, the Court is pleased to appoint Rebecca McKelvey Castañeda, Stites & Harbison, PLLC, 401 Commerce Street, Suite 800,

Nashville, Tennessee 37219, to represent Vanessa G. in the appeal in this Court. The Court appreciates Ms. McKelvey's willingness to accept this appointment.

This cause shall be set for oral argument on the Court's May 27, 2015, SCALES docket in Cookeville, Tennessee.

MAJORITY OPINION OF THE SUPREME COURT OF TENNESSEE (JANUARY 29, 2016)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE CARRINGTON H., ET AL.

No. M2014-00453-SC-R11-PT

May 28, 2015 Session[1]

Appeal by Permission from the Court of Appeals, Middle Section Juvenile Court for Maury County No. 90576, 90577 George L. Lovell, Judge

Before: Cornelia A. CLARK, Delivered the Opinion of the Court, in Which Jeffrey S. BIVINS and Holly KIRBY, JJ., Joined. Sharon G. LEE, C.J., with Whom Gary R. WADE, J., Joins, Concurring and Dissenting.

I. Factual and Procedural Background

This appeal arises from a petition to terminate the parental rights of Vanessa G. ("Mother") to her minor child Carrington. By the time the Tennessee

[1] We heard oral argument in this case on May 28, 2015, on the campus of Lipscomb University in Nashville, Tennessee, as a part of the American Legion Auxiliary's Volunteer Girls State S.C.A.L.E.S. (**S**upreme **C**ourt **A**dvancing **L**egal **E**ducation for **S**tudents) project.

Department of Children's Services ("DCS") filed the petition on October 24, 2013, it had been providing services to Carrington's family for ten years.[2] Mother's entire history with DCS is not included in the record on appeal, but the record on appeal establishes the following factual background.

Mother gave birth to six children between 1996 and 2004. Carrington, the sixth child, was born November 24, 2004. About seven months before Carrington's birth, Mother and Father were the subjects of a dependency and neglect action in the Juvenile Court for Lewis County.[3] With the assistance of their attorney, Mother and Father waived their right to an adjudicatory hearing and consented to a finding that their five children were dependent and neglected and that their home was in such a condition as to make it unsafe and unsanitary for the children to reside there. The Juvenile Court awarded temporary custody of the children to DCS but physically placed the children with Mother and Father. The Juvenile Court ordered Mother to continue with mental health treatment and directed both parents to continue with domestic

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[2] DCS's initial petition sought to terminate the parental rights of Carrington's father, Christopher H. ("Father"), as well, and sought to terminate both parents' rights to Carrington's brother, Charles. On the day of trial, December 20, 2013, DCS removed Charles from the petition, because he was within four months of attaining majority, and voluntarily dismissed the petition against Father based on his stated intention to surrender his parental rights to Carrington upon the final termination of Mother's parental rights.

[3] The Juvenile Court for Maury County adjudicated the termination petition. For simplicity, "Juvenile Court" is used to refer to the Juvenile Court for both Lewis and Maury Counties.

counseling as needed, to cooperate with DCS, and to comply with the permanency plan.

On December 2, 2005, when Carrington was nearly thirteen months old, the Juvenile Court ordered all six children removed from their parents' custody through an emergency removal process and placed them in the temporary custody of their maternal grandmother and aunt. After a hearing, the Juvenile Court, on January 10, 2006, ordered the children to continue residing temporarily with their maternal grandmother and aunt but also granted each parent four hours supervised weekly visitation with the children. The adjudicatory hearing was scheduled for February 9, 2006, but the record on appeal does not include the transcript of, or order from, that proceeding.

The record on appeal reflects that a hearing occurred on April 7, 2006, and the Juvenile Court placed the children on a ninety-day trial home visit with Father. Mother, by then divorced from Father, received visitation with the four oldest children every weekend and visitation on alternate weekends with the two youngest children, Brighton, nearly three years old, and Carrington, almost eighteen months old. Mother's visitation was contingent upon a favorable home study by DCS.

On May 5, 2006, for reasons not apparent from the record, the Juvenile Court suspended Mother's visitation with Carrington and Brighton but reinstated her visitation a month later. Nevertheless, the Juvenile Court noted that "there [were] issues concerning [Mother] that concern[ed] the [Juvenile] Court and if not addressed, could lead to severe limitations as to visitation."

About fourteen months later, on July 13, 2007, DCS filed a dependency and neglect petition against Mother in the Juvenile Court for Maury County. DCS sought by the petition to terminate Mother's visitation privileges and to continue custody of the children with Father. DCS filed the petition after receiving a referral alleging sexual abuse and after the four oldest children disclosed during forensic interviews that Mother would "masturbate in front of them." Following a hearing on July 23, 2007, the Juvenile Court, by an August 10, 2007 order, suspended Mother's visitation pending the adjudicatory hearing on DCS's petition, which the Juvenile Court scheduled for August 27, 2007.

The adjudicatory hearing did not actually commence, however, until February 15, 2008, at which time Mother, upon the advice of her appointed counsel and in open court, "waived her right to an adjudicatory hearing." The Juvenile Court entered its orders on March 27, 2008, and upon the requests of counsel for DCS and Father, included findings that the allegations of the petition had been established by clear and convincing evidence and that the children were dependent and neglected because: (1) Mother, by reason of cruelty, mental incapacity, immorality, or depravity was unfit to properly care for them; (2) the children were in such condition of want or suffering or under such improper guardianship or control as to injure or endanger their morals or health; and (3) the children were suffering abuse or neglect. *See* Tenn. Code Ann. § 37-1-102(b)(12)(B), (F), (G) (2014).[4] The

[4] Unless the language of the statute has changed since the filing of the petition to terminate Mother's parental rights, citations in this opinion shall refer to the current version of the statute.

Juvenile Court refused to reinstate Mother's visitation with the children and ordered them to remain in the legal and physical custody of Father. The Juvenile Court deemed its March 27, 2008 order "the final determination as to the claims that the children are dependent and neglected for the reasons set out above" and "advised" the parties that the order could "be appealed for trial *de novo* in the Maury County Circuit Court by filing a notice of appeal within ten (10) days at the office of the Clerk of the Maury County Juvenile Court." The record on appeal does not indicate that Mother appealed the Juvenile Court's March 27, 2008 order.

On November 17, 2009, the Juvenile Court held a review hearing. After hearing testimony from DCS and CASA representatives, the Juvenile Court again kept in place its order suspending Mother's visitation with the children.

On December 21, 2009, DCS filed a petition in the Juvenile Court for Maury County, seeking removal of the children from Father's home and alleging that the children were dependent and neglected based upon Father having physically abused five-year-old Carrington by beating and striking him. By an order entered the same day, the Juvenile Court awarded DCS temporary custody of the children.

About three months later, on February 18, 2010, the Juvenile Court ruled that Mother would "have no visitation or contact with the children until the children, on their own volition, request[ed] such visitation, and then only with the guidance and facilitation of the children's treating professionals." Regarding Father, the Juvenile Court ruled that if he failed to comply with the requirements set forth for

him, either DCS or the children's guardian ad litem "should file the appropriate motions or petitions with the Juvenile Court to assure the children have permanency in this matter."

Eight days later, on February 26, 2010, DCS provided Mother with a document titled "Criteria and Procedures for Termination of Parental Rights" and reviewed the contents of the document with Mother. Mother signed the document, acknowledging that she had received it along with an explanation of its contents.

On September 20 and 28, 2011, Mother and her appointed counsel participated in the development of family permanency plans. As relevant to Carrington, these permanency plans described the concerns regarding Mother as: (1) "a history of mental health instability and abuse of prescription medication"; (2) "sexually inappropriate [conduct] with her children"; and (3) "a history of environmental neglect and unsafe housing." The enumerated goals and actions for Mother were: (1) taking her medications as prescribed by her treating professional; (2) providing documentation to DCS of her prescriptions and providers and the pharmacy used for her prescriptions; (3) submitting to random drug screens; (4) asking her mental health provider to furnish an assessment of her emotional ability to parent her children; and (5) providing DCS with a plan for the children in the event she experienced a seizure or a blackout, such as she had previously reported experiencing.

As to the three oldest children only, the permanency plans required Mother to: (1) overcome her denial of sex abuse and acknowledge it verbally or in writing to a professional counselor; (2) cooperate with

her treating professional and the children's treating professionals to ensure appropriate boundaries were implemented and understood and to address the possibility of parental alienation; (3) ensure that no inappropriate sexual materials, books, magazines, pictures, or videos were around the children; (4) provide clean and clutter-free housing with enough space and furniture for the children; (5) provide DCS with six consecutive months of paid rental and utility receipts as proof of stability; and (6) provide proof of legal income sufficient for her family's needs. Mother was expected to satisfy these goals by January 2012.

On October 14, 2011, the Juvenile Court entered a final order on DCS's December 21, 2009 dependency and neglect petition against Father. The Juvenile Court found that Father had abused Carrington in December 2009, and that Carrington had suffered a swollen and bruised nose and bruises on his stomach, sides, legs, ankles, and arm.[5] The Juvenile Court found by clear and convincing evidence that, as to Carrington, Father's actions constituted abuse, but not severe abuse, under the relevant statutes. As to the other children, the Juvenile Court found that Father's actions threatened their health by subjecting them to inappropriate discipline and threatened their morals because Father had lied about his own actions and had coached the children to lie to the authorities about his actions. *See* Tenn. Code Ann. § 37-1-102(b)(12)(B), (F), and (G). Based on these findings, the Juvenile Court concluded that the children were

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[5] Father was charged with aggravated child abuse for inflicting these injuries but eventually pleaded guilty to child abuse, for which he received a three-year sentence, suspended upon service of three years' supervised probation.

dependent and neglected and ordered them to remain in DCS custody.

In so ruling, the Juvenile Court reviewed the history of the case. The Juvenile Court emphasized that the children had already been adjudicated dependent and neglected as to Mother because she "would discipline the children by dressing in a negligee and masturbating in front of them, then putting her fingers under their nose[s] or into their mouth[s]." The Juvenile Court noted that the children "[had] been in numerous foster home placements" and had been "to innumerable interviews by DCS in two counties for several incidents, by police involving the abuse by Father, and by mental health assessors, counselors, and therapists." The Juvenile Court described the children as having "been through the wringer" and stated that the matter had begun "as a situation . . . with a Mother who had serious mental problems, beside[s] trying to raise six children, and a Father who was not as engaged as he should have been in the day-to-day care of the children." The Juvenile Court found that DCS had made "not only reasonable efforts, but Herculean efforts," to rectify the situation and had provided or offered services to the children and parents for many years.

At a permanency hearing a month later, on November 7, 2011, Mother's appointed counsel orally moved the Juvenile Court to grant Mother visitation with the children. The Juvenile Court scheduled a hearing on the motion for December 19, 2011. The record on appeal does not include, however, any further orders or information regarding the disposition of Mother's motion, any hearing on the motion, or any

other court proceeding in the dependency and neglect actions against Mother and Father.

By the time DCS filed the October 24, 2013 petition to terminate parental rights from which this appeal arises, Mother had been without the physical custody of the children since December 2005, almost eight years, and without visitation privileges since July 2007, although the Juvenile Court had approved her having supervised visitation if any of the children requested it. In its petition, DCS alleged that the following three grounds supported termination of Mother's parental rights: (1) substantial noncompliance with the permanency plan;[6] (2) the persistence of the

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6 Tennessee Code Annotated section 36-1-113(g)(2) (2015 Supp.) provides that "substantial noncompliance by the parent . . . with the statement of responsibilities in a permanency plan" is a ground for termination of parental rights. Another statute provides:

> Substantial noncompliance by the parent with the statement of responsibilities provides grounds for the termination of parental rights, notwithstanding other statutory provisions for termination of parental rights, and notwithstanding the failure of the parent to sign or to agree to such statement if the court finds the parent was informed of its contents, and that the requirements of the statement are reasonable and are related to remedying the conditions that necessitate foster care placement. The permanency plan shall not require the parent to obtain employment if such parent has sufficient resources from other means to care for the child, and shall not require the parent to provide the child with the child's own bedroom unless specific safety or medical reasons exist that would make bedroom placement of the child with another child unsafe.

Tenn. Code Ann. § 37-2-403(a)(2)(C) (2014).

conditions that led to the removal of Carrington;[7] and (3) mental incompetence.[8]

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[7] Persistence of the conditions that led to the child's removal from a parent's home is grounds for termination where:

> (3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:
>
> (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent or parents or the guardian or guardians, still persist;
>
> (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent or parents or the guardian or guardians in the near future; and
>
> (C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home[.]

Tenn. Code Ann. § 36-1-113(g)(3).

[8] Termination of parental rights is permissible if clear and convincing evidence establishes that:

> (i) The parent or guardian of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's or guardian's mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent or guardian will be able to assume or resume the care of and responsibility for the child in the near future; and

On December 20, 2013, the Juvenile Court for Maury County held a hearing on the petition. Four attorneys were present at the hearing, including Mother's appointed counsel, Father's appointed counsel, Carrington's guardian ad litem, and the attorney for DCS. Of the four attorneys, only Mother's appointed counsel presented opening statements. Mother's appointed attorney asked the Juvenile Court not to rely upon the 2005 order depriving Mother of custody of her children as a basis for establishing persistence of conditions. He argued that Mother's failure to pay child support for Carrington and to visit Carrington were the results of her having income only from disability benefits and of court orders that prevented her from visiting with the children.

DCS presented the testimony of four witnesses and introduced a number of exhibits, including the September 20 and 28, 2011 permanency plans. Although Mother presented no other evidence, her appointed counsel cross-examined each DCS witness.

Tabitha Smith, a counselor service worker for the Department of Human Services, testified as to Mother's compliance with the permanency plans. Ms. Smith first became involved with the case in 2009, after the children were removed from Father's home. According to Ms. Smith, Mother had attempted to comply with many of the requirements of the permanency plans but had not complied fully. In particular, Ms. Smith testified that Mother had failed to: (1) submit to and pass random drug testing; (2) provide

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> (ii) That termination of parental or guardian rights is in the best interest[s] of the child[.]

Tenn. Code Ann. § 36-1-113(g)(8)(B).

an opinion from a mental health professional that she is emotionally capable of parenting her children; (3) provide proof of six consecutive months of paid rent and utilities; (4) provide DCS with proof that she receives legal income sufficient to support her family; (5) provide DCS with a safety plan for what would happen with the children should she have a seizure; (6) provide sufficient space and beds in her home for the minor children; and (7) acknowledge to a counselor that the children had been sexually and physically abused. Ms. Smith agreed that Mother had attended 95% of her scheduled meetings, but she stated that Mother had behaved erratically at the meetings. On one such occasion, Ms. Smith had driven Mother to a local hospital after the meeting because Mother's speech was slurred and her behavior erratic.

In response to cross-examination questions from Mother's appointed attorney, Ms. Smith acknowledged that she had asked Mother to submit to random drug testing on only three occasions and had not asked Mother to submit a urine sample for drug testing since 2011—two years before the hearing. Ms. Smith agreed that Mother had been receiving Social Security disability benefits since 2008, and she conceded that Mother could have advised DCS of the amount of her disability income before Ms. Smith became involved in the case. To Ms. Smith's knowledge, Mother had no outstanding debts to suggest that Mother's disability income would be insufficient to enable Mother to provide for her family's basic needs. When asked about her testimony that Mother's home lacked adequate space and bedding for the children, Ms. Smith acknowledged that she had not been inside Mother's home since the spring of 2012, more than a

year before the hearing. When asked about her testimony that Mother had failed to provide the opinion of a mental health expert regarding her emotional capacity to parent the children, Ms. Smith agreed that Mother had provided DCS with a medical release and authorization to contact her service providers directly to obtain Mother's records. Ms. Smith conceded that DCS had provided Mother's mental health counseling services and could have contacted Mother's service providers directly. Indeed, Ms. Smith confirmed that DCS actually had asked one of Mother's providers to furnish an opinion on her emotional parenting capability. With regard to the requirement that Mother acknowledge sexual abuse, Ms. Smith agreed that Mother's psychosexual evaluation, conducted on March 5, 2009, "indicated that [Mother] produced a valid test result which demonstrated no sexual pathology even upon recent resubmission of the test."

Elysse Beasley, a psychotherapist and licensed senior psychological examiner and professional counselor, testified for DCS as an expert in the fields of psychology and psychological examination. Ms. Beasley, who had conducted Mother's March 5, 2009 psychosexual evaluation and Mother's July 2, 2013 psychological evaluation, authenticated and submitted copies of her evaluation reports.

According to Ms. Beasley, the purpose of the July 2, 2013 evaluation was to determine whether Mother's psychological condition would permit her to care for her children safely. Ms. Beasley's evaluation of Mother consisted of a clinical interview, a clinical mental status examination, review of reports of Mother's earlier evaluations, review of documents

DCS provided, and the administration of numerous psychological tests, including the Minnesota Multiphasic Personality Inventory-2, Millon Clinical Multi-Axial Inventory-III, Adult Adolescent Parenting Inventory-2, and Substance Abuse Subtle Screening Inventory-3.

From the clinical interview and review of Mother's medical records, Ms. Beasley learned that Mother had been hospitalized in November 2006 for eight days for treatment of depression and anxiety. In 2009, Mother received inpatient treatment at Rolling Hills Psychiatric Hospital and Cumberland Heights. In 2011, Mother was hospitalized for six days at Vanderbilt University Medical Center, after a friend reported that Mother had been carrying around razor blades and threatening to harm herself. During the 2011 hospitalization, Mother was diagnosed with Bipolar II Disorder, Post Traumatic Stress Disorder, Sedative, Hypnotic, or Anxiolytic Dependence, and Opioid Abuse, with underlying Borderline Personality Disorder. In September 2012, Mother was again hospitalized at Rolling Hills Psychiatric Hospital for seventeen days and was treated for polysubstance dependence, depression, suicidal ideation, and Xanax abuse.

Ms. Beasley concluded, based on the clinical interview and Mother's test results, that Mother has poor insight, poor impulse control, and widely shifting mood swings. Ms. Beasley opined that Mother suffers from post-traumatic stress disorder, caused by an abusive relationship and the anxiety and nightmares associated with reliving the trauma. Ms. Beasley also noted Mother's well-documented history of drug abuse and her Axis II diagnosis of histrionic personality disorder. Histrionic personality disorder, Ms. Beasley explained, is characterized by intense unstable

relationships, dramatic behavior, and a need to be noticed, which results in exaggeration, attention seeking, rapidly shifting emotions, gullibility, rash decision-making, and suicide attempts. Ms. Beasley explained that, like all personality disorders, histrionic personality disorder is a longstanding and very entrenched personality characteristic "that tends to be very, very, very difficult to treat." Mother's histrionic personality disorder, Ms. Beasley opined, has become a "very ingrained part of who she is and how she operates, and there are no medications for treating personality disorders, although medications might help with bouts of depression."

Ms. Beasley explained that Mother's Global Assessment of Functioning results indicated that Mother's mental health moderately interferes with her ability to function on a day-to-day basis and that she has suicidal ideations. Ms. Beasley noted as well that Mother's Substance Abuse Subtle Screening Inventory produced unreliable results. Although Mother denied alcohol or drug usage in the six months prior to the screening, Mother's high defensiveness and high supplemental-addiction-measure scores indicated that she was trying to minimize evidence of personal problems and that she had given answers similar to those given by defensive persons with substance abuse disorders.

Ms. Beasley opined within a reasonable degree of professional certainty that Mother is neither competent nor able to provide for or fully care for Carrington due to her mental condition. Although Mother had been in treatment to address her substance abuse problems, Ms. Beasley concluded that very little had changed in Mother's emotions, depression, anger, or method of

handling these issues since Ms. Beasley evaluated Mother in 2009. Ms. Beasley pointed out that, even without the stress of caring for the children, Mother had been hospitalized multiple times between 2006 and 2012 and was still experiencing stress-related difficulties in 2013. Ms. Beasley emphasized that the hospitalizations were merely the culmination of Mother's problems, and she opined that Mother would have had "all kinds of symptoms and inabilities to function prior to the hospitalization[s]." Ms. Beasley testified that all of Mother's symptoms were present both in 2009 and at the time of the July 2013 evaluation and were unlikely to resolve in the near future. Ms. Beasley explained:

> [Mother] has little psychological insight. She is defensive and reluctant to engage in self-exploration. Additionally, she has little motivation to change her behavior since she blames others for the situation in which she finds herself. Long-term commitment to therapy is required before [Mother's] personality would substantially change. However, individuals with her profile often terminate treatment early. At this point in time, [Mother] does not have the physical and emotional well-being to safely care for her six children and past therapy efforts from 2005 to the current time have proven unsuccessful in providing long term improvement in her psychological functioning.

According to Ms. Beasley, the more stress Mother is under, "the more reduced her ability to function becomes." After Ms. Beasley explained that her opinions were aimed at answering the question of

whether Mother has the emotional capacity to parent a normal child, counsel for DCS asked whether Mother has the emotional capacity to parent a child with "a behavioral problem or disorder that result[s] in periodic outbursts of anger, demonstrated by kicking and screaming, refusing to listen to or take instruction, sort of an oppositional defiance to being told what to do, when to do it, and how to do it." To this question, Ms. Beasley responded, "[T]hat sort of child would be difficult to manage even for somebody, you know, who was not suffering from any of this." Although Ms. Beasley did not view Mother as posing a risk of physical abuse to the child, she opined that Mother would pose a risk of emotional abuse to the child.

Mother's appointed counsel cross-examined Ms. Beasley, focusing on the conclusion in Ms. Beasley's 2009 psychosexual evaluation report that Mother had produced a valid test and that, while it could not be stated that Mother was not culpable of a sexual offense, there was no sexual pathology to support an inference of culpability. Mother's appointed counsel also questioned Ms. Beasley regarding the telephone call she had received from a DCS employee after submitting her 2009 evaluation report to DCS. According to Ms. Beasley, the DCS employee stated that her boss was not happy with the report and asked Ms. Beasley whether DCS could send her additional information about the case to review, in the event it might change the results of her evaluation report. Ms. Beasley testified that she informed the DCS employee that additional information would not change the facts or the results of the evaluation. Nevertheless, Ms. Beasley decided to resubmit the raw test data, but

the results of the evaluation did not change. Ms. Beasley agreed that, after the 2009 evaluation, she had recommended family therapy with Mother, "with the goal of working towards supervised visitation." Mother's appointed counsel then asked Ms. Beasley her opinion of the Juvenile Court's 2009 decision to deny Mother visitation with the children, unless the children requested visitation with Mother. Ms. Beasley responded that, at the time of the decision, the children ranged in age from five to twelve years old, and that, in her opinion, "[i]t should not have been left up to the children . . . whether or not they should see a parent or not see a parent." In response to further cross-examination questioning, Ms. Beasley opined that some attempt should have been made "towards visitation and some sort of reconciliation with [Mother]."

Leslie Ross also testified for DCS. Ms. Ross was an outpatient therapist at Centerstone, one of Mother's mental health service providers. Ms. Ross treated Mother in 2012 for depression, post-traumatic stress disorder, issues concerning visitation with her children, and medication. During this time, Ms. Ross ordinarily counseled with Mother once per week, but not less than once per month. In January 2013, Centerstone asked Mother to sign a behavior contract due to ongoing problems. The contract required Mother, among other things, to see a particular staff member who would prescribe clinically appropriate medications but who would not prescribe Ativan as Mother requested. The contract also required Mother to refrain from: (1) sending emails to Centerstone staff; (2) calling Centerstone several times each day demanding to speak to staff members; (3) using

inappropriate language and/or threatening language with her case manager; and (4) using verbally aggressive or inappropriate language, including yelling, name calling, and cursing, toward Centerstone staff and other patients. When Mother refused to sign the agreement, Centerstone refused to continue providing Mother with services.

On cross-examination, Mother's appointed counsel elicited testimony from Ms. Ross that, prior to the problems that culminated in Centerstone presenting Mother with the behavior contract in 2013, Mother had received treatment at Centerstone for more than ten years without incident.

Richard Walker, a clinical social worker at Centerstone, also testified for DCS as an expert witness in social work and child therapy. Mr. Walker explained that Carrington had been diagnosed with reactive attachment disorder and oppositional defiant disorder.[9] According to Mr. Walker, reactive attachment disorder usually arises in young children when their patterns of attachment are disrupted, causing them to have problems forming and sustaining attachments. Mr. Walker stated that Carrington's behavioral problems are atypical. For the most part, Carrington functions as a normal child but becomes unmanageable when he is upset. During these periods, Carrington refuses to cooperate with anyone, and unless he is physically restrained, Carrington kicks, screams, bites, throws things, and attacks other children and anyone else who tries to direct him. According to Mr. Walker, these episodes of Carrington losing control coincide

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[9] Carrington had also been diagnosed with attention deficit disorder, but Mr. Walker disagreed with this diagnosis.

with impending moves. As an example, Dr. Walker explained that in 2011, when Carrington was moved from one home to another home, his foster parents had difficulty controlling his behavior. Carrington would alternate between clinging to his foster parents and becoming oppositional and combative. At the time of the hearing, Mr. Walker was treating Carrington with talk and play therapy, counseling him on cooperating with others, and teaching him skills for building friendships and getting along with other people. Mr. Walker opined that a permanent and stable living arrangement in a nurturing home, where the attachments do not break, even when Carrington becomes upset, is critical to Carrington's well-being. Placing Carrington with a parent with histrionic personality disorder would be almost the exact opposite of the home environment that he needs, according to Mr. Walker, because a parent with histrionic personality disorder would be unable to provide the stable home environment Carrington needs. Mr. Walker explained that, although visitation with a parent with histrionic personality disorder would be disruptive for Carrington, the disruption would be more limited because exposure to the parent's unstable behavior patterns and emotions would be periodic rather than constant.

On cross-examination by Mother's appointed attorney, Mr. Walker agreed that he had been aware of the 2009 order giving the children the choice of whether to visit with Mother. When asked his opinion of this arrangement, Mr. Walker stated that he would have favored an approach "where the children were not the ones who made th[e] decision" and "[which]

involved periodic visits with [Mother] and, in this case, under close supervision."

Mother did not present any additional proof. In closing argument, Mother's appointed counsel contended that DCS had failed to carry its burden of establishing any of the alleged grounds for termination by clear and convincing evidence. He also argued that Mother was not at fault for the 2009 order allowing the children to make the decision on whether to visit with her, and that, because Mother had not been allowed to visit with Carrington, the proof regarding her inability to parent was purely speculative. He asserted that DCS had put aside Mother's case while it pursued the abuse charges against Father and had failed to make any effort to reunify Mother with Carrington.

In his closing argument, Carrington's guardian ad litem described the case as "probably the saddest" with which any of the lawyers involved had ever dealt. Nevertheless, he asked the Juvenile Court to terminate Mother's parental rights, explaining that "with the histrionic personality disorder and all the other sad issues that [Mother] has had to deal with in her life," Mother lacks the capacity to parent a difficult child, like Carrington, and her mental status would be detrimental to him.

At the conclusion of the December 20, 2013 hearing, the Juvenile Court took the matter under advisement and issued its final order on February 27, 2014, terminating Mother's parental rights to Carrington.[10] The Juvenile Court found by clear and

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[10] On January 30, 2014, DCS filed a motion to ascertain the status of the Juvenile Court's decision. *See* Tenn. Code Ann. § 36-

convincing evidence that (1) Mother had failed to substantially comply with the requirements of the permanency plan; (2) Carrington had been removed from Mother's home by court order for more than six months, and the conditions that led to Carrington's removal still persisted, and there was little likelihood that these conditions would be remedied at an early date so that Carrington could safely return to Mother in the near future, and the continuation of the parent-child relationship greatly diminished Carrington's chances of early integration into a safe, stable, and permanent home; (3) Mother was incompetent to adequately provide for the further care and supervision of Carrington and it was unlikely that Mother would be able to assume or resume the care of and responsibility for Carrington in the near future; and (4) termination of Mother's parental rights was in Carrington's best interest.

Mother appealed from the trial court's judgment terminating her parental rights.[11] On appeal, Mother's appointed attorney argued that the Juvenile Court erred in finding clear and convincing evidence to

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1-113(k) (requiring trial courts to render decisions within thirty days of the conclusion of a hearing on a petition to terminate parental rights).

[11] On the same day that DCS filed the motion to ascertain status, January 30, 2014, Mother's attorney filed a motion requesting to be relieved as appointed counsel for Mother. Appointed counsel alleged that he had represented Mother since 2007 and proposed "that a 'fresh perspective' would best serve Mother's interests in the event that an appeal, as of right, is taken from the ruling of this court." The record does not reflect that the Juvenile Court ruled on the motion. Having not been relieved, appointed counsel filed a notice of appeal on Mother's behalf and represented her before the Court of Appeals.

establish the termination grounds of substantial noncompliance and persistence of conditions. Appointed counsel also argued that the trial court erred by finding clear and convincing evidence that termination of Mother's parental rights was in Carrington's best interests. Appointed counsel did not appeal the trial court's finding that Mother lacked the mental competency to provide for Carrington's care and supervision.

On October 21, 2014, the Court of Appeals affirmed the trial court's judgment but declined to review any of Mother's challenges to the trial court's grounds for termination. *In re Carrington H.*, No. M2014-00453-COA-R3-PT, 2014 WL 5390572, at *5 (Tenn. Ct. App. Oct. 21, 2014). The intermediate appellate court reasoned that, because Mother had not appealed the trial court's finding she lacked the mental competency to parent Carrington, the trial court's finding on that ground was final and furnished a sufficient basis for the appellate court to affirm the trial court's decision terminating Mother's parental rights. The Court of Appeals affirmed the trial court's finding that DCS offered clear and convincing evidence to establish that termination of Mother's parental rights was in Carrington's best interests. *Id.* at *8. On November 5, 2014, the Court of Appeals granted appointed counsel's motion to withdraw as counsel for Mother.

Thereafter, Mother, proceeding pro se, timely filed an application for permission to appeal in this Court. She asserted that her appointed counsel's representation was inadequate and deprived her of the right to counsel statutorily guaranteed to indigent parents in termination proceedings. Specifically, Mother asserted that she had been prejudiced by appointed

counsel's deficient representation during the 2008 dependency and neglect proceeding and during the parental termination trial and appeal. Mother also asserted that the Court of Appeals erred by declining to review the sufficiency of the evidence to support the Juvenile Court's findings regarding the grounds for termination.

We granted Mother's pro se application for permission to appeal and appointed new counsel to represent her before this Court. *In re Carrington H.*, No. M2014-00453-SC-R11-PT (Tenn. Jan. 28, 2015) (order granting pro se application, appointing counsel, and setting out issues of particular interest).[12] We also directed the parties to address the following issues:

(1) Whether the right to counsel in a termination of parental rights proceeding includes the right to the effective assistance of counsel; and

(2) If so, what procedure and standard should the Court adopt to review that claim?

II. Analysis

A. Standards Governing Parental Termination Trial Proceedings

A parent's right to the care and custody of her child is among the oldest of the judicially recognized fundamental liberty interests protected by the Due

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[12] The Court is grateful to attorney Rebecca McKelvey Castañeda of the law firm of Stites & Harbison, PLLC, for providing Mother with outstanding representation in this appeal.

Process Clauses of the federal and state constitutions.[13] *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *In re Angela E.*, 303 S.W.3d 240, 250 (Tenn. 2010); *In re Adoption of Female Child*, 896 S.W.2d 546, 547-48 (Tenn. 1995); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993). But parental rights, although fundamental and constitutionally protected, are not absolute. *In re Angela E.*, 303 S.W.3d at 250. "'[T]he [S]tate as *parens patriae* has a special duty to protect minors . . . .' Tennessee law, thus, upholds the [S]tate's authority as *parens patriae* when interference with parenting is necessary to prevent serious harm to a child." *Hawk*, 855 S.W.2d at 580 (quoting *In re Hamilton*, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983)); *see also Santosky v. Kramer*, 455 U.S. 745, 747 (1982); *In re Angela E.*, 303 S.W.3d at 250. "When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it." *Santosky*, 455 U.S. at 759. "Few consequences of judicial action are so grave as the severance of natural family ties." *Id.* at 787; *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996). The parental rights at stake are "far more precious than any property right." *Santosky*, 455 U.S. at 758-59. Termination of parental rights has the legal effect of reducing the parent to the role of a complete stranger

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[13] U.S. Const. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."). Similarly, article 1, section 8 of the Tennessee Constitution states "[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

and of "severing forever all legal rights and obligations of the parent or guardian of the child." Tenn. Code Ann. § 36-1-113(l)(1); *see also Santosky*, 455 U.S. at 759 (recognizing that a decision terminating parental rights is "final and irrevocable"). In light of the interests and consequences at stake, parents are constitutionally entitled to "fundamentally fair procedures" in termination proceedings. *Santosky*, 455 U.S. at 754; *see also Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 27 (1981) (discussing the due process right of parents to fundamentally fair procedures).

Among the constitutionally mandated "fundamentally fair procedures" is a heightened standard of proof—clear and convincing evidence. *Santosky*, 455 U.S. at 769. This standard minimizes the risk of unnecessary or erroneous governmental interference with fundamental parental rights. *Id.*; *In re Bernard T.*, 319 S.W.3d 586, 596 (Tenn. 2010). "Clear and convincing evidence enables the fact-finder to form a firm belief or conviction regarding the truth of the facts, and eliminates any serious or substantial doubt about the correctness of these factual findings." *In re Bernard T.*, 319 S.W.3d at 596 (citations omitted). The clear-and-convincing-evidence standard ensures that the facts are established as highly probable, rather than as simply more probable than not. *In re Audrey S.*, 182 S.W.3d 838, 861 (Tenn. Ct. App. 2005); *In re M.A.R.*, 183 S.W.3d 652, 660 (Tenn. Ct. App. 2005).

Tennessee statutes governing parental termination proceedings incorporate this constitutionally mandated standard of proof. Tennessee Code Annotated section 36-1-113(c) provides:

> Termination of parental or guardianship rights must be based upon:
>
> (1) A finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and
>
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.

This statute requires the State to establish by clear and convincing proof that at least one of the enumerated statutory grounds[14] for termination exists and that termination is in the child's best interests. *In re Angela E.*, 303 S.W.3d at 250; *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). "The best interests analysis is separate from and subsequent to the determination that there is clear and convincing evidence of grounds for termination." *In re Angela E.*, 303 S.W.3d at 254. Although several factors relevant to the best interests analysis are statutorily enumerated,[15] the list is illustrative, not exclusive. The parties are free to offer proof of other relevant factors. *In re Audrey S.*, 182 S.W.3d at 878. The trial court must then determine whether the combined weight of the facts "amount[s] to clear and convincing evidence that termination is in the child's best interest." *In re Kaliyah S.*, 455 S.W.3d 533, 555 (Tenn. 2015). These requirements ensure that each parent receives the constitutionally required "individualized

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[14] Tenn. Code Ann. § 36-1-113(g)(1)-(13).

[15] Tenn. Code Ann. § 36-1-113(i).

determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away." *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

Furthermore, other statutes impose certain requirements upon trial courts hearing termination petitions. A trial court must "ensure that the hearing on the petition takes place within six (6) months of the date that the petition is filed, unless the court determines an extension is in the best interests of the child." Tenn. Code Ann. § 36-1-113(k). A trial court must "enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing." *Id.* This portion of the statute requires a trial court to make "findings of fact and conclusions of law as to whether clear and convincing evidence establishes the existence of each of the grounds asserted for terminating [parental] rights." *In re Angela E.*, 303 S.W.3d at 255. "Should the trial court conclude that clear and convincing evidence of ground(s) for termination does exist, then the trial court must also make a written finding whether clear and convincing evidence establishes that termination of [parental] rights is in the [child's] best interests." *Id.* If the trial court's best interests analysis "is based on additional factual findings besides the ones made in conjunction with the grounds for termination, the trial court must also include these findings in the written order." *Id.* Appellate courts "may not conduct de novo review of the termination decision in the absence of such findings." *Id.* (citing *Adoption Place, Inc. v. Doe*, 273 S.W.3d 142, 151 & n. 15 (Tenn. Ct. App. 2007)).

B. Standards of Appellate Review

An appellate court reviews a trial court's findings of fact in termination proceedings using the standard of review in Tenn. R. App. P. 13(d). *In re Bernard T.*, 319 S.W.3d at 596; *In re Angela E.*, 303 S.W.3d at 246. Under Rule 13(d), appellate courts review factual findings de novo on the record and accord these findings a presumption of correctness unless the evidence preponderates otherwise. *In re Bernard T.*, 319 S.W.3d at 596; *In re M.L.P.*, 281 S.W.3d 387, 393 (Tenn. 2009); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 809 (Tenn. 2007). In light of the heightened burden of proof in termination proceedings, however, the reviewing court must make its own determination as to whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, amount to clear and convincing evidence of the elements necessary to terminate parental rights. *In re Bernard T.*, 319 S.W.3d at 596-97. The trial court's ruling that the evidence sufficiently supports termination of parental rights is a conclusion of law, which appellate courts review de novo with no presumption of correctness. *In re M.L.P.*, 281 S.W.3d at 393 (quoting *In re Adoption of A.M.H.*, 215 S.W.3d at 810). Additionally, all other questions of law in parental termination appeals, as in other appeals, are reviewed de novo with no presumption of correctness. *In re Angela E.*, 303 S.W.3d at 246.

C. Scope of Appellate Review

The Court of Appeals declined to consider Mother's challenges to two of the three grounds on which the trial court based its decision to terminate her parental rights. *In re Carrington H.*, 2014 WL

5390572, at *5. The Court of Appeals reasoned that because Mother failed to challenge the third ground for termination, mental incompetency, the trial court's finding on that ground became final and is sufficient to support the trial court's decision terminating Mother's parental rights. *Id.* DCS agrees with the Court of Appeals' reasoning and asks us to affirm its ruling on this issue.

The Court of Appeals has disagreed on the scope of review in parental termination appeals. Some panels have declined to address any of the grounds for termination where a parent appeals fewer than all of the grounds relied on by the trial court for termination or only appeals the trial court's decision as to the child's best interests. *See In re Patrick J.*, No. M2014-00728-COA-R3-PT, 2014 WL 7366946, at *1 (Tenn. Ct. App. Dec. 23, 2014); *In re Alexis L.*, No. M2013-01814-COA-R3-PT, 2014 WL 1778261, at *1 (Tenn. Ct. App. Apr. 30, 2014); *In re Kyla P.*, No. M2013-02205-COA-R3-PT, 2014 WL 4217412, at *3 (Tenn. Ct. App. Aug. 26, 2014); *In re A.T.S.*, No. M2004-01904-COA-R3-PT, 2005 WL 229905, at *3 (Tenn. Ct. App. Jan. 28, 2005). At least one panel has held that when a parent appeals only the trial court's decision on the child's best interests, the Court of Appeals has a duty to examine the record to determine whether the evidence is sufficient to prove by clear and convincing evidence at least one of the grounds for termination. *In re Jason C.H.*, No. M2010-02129-COA-R3-PT, 2011 WL 917389, at *4 (Tenn. Ct. App. Mar. 16, 2011). At least one other panel has held that all grounds relied on by the trial court to terminate parental rights should be reviewed, even though all of the grounds were not raised on appeal. *In re Robert D.*, No. E2013-

00740-COA-R3-PT, 2014 WL 201621, at *11 (Tenn. Ct. App. Jan. 17, 2014). Other panels have exercised the discretion Tennessee Rule of Appellate Procedure 13 provides to review the trial court's determination of the child's best interests even though the parent did not raise that issue on appeal, citing the gravity of the consequences of terminating parental rights. *In re Brittany D.*, No. M2015-00179-COA-R3-PT, 2015 WL 5276169, at *7 (Tenn. Ct. App. Sept. 9, 2015); *In re Justin K.*, No. M2012-01779-COA-R3-PT, 2013 WL 1282009, at *8 n.6 (Tenn. Ct. App. Mar. 27, 2013).

Although this issue has not previously been squarely presented to this Court, we commented upon it in *In re Angela E.* There, after holding that trial courts are obligated to make factual findings on each ground alleged for termination, we stated:

> Consistent with the same policies—that is, the importance of permanently placing children and the just, speedy resolution of cases—the Court of Appeals should likewise review the trial court's findings of fact and conclusions of law as to each ground for termination, even though the statute only requires the finding of one ground to justify terminating parental rights. The Court of Appeals' thorough review of all grounds decided by the trial court will prevent unnecessary remands of cases that we hear in this Court.

303 S.W.3d at 251 n.14 (citations omitted). DCS argues that the foregoing language does not require the Court of Appeals to review every ground for termination of parental rights, regardless of whether the issue has been raised on appeal, because issues

not raised on appeal cannot be raised in this Court. DCS also maintains that imposing such a requirement would have the effect of encouraging "counsel to raise frivolous issues on appeal in termination proceedings" and "would operate against the child's interest in prompt resolution of the termination proceeding."

We certainly have no desire to encourage attorneys to raise frivolous issues in any appeal. Nor do we wish to prolong the resolution of parental termination proceedings. But we fail to see how requiring the Court of Appeals to review thoroughly the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests would produce either of these undesirable results. To the contrary, requiring this review will ensure that fundamental parental rights are not terminated except upon sufficient proof, proper findings, and fundamentally fair procedures. Requiring this review should not prolong any appeal already pending before the Court of Appeals by any measurable degree and has the potential to reduce the number of applications for permission to appeal filed in this Court. This will, in turn, advance the important goal of concluding parental termination litigation as rapidly as possible "consistent with fairness." *Lassiter*, 452 U.S. at 32; *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003) (discussing the rationale for requiring trial courts to make findings on each ground and recognizing the importance of establishing permanent placements for children).

Although DCS is correct that issues not raised in the Court of Appeals generally will not be considered by this Court, there are exceptions to this general rule. Indeed, we recognized recently that "Rules 13(b) and

36(a) of the Tennessee Rules of Appellate Procedure, considered together, give appellate courts considerable discretion to consider issues that have not been properly presented in order to achieve fairness and justice." *In re Kaliyah*, 455 S.W.3d at 540 (footnote omitted). We exercised this discretion in that case to consider an issue that DCS had not raised in either the trial court or the Court of Appeals. *Id.* DCS's argument on this point is unpersuasive. Therefore, consistent with our statement in *In re Angela E.*, we hold that in an appeal from an order terminating parental rights the Court of Appeals must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal.[16] 303 S.W.3d at 251 n.14.

In the interest of finally resolving this already protracted appeal as expeditiously as possible, we will review the trial court's findings, rather than remand to the Court of Appeals to do so. Before undertaking that review, however, we next consider Mother's assertion that her statutory right to appointed counsel necessarily includes the right to effective assistance of counsel and the right to a procedure by which she may attack the judgment terminating her parental rights based on ineffective assistance of counsel.

D. Effective Assistance of Counsel in Parental Termination Proceedings

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[16] To aid in fulfilling this obligation, the Court of Appeals may adopt a rule requiring parents to brief these issues in every appeal.

Our analysis of this issue necessarily begins with *Lassiter*, in which the United States Supreme Court, in a five-to-four decision, held that the Due Process Clause of the Fourteenth Amendment does not require States to appoint counsel for parents in every parental termination proceeding. 452 U.S. at 24. The *Lassiter* Court acknowledged that, although "'due process' has never been, and perhaps can never be, precisely defined," it should be understood as expressing "the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." *Id.* Discerning "what 'fundamental fairness' consists of in a particular situation," the Court explained, is "an uncertain enterprise" that may be accomplished "by first considering any relevant precedents and then by assessing the several interests that are at stake." *Id.* at 24-25. With respect to the right to appointed counsel, the Court concluded that its prior "relevant precedents" had defined "fundamental fairness" as establishing "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Id.* at 26-27 (emphasis added). The *Lassiter* Court then utilized the three factors enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to analyze whether due process requires appointed counsel when there is no potential deprivation of physical liberty but when parental rights are at stake. *Lassiter*, 452 U.S. at 31.

The Court weighed the three *Mathews* factors—(1) the private interests at stake; (2) the risk of an erroneous decision; and (3) the government's interest—against the presumption that there is no right to appointed counsel in the absence of a potential loss of

physical liberty. *Id.* The Court reiterated "that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Id.* at 27 (quoting *Stanley*, 405 U.S. at 651). The Court pointed out that, where the State prevails in a parental termination proceeding, "it will have worked a unique kind of deprivation," and that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one." *Id.* (footnote omitted). The Court emphasized that the State has an "urgent interest in the welfare [of children]" and "in an accurate and just decision." *Id.* While the State also has a legitimate financial interest in limiting the expenses of termination proceedings, the Court described that interest as minimal. *Id.* at 28. The State's interests, the Court recognized, "may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal." *Id.* As to the final factor, the Court described the procedures in place in North Carolina, where the *Lassiter* case originated, noted that most parental termination proceedings do not involve "the evidentiary problems peculiar to criminal trials," and observed that "the standards for termination are not complicated." *Id.* at 29. Nevertheless, the Court recognized that termination proceedings may involve medical and psychiatric evidence and that parents often have little education and are "distress[ed] and disorient[ed]" by the process. *Id.* at 30. Ultimately, however, the Court concluded that the combined weight of the parent's interests, the government's

interests, and the risk of erroneous deprivation was insufficient to "lead to the conclusion that the Due Process Clause requires the appointment of counsel [as a matter of course] when a State seeks to terminate an indigent's parental status." *Id.* at 31. Rather, the *Lassiter* Court held that the question of whether Due Process requires the appointment of counsel in parental termination proceedings must be answered on a case-by-case basis. *Id.* at 32. Appointed counsel is constitutionally required in parental termination cases only where the trial court's assessment of such factors as the complexity of the proceeding and the capacity of the uncounseled parent indicates an appointment is necessary. *Id.* at 27-32; *see also State ex rel. T.H. by H.H. v. Min*, 802 S.W.2d 625, 626 (Tenn. Ct. App. 1990) (explaining that a parent has no absolute constitutional right to appointment of counsel in termination proceedings under the state or federal constitutions and discussing the factors that should be considered to determine if appointment of counsel is warranted in a particular case).

The *Lassiter* Court recognized that its holding represented a "minimally tolerable" constitutional standard and that "wise public policy" may counsel in favor of a more protective standard. 452 U.S. at 33. The Supreme Court has not revisited the question of appointed counsel in parental termination proceedings in the more than thirty years since *Lassiter* was decided. This may be because almost all States now provide appointed counsel in every parental termination case, either by statute, constitutional provision, or court rule, and do not condition the appointment of counsel on the outcome of the case-by-case balancing

test adopted in *Lassiter*.[17] *See* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 193 (2004).

Tennessee joined this majority in 2009. Rather than incur the time and expense of litigating the right to appointed counsel in each case under the *Lassiter* balancing test, Tennessee statutorily provides the right to appointed counsel for indigent parents in every parental termination proceeding. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii) (2014);[18] Tenn. Sup. Ct. R.

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[17] Even when Lassiter was decided, thirty-three States and the District of Columbia already provided for the appointment of counsel in parental termination cases. Lassiter, 452 U.S. at 34.

[18] A parent is entitled to representation by legal counsel at all stages of [a] proceeding . . . involving . . . [t]ermination of parental rights . . . .Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii).

13, § 1 (c), (d)(2)(B);[19] Tenn. R. Juv. P. 39(e)(2).[20] Tennessee's statutory right to counsel is not disputed, and it is also undisputed that Mother was represented by appointed counsel in this matter. Instead, Mother asks us to go a step further and hold that the statutory right to appointed counsel includes, in every case, the right to challenge a judgment terminating parental rights based on ineffective assistance of counsel after

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[19] Tennessee Supreme Court Rule 13, section 1, provides in pertinent part:

> (c) All general sessions, juvenile, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation . . . according to the procedures and standards set forth in this rule.
>
> [. . .]
>
> (d) . . . (2) In the following proceedings, and in all other proceedings where required by law, the court or appointing authority shall advise any party without counsel of the right to be represented throughout the case by counsel and that counsel will be appointed if the party is indigent and, except as provided in (C) and (D) below, requests appointment of counsel.
>
> [. . .]
>
> (B) Cases under Titles 36 and 37 of the Tennessee Code Annotated involving allegations against parents that could result in finding a child dependent or neglected or in terminating parental rights;

Tenn. Sup. Ct. R. 13, § 1(c), (d)(2)(B).

[20] "[A]ny party who appears without an attorney shall be informed of the right to an attorney, and in the case of an indigent respondent[,] an attorney shall be appointed pursuant to Tennessee Supreme Court Rule 13[.]" Tenn. R. Juv. P. 39(e)(2).

the appellate court has rendered its decision on a parent's appeal as of right from the judgment terminating parental rights. Mother suggests that the parent should be given a specific period of time, "akin to a time to appeal," to raise the claim of ineffective assistance to the appellate court. Mother asserts that "[t]he appellate court—being the court having most recently reviewed the record and then rendered a decision on that record—would actually be in the most timely position to opine on whether the parent's court-appointed counsel was ineffective or not, based on the face of the record." Mother suggests that "[t]he appellate court could then either decide the claim based on the record or remand the case for an evidentiary hearing (to take place within a time limit) on the issue of whether there was ineffective assistance of counsel, with instructions that if the trial court finds there was ineffective assistance, then the termination of parental rights must be vacated."

DCS responds that the statutory right to counsel does not give rise to a separate right of effective assistance of counsel and a right to mount collateral attacks on judgments terminating parental rights in every case. DCS concedes, however, that if a parent is constitutionally entitled to the appointment of counsel based on the *Lassiter* balancing test, the parent is also entitled to the effective assistance of counsel. To promote expedited review of termination cases, DCS urges this Court to require parents to raise ineffective assistance of counsel claims by motions filed prior to briefing in appeals as of right from orders terminating parental rights. *See In re R.E.S.*, 978 A.2d 182 (D.C. Ct. App. 2009). According to DCS, under this procedure, the Court of Appeals would either rule on the motion

in an expedited fashion when the record permits, or if the record is not sufficient, would remand to the trial court for development of a sufficient record while the rest of the appeal proceeds. In light of the importance of providing permanency for children, DCS asserts that remands would occur "only when absolutely necessary to satisfy minimum standards of due process, and under strict instructions and time limits from the Court of Appeals." Finally, to ensure the appellate process is not protracted, DCS suggests that no discretionary appeals should be permitted after the issue of ineffective assistance of counsel is resolved on direct appeal. For purposes of this appeal, DCS presumes that Mother was constitutionally entitled to appointed counsel and therefore was entitled to the effective assistance of counsel. Nevertheless, DCS argues that Mother's appointed counsel provided effective representation and that she is not entitled to relief from the judgment terminating her parental rights.

DCS's argument that the right of effective assistance of counsel arises only if the parent has a constitutional right to counsel under *Lassiter* is consistent with decisions interpreting the Sixth Amendment[21] right to counsel. The United States Supreme Court has held that, in the absence of a Sixth

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[21] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

Amendment right to counsel, there is no constitutional right to effective assistance of counsel, even in proceedings where counsel is appointed by the court. *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987) (holding that there is no right to counsel or effective assistance of counsel in post-conviction proceedings); *Wainwright v. Torna*, 455 U.S. 586, 588 (1982) (stating that because there is no constitutional right to counsel for discretionary appeals, there is no right to effective assistance of counsel in such appeals); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (holding that there is no constitutional right to appointed counsel for discretionary appeals). We note as well that, just one year after *Lassiter*, the United States Supreme Court held that parents cannot use the federal writ of habeas corpus to mount collateral attacks on state judgments terminating their parental rights. *Lehman v. Lycoming Cnty. Children's Servs. Agency*, 458 U.S. 502, 511 (1982).[22]

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[22] Although the jurisdiction of this Court is appellate only, the dissenting justices examine the record and make factual findings to support their assertion that Mother is constitutionally entitled to counsel under *Lassiter*. The dissenting justices then assert that we have erred by relying on precedent that recognizes the right to effective assistance of counsel arises only if a party has a constitutional right to counsel. It is true that DCS conceded for purposes of this appeal that Mother had a constitutional right to counsel under *Lassiter*; however, the trial court held no hearing and made no factual findings on this issue. Nevertheless, even assuming *Lassiter* provides Mother with a constitutional right to counsel, nothing in *Lassiter* requires state courts to import criminal law concepts of ineffective assistance of counsel or to assess counsel's performance by standards developed in the criminal law context. Instead, *Lassiter* requires state courts to ensure that parents receive fundamentally fair procedures.

Likewise, this Court has declined to recognize a right to effective assistance of counsel in the absence of a constitutional right to appointed counsel.[23] *See Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010) ("[T]here is no constitutional entitlement to the effective assistance of counsel in a post-conviction proceeding. There is a statutory right to counsel. This statutory right does not, however, serve as a basis for relief on a claim of ineffective assistance of counsel in a post-conviction proceeding and does not include the full panoply of procedural protection that the Tennessee Constitution requires be given to defendants who are in a fundamentally different position at trial and on first appeal as of right." (internal quotation marks omitted)); *Leslie v. State*, 36 S.W.3d 34, 38 (Tenn. 2000) (recognizing that, although post-conviction petitioners have a statutory right to counsel upon filing a petition that states a colorable claim, post-conviction petitioners have neither a constitutional right to counsel nor a constitutional right to effective assistance of counsel).[24]

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[23] The Tennessee Constitution also provides a right to counsel in criminal cases. Tenn. Const. art. I, § 9 ("That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . . .").

[24] The dissenting justices argue that parental termination proceedings and post-conviction proceedings are factually distinct and should be viewed differently. We disagree. First, factual distinctions, assuming they exist, in no way alter the well-settled legal principle that a litigant has no constitutional right to effective assistance of counsel in the absence of a constitutional right to counsel. Moreover, the assertion that a parental termination proceeding is a parent's "first opportunity to defend herself in court against charges brought by the State,

As Mother correctly points out, however, most States have held that the right to counsel in parental termination cases, regardless of its basis, includes the right to effective assistance of counsel.[25] Calkins,

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which could forever sever the relationship with her child" is simply incorrect. The facts of this case illustrate the fallacy of this assertion. Mother's parental rights were terminated based upon persistence of conditions, substantial noncompliance with a permanency plan, and mental incompetence. DCS had provided Mother with services aimed at rectifying the issues that ultimately resulted in the termination of her parental rights for ten years before filing the petition to terminate. Many court proceedings were held during this time. Indeed, in an order entered after one such proceeding but two years before DCS filed the termination petition, the Juvenile Court found that DCS had made "not only reasonable efforts, but Herculean efforts." In the vast majority of parental termination cases, a parent has multiple opportunities to correct the issues that ultimately result in the termination of parental rights long before the parent is called upon to defend against a termination petition.

[25] *See*, *e.g.*, *S.C.D. v. Etowah Cnty. Dep't of Human Res.*, 841 So. 2d 277, 279 (Ala. Civ. App. 2002) (quoting *Crews v. Houston Cnty. Dep't of Pensions & Sec.*, 358 So.2d 451, 455 (Ala. Civ. App. 1978)); *Chloe W. v. Dep't of Health & Soc. Servs., Office of Children's Servs.*, 336 P.3d 1258, 1265 (Alaska 2014); *Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005); *In re Darlice C.*, 129 Cal. Rptr. 2d 472, 475 (Cal. Ct. App. 2003); *People ex rel. C.H.*, 166 P.3d 288, 290 (Colo. App. 2007); *State v. Anonymous*, 425 A.2d 939, 943 (Conn. 1979); *In re R.E.S.*, 978 A.2d at 189; *J.B. v. Fla. Dep't of Children and Families*, 170 So.3d 780, 790 (Fla. 2015); *In re A.R.A.S.*, 629 S.E.2d 822, 825 (Ga. Ct. App. 2006); *In re RGB*, 229 P.3d 1066, 1090 (Haw. 2010); *In re M.F.*, 762 N.E.2d 701, 709 (Ill. App. Ct. 2002); *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992) (citing *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986)); *In re Rushing*, 684 P.2d 445, 448-49 (Kan. Ct. App. 1984); *In re Adoption/Guardianship of Chaden M.*, 30 A.3d 935, 942 (Md. 2011); *In re Adoption of Azziza*, 931 N.E.2d 472, 477 (Mass. App. Ct. 2010) (citing *In re Stephen*, 514 N.E.2d 1087, 1090-91 (Mass. 1987)); *In re Trowbridge*, 401 N.W.2d 65,

supra, at 199. Nevertheless, "[m]ost of the [S]tates that have grounded an ineffectiveness claim on a statutory right to counsel have ignored the proposition that there is no right to effective counsel unless it is a constitutional right." *Id.* at 197. Many of these state courts have opined that the statutory right to counsel is meaningless unless it includes the right to effective assistance of counsel, which these courts have defined as the right to challenge the judgment terminating parental rights based on counsel's ineffectiveness. *Id.*[26]

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66 (Mich. Ct. App. 1986); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989); *In re A.S.*, 87 P.3d 408, 412-13 (Mont. 2004); *In re Guardianship of A.W.*, 929 A.2d 1034, 1037 (N.J. 2007); *In re Jessica* F., 974 P.2d 158, 162 (N.M. Ct. App. 1998); *In re Elijah D.*, 902 N.Y.S.2d 736, 736 (N.Y. App. Div. 2010); *In re S.C.R.*, 679 S.E.2d 905, 909 (N.C. Ct. App. 2009); *In re K.L.*, 751 N.W.2d 677, 685 (N.D. 2008); *In re Wingo*, 758 N.E.2d 780, 791 (Ohio Ct. App. 2001); *In re D.D.F.*, 801 P.2d 703, 707 (Okla. 1990); *In re Geist*, 796 P.2d 1193, 1200 (Or. 1990); *In re Adoption of T.M.F.*, 573 A.2d 1035, 1040 (Pa. Super. Ct. 1990); *In re Bryce T.*, 764 A.2d 718, 722 (R.I. 2001); *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003); *In re E.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994); *In re Moseley*, 660 P.2d 315, 318 (Wash. Ct. App. 1983); *In re M.D.(S).*, 485 N.W.2d 52, 55 (Wis. 1992). But *see In re Azia B.*, 626 N.W.2d 602, 612 (Neb. App. 2001) (declining to recognize a claim of ineffective assistance for parental termination cases).

26 The dissenting justices adopt this approach, stating that, "providing counsel for an indigent parent but not requiring counsel to render effective representation is an empty gesture" and opining that fairness cannot be assured "without requiring the parent's lawyer to be effective[.]" What they apparently fail to recognize is that our refusal to allow parents to repeatedly challenge orders terminating their rights through ineffectiveness claims does not at all negate the ethical obligations all lawyers have to "provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" and to

Courts that have recognized a parent's right to claim ineffective assistance of counsel are by no means uniform, however, on the procedure by which such claims should be raised. Some courts allow such claims to be raised in post-trial motions,[27] while other

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"act with reasonable diligence and promptness in representing a client." Tenn. Sup. Ct. R. 8, RPC 1.1, 1.3. These ethical obligations apply in all cases, including civil cases and other quasi-criminal cases, such as post-conviction proceedings, in which litigants have no constitutional right to counsel and therefore cannot assert claims of ineffective assistance of counsel against their lawyers. Lawyers in such cases *daily* provide invaluable services, often on a pro bono basis, to litigants all across this State. We are convinced that lawyers (in general) take their ethical obligations seriously and endeavor to fulfill them, even in cases where litigants have no right to assert ineffective assistance of counsel claims. Thus, we must strenuously disagree with the dissenting justices' assertion that providing counsel in cases where litigants have no right to assert ineffectiveness claims is an "empty gesture." We also very much take issue with the dissenting justices' assertion that fairness cannot be assured in parental termination proceedings unless parents are allowed to bring claims of ineffective assistance of counsel against their attorneys. Were this assertion accurate, fairness could not be assured in any civil or quasi-criminal case which does not include a constitutional right to effective assistance of counsel. Fairness in judicial proceedings does not hinge upon a litigant's right to assert an ineffective assistance claim. Indeed, as detailed hereinafter, in Tennessee numerous procedures are in place to ensure that parents receive the fundamentally fair procedures to which they are constitutionally entitled in parental termination cases.

[27] *See*, *e.g.*, *S.E. v. J.D.G.*, 869 So.2d 1177, 1179 (Ala. Civ. App. 2003); *J.B.*, 170 So.3d at 794 (adopting an interim procedure whereby "a parent—without assistance of appointed counsel—shall have twenty . . . days after the termination judgment issues within which to file a motion in the trial court alleging claims of ineffective assistance of counsel"); *Jones*, 205 S.W.3d at 794-95 (declining to consider a claim of ineffective assistance of counsel

courts allow such claims to be raised on direct appeal,[28] and still other courts authorize raising the issue in a petition for habeas corpus.[29]

Courts are also divided on the standard by which such claims should be evaluated. A majority of jurisdictions have adopted an adaptation of the *Strickland v. Washington*, 466 U.S. 668, 687 (1984) standard.[30] A minority of jurisdictions utilize a fundamental fairness test, which inquires whether

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on appeal because the issue was not first raised in the trial court); *In re J.M.S.*, 43 S.W.3d 60, 64 (Tex. Ct. App. 2001) (allowing ineffectiveness claims to be raised either in a motion for new trial or on direct appeal, but noting the difficulties inherent in not first raising the issue to the trial court and developing the record).

[28] *See*, *e.g.*, *In re Guardianship of A.W.*, 929 A.2d at 1040; *In re Geist*, 796 P.2d at 1201; *Chloe W.*, 336 P.3d at 1266; *People ex rel. C.H.*, 166 P.3d at 291; *In re R.E.S.*, 978 A.2d at 193; *In re Termination of Parental Rights of James W.H.*, 849 P.2d at 1079 (N.M. Ct. App. 1993); *T.L.*, 751 N.W.2d at 685; *In re Adoption of T.M.F.*, 573 A.2d at 1043; *In re J.M.S.*, 43 S.W.3d at 64.

[29] *See*, *e.g.*, *In re Darlice C.*, 129 Cal. Rptr. 2d at 475.

[30] *See*, *e.g.*, *Jones*, 205 S.W.3d at 794; *In re V.M.R.*, 768 P.2d 1268, 1270 (Colo. App. 1989); *In re A.H.P.*, 500 S.E.2d 418, 422 (Ga. Ct. App. 1998); *In re R.G.*, 518 N.E.2d 691, 700-01 (Ill. App. Ct. 1988); *In re D.W.*, 385 N.W.2d at 579; *In re Guardianship of A.W.*, 929 A.2d at 1038; *In re K.L.*, 751 N.W.2d at 685; *Jones v. Lucas Cnty. Children Servs. Bd.*, 546 N.E.2d 471, 473 (Ohio Ct. App. 1988); *In re N.L.*, 347 P.3d 301, 304 (Okla. Civ. App. 2014); *In re E.H.*, 880 P.2d at 13; *cf. Chloe W.*, 336 P.3d at 1265; *In re Christina P.*, 220 Cal. Rptr. 525, 129-30 (Cal. Ct. App. 1985); *In re Zen T.*, 88 A.3d 1286, 1288-89 (Conn. App. Ct. 2014); *In re Adoption of Azziza*, 931 N.E.2d at 477; *In re C.R.*, 646 N.W.2d 506, 513 (Mich. Ct. App. 2002), *overruled on other grounds by In re Sanders*, 852 N.W.2d 524 (Mich. 2014); *In re Michael C.*, 920 N.Y.S.2d 502, 503 (N.Y. App. Div. 2011); *In re S.C.R.*, 679 S.E.2d at 909.

the alleged deficiencies on the part of a parent's attorney resulted in a fundamentally unfair parental termination proceeding. Calkins, supra, at 216-17. The fundamental fairness standard hues closely to the doctrinal basis from which the right to appointed counsel in parental termination proceedings arises– Due Process. It is also more flexible than the *Strickland* standard, allowing for such procedural protections as a particular situation demands, and it considers the totality of the circumstances of the proceeding. *See In re Geist*, 796 P.2d at 1203; *In re RGB*, 229 P.3d at 1090-91 ("[T]he proper inquiry . . . is whether the proceedings were fundamentally unfair as a result of counsel's incompetence."); *In re Adoption of T.M.F.*, 573 A.2d at 1044 (same); *cf. S.C.D.*, 841 So. 2d at 279-80 ("[T]he test in cases of this type is whether an examination of the entire record demonstrates that the complaining party was afforded a fair trial.").

This Court has not previously decided whether parents have a right to attack a judgment terminating parental rights based on ineffective assistance of counsel. Although the Court of Appeals has not recognized such a right, *see In re Grayson H.*, No. E2013-01881-COA-R3-PT, 2014 WL 1464265, at *13 (Tenn. Ct. App. Apr. 14, 2014) (no perm. app. filed), the intermediate appellate court has addressed claims challenging the effectiveness of appointed counsel's representation by reviewing the appellate record. In the cases reviewed by the Court of Appeals, the record on appeal contained clear proof either that appointed counsel had effectively represented the parent or that appointed counsel had been absent from key portions of the termination proceeding and therefore deprived

the parent of the statutory right to appointed counsel. *See, e.g., In re Grayson H.*, 2014 WL 1464265, at *10-11; *In re M.H.*, No. M2005-00117-COA-R3-PT, 2005 WL 3273073, at *7-8 (Tenn. Ct. App. Dec. 2, 2005) (no perm. app. filed); *In re S.D.*, No. M2003-02672-COA-R3-PT, 2005 WL 831595, at *14-15 (Tenn. Ct. App. Apr. 8, 2005) (no perm. app. filed); *In re M.E.*, No. M2003-00859-COA-R3-PT, 2004 WL 1838179, at *15 (Tenn. Ct. App. Aug. 16, 2004), perm. app. denied (Tenn. Nov. 8, 2004).

Furthermore, no Tennessee statute provides a procedure, comparable to post-conviction procedures, by which parents may attack judgments terminating parental rights based on ineffective assistance of counsel. Rather, a Tennessee statute of repose provides that, if an order terminating parental rights is affirmed on appeal, the order is binding and shall not, "for any reason," "be overturned by any court or collaterally attacked by any person after one (1) year from the date of the entry of the final order of termination." Tenn. Code Ann. § 36-1-113(q). After carefully considering this issue, "[w]e conclude that transporting the structure of the criminal law, featuring as it does the opportunity for repeated re-examination of the original court judgment through ineffectiveness claims and post-conviction processes, has the potential for doing serious harm to children whose lives have by definition already been very difficult." *Baker v. Marion Cnty. Office of Family & Children*, 810 N.E.2d 1035, 1038-39 (Ind. 2004).

Due process unquestionably requires States to provide parents with fundamentally fair procedures, but it does not require States to ignore the other interests at stake in parental termination proceedings. The

State has both the right and the responsibility to protect children. "The State's interest in finality is unusually strong in child-custody disputes . . . . It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents." *Lehman*, 458 U.S. at 513. In criminal cases, the burdens resulting from extended, collateral attacks on convictions are justified because the complete deprivation of personal liberty "demands a thorough search for the innocent." *Baker*, 810 N.E.2d at 1040; *see also Lehman*, 458 U.S. at 515-16 (stating that "[t]he considerations in a child-custody case are quite different" from other cases involving habeas corpus and reserving habeas corpus for "those instances in which the federal interest in individual liberty" is so strong as to outweigh a state's interest in finality). In parental termination proceedings, the burdens of extended litigation fall most heavily upon children—those most vulnerable and most in need of protection, stability, and expeditious finality. *Baker*, 810 N.E.2d at 1040. "There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' under the care of his parents or foster parents, especially when such uncertainty is prolonged." *Lehman*, 458 U.S. at 513-14. "Due to the immeasurable damage a child may suffer amidst the uncertainty that comes with such collateral attacks, it is in the child's best interest and overall well[-]being to limit the potential for years of litigation and instability." *Baker*, 810 N.E.2d at 1040.

By refusing to import criminal law post-conviction type remedies, we do not at all disregard the well-established constitutional principle

precluding the termination of parental rights except upon fundamentally fair procedures. But this constitutional mandate can be achieved without compromising the interests of children in permanency and safety. "By its very nature, 'due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Heyne v. Metro. Nashville Bd. of Pub. Educ.*, 380 S.W.3d 715, 732 (Tenn. 2012) (quoting *Cafeteria & Rest. Workers Union, Local 473 AFL-CIO v. McElroy*, 367 U.S. 886, 895 (1961)). Tennessee court rules, statutes, and decisional law are already replete with procedures, some previously described herein, designed to ensure that parents receive fundamentally fair parental termination proceedings.

A review of some of the existing procedures illustrates this point. Under Tennessee statutes, parental termination is a last resort, and usually sought only after reasonable efforts have been made to reunify parents with children. *See In re Kaliyah*, 455 S.W.3d at 553 (citing Tenn. Code Ann. § 36-1-113(h)(2)(C)); Tenn. Code Ann. § 37-1-166 (2014). This case illustrates the point. Here, in an order filed before DCS instituted termination proceedings, the Juvenile Court stated that DCS had made "Herculean" efforts to rectify the problems that led to Carrington's removal. The grounds for termination are statutorily defined and circumscribed, and parents receive notice of the particular grounds on which the State is relying for termination and an opportunity to contest those grounds. Tenn. Code Ann. § 36-1-113(d), (e), (g); Tenn. R. Juv. P. 39(a)-(b); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (stating that two "essential requirements of due process . . . are notice

and an opportunity to respond . . . either in person or in writing, why proposed action should not be taken"); *Heyne*, 380 S.W.3d at 732 (stating that notice and an opportunity to be heard in a meaningful time and manner are fundamental elements of due process). Indigent parents are provided appointed counsel, and appointed attorneys are ethically obligated to represent parents competently and diligently. Tenn. Sup. Ct. R. 8, RPC 1.1, 1.3. In addition to attorneys appointed for parents, the trial court also appoints an attorney as guardian ad litem for children in parental termination proceedings. *See* Tenn. R. Juv. P. 39(d) (stating that appointment of a guardian ad litem in a juvenile court parental termination proceeding shall be pursuant to Tenn. Code Ann. § 37-1-149(a) (2014)); Tenn. R. Civ. P. 17.03 (discussing the appointment of guardians ad litem in circuit or chancery courts in all civil actions and in other courts exercising circuit or chancery jurisdiction); *In re Adoption of D.P.E.*, No. E2005-02865-COA-R3-PT, 2006 WL 2417578, at *2 (Tenn. Ct. App. Aug. 22, 2006) (interpreting Tenn. Sup. Ct. R. 13 § 1(d)(2)(D) as requiring the appointment of guardians ad litem in contested parental termination proceedings); *In re T.B.L.*, No. M2005-02413-COA-R3-PT, 2006 WL 1521122, at *2 (Tenn. Ct. App. June 2, 2006) (holding that the chancery court had an obligation to appoint a guardian ad litem, even in the absence of a request, where the petition was contested); *see also Newsome v. Porter*, No. M2011-02226-COA-R3-PT, 2012 WL 760792, at *2 (Tenn. Ct. App. Mar. 7, 2012) (citing other Court of Appeals' decisions interpreting Rule 13 as requiring appointment of a guardian ad litem in parental termination proceedings). A guardian ad litem is responsible for advocating for the child's best

interests and may take a position independent of and opposed to DCS on whether termination is in the child's best interests. *In re Adoption of D.P.E.*, 2006 WL 2417578, at *3. The guardian ad litem must "undertake any and all legally sanctioned actions consistent with [e]nsuring that the child's best interests are protected . . . [including], among other things, interview[ing] the other parties and witnesses, review[ing] pertinent records, and fil[ing] and respond[ing] to pleadings on the child's behalf." *Id.*

The accuracy and fairness of parental termination proceedings are enhanced by the elevated standard of proof and by judicial involvement that is more intensive than in other cases. Fair and impartial judges, aware of the interests at stake and knowledgeable of the law, are the fact finders in parental termination proceedings. *See Moncier v. Bd. of Prof'l Responsibility*, 406 S.W.3d 139, 161 (Tenn. 2013) (recognizing that "[a] basic requirement of due process is a fair trial before a fair tribunal"). While a trial judge must depend on the litigants to present the evidence of grounds and defenses, the judge is not limited to the parties' presentations and may require more evidence, investigation, evaluations, or expert testimony when she determines that more is necessary to resolve the issues at stake. Tenn. R. Juv. P. 39 (e)(3)-(4).

As already noted, before parental rights may be terminated, the State must prove at least one statutory ground for termination by clear and convincing evidence and that terminating parental rights is in the child's best interests. Tenn. Code Ann. § 36-1-113(c). Although some factors relevant to the best interests analysis are statutorily enumerated,

the list is illustrative not exclusive. *Id.* § 36-1-113(i). Parties may introduce proof of any fact relevant to the child's best interests, including proof about DCS's reasonable efforts, or lack thereof, to reunite the child with the parent. Facts relevant to a child's best interests need only be established by a preponderance of the evidence, although DCS must establish that the combined weight of the proven facts amounts to clear and convincing evidence that termination is in the child's best interests. *In re Kaliyah*, 455 S.W.3d at 555.

As previously discussed, trial courts must make specific written findings on each and every ground alleged for termination and findings on the factors relevant to the child's best interests. Appellate review of parental termination cases is expedited. Tenn. R. App. P. 8A. Indigent parents are entitled to a record at state expense complete enough to allow fair appellate consideration of parents' claims. *M.L.B.*, 519 U.S. at 128; *In re Austin C.*, No. M2013-02147-COA-R3-PT, 2014 WL 4261178, at *6 (Tenn. Ct. App., Aug. 27, 2014). Indigent parents are provided appointed counsel on appeal. Tenn. Code Ann. § 37-1-126(a)(2)(B)(ii) (2014). Finally, our holding in this appeal makes clear that appellate courts must review the trial court's findings as to each ground for termination and as to whether termination is in the child's best interests. Given these existing procedural safeguards, we decline to hold that securing the constitutional right of parents to fundamentally fair procedures requires adoption of an additional procedure, subsequent to or separate from an appeal as of right, by which parents may attack the judgment

terminating parental rights based upon ineffective assistance of appointed counsel.

Moreover, our independent review of the record on appeal refutes Mother's assertion that her counsel's representation denied her a fundamentally fair proceeding. To the contrary, the record illustrates that counsel actively represented Mother at the termination proceeding. As mentioned in the factual summary, appointed counsel was the only attorney to offer an opening statement. Additionally, appointed counsel cross-examined each witness and pursued the reasonable strategy of showing that Mother had no relationship with Carrington because the trial court had denied her visitation with him and because DCS had failed to make reasonable efforts at reunification. At the time of the 2013 termination proceeding, some appellate decisions had required the State to prove reasonable efforts as a condition precedent to terminating parental rights. *In re Kaliyah*, 455 S.W.3d at 535 (discussing and overruling those prior decisions). Therefore, appointed counsel's strategy of showing that DCS had failed to make reasonable efforts was designed to defeat DCS's petition to terminate her parental rights.

Appointed counsel also attempted through cross-examination to undermine DCS's proof regarding the grounds for termination. Appointed counsel asked questions on cross-examination designed to show that Mother had substantially complied with the permanency plan, that Mother had corrected at least some of the conditions that led to Carrington's removal, and that Mother had participated in mental health treatment without incident for some period of time.

Although Mother complains of appointed counsel's failure to file an answer to the termination petition, we note that an answer need not be filed. Tenn. R. Juv. P. 39(c) (requiring a respondent to appear personally or file a written answer). Additionally, by not filing an answer, appointed counsel avoided admitting or denying each allegation of the petition, which may actually have aided Mother, but which was, in any event, a reasonable choice. *Id.* Mother also complains of appointed counsel's failure to conduct discovery; however, she fails to explain how this decision denied her a fundamentally fair proceeding. Appointed counsel had represented Mother since 2007 and, therefore, already had access to all the information about the case amassed during those six years. Indeed, the record reflects that appointed counsel participated in formulating the permanency plans. Mother also faults appointed counsel for not filing a witness list in Maury County Juvenile Court, but she fails to identify a court rule requiring the filing of such a list, nor does she explain how appointed counsel's failure to file such a list denied her a fundamentally fair proceeding. Mother also complains that appointed counsel did not call witnesses; however, as already explained, the record reflects that counsel's strategy was to attack DCS's case by cross-examining DCS's witnesses. This strategy led to counsel eliciting testimony from DCS's mental health expert witnesses which was favorable to his argument that DCS had not made reasonable efforts and that the trial court's order denying Mother visitation had prevented her from establishing a relationship with Carrington. In summary, a review of the record on appeal convinces us that appointed

counsel's representation did not deprive Mother of a fundamentally fair parental termination proceeding.

We also decline to address Mother's assertion that she is entitled to relief from the judgment terminating her parental rights based on appointed counsel's inadequate representation in the 2008 dependency and neglect proceeding. Dependency and neglect - proceedings are separate and distinct from proceedings to terminate parental rights. *See In re M.J.B.*, 140 S.W.3d 643, 651 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. July 1, 2004) ("A termination of parental rights proceeding is not simply a continuation of a dependent-neglect proceeding. It is a new and separate proceeding involving different goals and remedies, different evidentiary standards, and different avenues for appeal."); *In re L.A.J., III*, No. W2007-00926-COA-R3-PT, 2007 WL 3379785, at *6 (Tenn. Ct. App. Nov. 15, 2007) (declining to set aside a termination order based on the failure to appoint counsel for Father in a dependency and neglect proceeding). This appeal arises from and involves only the termination proceeding; therefore, any assertion regarding counsel's allegedly deficient representation in the earlier dependency and neglect proceeding is not properly before us in this appeal.

We now turn our attention to reviewing the trial court's findings on the grounds for termination and the child's best interests.

E. Review of Trial Court's Findings

The trial court found that DCS had offered clear and convincing proof of three grounds supporting termination of Mother's parental rights: (1) substantial

noncompliance with the permanency plan; (2) persistence of the conditions that led to the removal of Carrington; and (3) mental incompetence. We review the trial court's findings as to each ground.

1. Substantial Noncompliance

A parent's rights may be terminated for her substantial noncompliance with the responsibilities contained in a permanency plan, Tenn. Code Ann. § 36-1-113(g)(2), so long as the plan requirements are "reasonable and related to remedying the conditions which necessitate[d] foster care placement." *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002). Determining whether a parent has substantially complied with a permanency plan involves more than merely counting up the tasks in the plan to determine whether a certain number have been completed and "going through the motions" does not constitute substantial compliance. *Id.* The trial court found that Mother "ha[d] failed to comply in a substantial manner with those reasonable responsibilities set out in the foster care plans related to remedying the conditions which necessitate[d] foster care placement." Specifically, the trial court found that Mother had failed to comply substantially with the requirements that she submit to random drug screens, take her medication as prescribed by treating professionals, and continue with mental health services. DCS offered proof to show that Mother had failed to submit to random drug tests, that she had not taken medications as prescribed by treating professionals and had been hospitalized in 2011 and 2012 to receive treatment for opioid abuse, polysubstance dependence, and Xanax abuse, and that her mental health services had been terminated in January 2013 because Mother

refused to sign a behavior contract requiring her, among other things, to counsel with a particular staff member who would prescribe appropriate medications and would not prescribe the medication Mother requested. Although DCS had not asked Mother to submit to random drug testing during the two years prior to the termination hearing, the record contains clear and convincing proof to support the trial court's findings regarding Mother's substantial noncompliance.

2. Persistence of Conditions

Parental rights may be terminated for persistence of conditions when:

> (g)(3) [t]he child has been removed from the home of the parent . . . by order of a court for a period of six (6) months and:
>
> (A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent . . . still persist;
>
> (B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent . . . in the near future; and
>
> (C) The continuation of the parent . . . and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3). It is undisputed that Carrington had been removed from Mother's custody

by court order for more than six months at the time of the termination hearing. In fact, Carrington was removed from Mother's custody in December 2005, and according to the trial court's finding in the order terminating her parental rights, Mother had not been in contact with Carrington since 2012, a year before the termination proceeding. The record reflects that Mother's behavioral problems stemming from her histrionic personality disorder were among the conditions that resulted in Carrington's removal from her custody. Elysse Beasley, senior psychological examiner and licensed professional counselor, testified about Mother's behavioral problems. The trial court found Ms. Beasley to be a credible witness. Ms. Beasley opined that Mother's behavioral problems had not improved and were unlikely to improve sufficiently in the near future to make it safe for Carrington to return to her care. As the trial court also pointed out, another mental health professional, Carrington's counselor, testified that placing Carrington in the care of a person with the same mental health and behavioral disorders as Mother would be "the exact opposite of what the child needs." The trial court noted that Mother had no "relationship of any kind with Carrington." The record fully supports the trial court's finding that DCS proved the ground of persistence of conditions by clear and convincing evidence.

3. Mental Incompetence

The final statutory ground the trial court relied upon to terminate Mother's parental rights is as follows:

> The parent . . . of the child is incompetent to adequately provide for the further care and supervision of the child because the parent's . . . mental condition is presently so impaired and is so likely to remain so that it is unlikely that the parent . . . will be able to assume or resume the care of and responsibility for the child in the near future.

Tenn. Code Ann. § 36-1-113(g)(8)(B)(i). DCS offered proof to show that Mother's mental condition had been impaired for more than six years and was not likely to improve in a short time, even with continued therapy and medication. Mother had been hospitalized on a number of occasions to obtain treatment for mental health issues and substance abuse issues. The mental health experts testified that Mother's impaired mental condition would prevent her from assuming the care and responsibility for Carrington in the near future. In short, the record on appeal fully supports the trial court's finding that DCS proved Mother's mental incompetence by clear and convincing evidence.

4. Best Interests Analysis

The proof also supports the trial court's finding that terminating Mother's parental rights is in Carrington's best interests.

> (i) In determining whether termination of parental . . . rights is in the best interest[s] of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent . . . has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest[s] to be in the home of the parent . . . ;

(2) Whether the parent . . . has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent . . . has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent . . . and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent . . . has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's . . . home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol, controlled substances or controlled substance analogues as may

render the parent . . . consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's . . . mental and/or emotional status would be detrimental to the child or prevent the parent . . . from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent . . . has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). The trial court found: (1) Mother has not made an adjustment of circumstances, conduct, or other conditions so as to make it safe or in the Carrington's best interests to be in her home; (2) Mother has suffered from mental illness and behavioral disorders for many years, and these conditions have not improved, despite treatment, medication, and services provided by DCS, and these conditions are unlikely to improve in the near future; (3) Mother has no meaningful relationship with Carrington and has had no contact with him since 2012; (4) returning Carrington to Mother's care would have a detrimental effect on his emotional, psychological, and medical condition; and (5) Mother's mental and emotional status would be detrimental to Carrington and prevent her from providing him safe and stable care and supervision and from effectively parenting him. We conclude that the evidence in the record does not preponderate against the trial court's factual findings and conclude that the combined weight of these facts amounts to clear and convincing evidence that termination of

Mother's parental rights is in Carrington's best interests.

III. Conclusion

Given the existing procedural safeguards applicable to parental termination proceedings, we decline to hold that securing the constitutional right of parents to fundamentally fair procedures requires adoption of an additional procedure, subsequent to or separate from an appeal as of right, by which parents may attack the judgment terminating parental rights based upon ineffective assistance of appointed counsel. Having thoroughly reviewed the trial court's findings regarding the grounds for termination and the best interests of Carrington, we affirm the judgment terminating Mother's parental rights. We also conclude that appointed counsel's representation did not deny Mother a fundamentally fair parental termination proceeding. Accordingly, the judgment of the Court of Appeals is affirmed. Costs of this appeal are taxed to the State of Tennessee, for which execution may issue if necessary.

/s/ Cornelia A. Clark
Justice

DISSENTING OPINION OF THE SUPREME COURT OF TENNESSEE (JANUARY 29, 2016)

IN THE SUPREME COURT OF TENNESSEE,
AT NASHVILLE

IN RE CARRINGTON H., ET AL.

No. M2014-00453-SC-R11-PT

Appeal by Permission from the Court of Appeals,
Middle Section Appeal from the Juvenile Court
for Maury County, Nos. 90576, 90577
George L. Lovell, Judge

Before: Sharon G. LEE, C.J., with Whom
Gary R. WADE, J., Joins, Concurring in
Part and Dissenting in Part

The Court has decided that an indigent parent has the right to assistance of counsel—but not the right to effective assistance of counsel—in a parental termination proceeding. I believe that the vast majority of lawyers provide competent representation as required by our Rules of Professional Conduct. *See* Tenn. Sup. Ct. R. 8, RPCs 1.1 & 1.3. But in those rare situations where a lawyer makes a mistake or fails to do his or her duty to such an extent that the termination proceeding is not fundamentally fair, I favor providing the parent with an opportunity to seek relief. In my view, providing counsel for an indigent parent but not

requiring counsel to render effective representation is an empty gesture.

As noted by the Court, there are numerous procedural safeguards in place to protect a parent's right to the continued care and custody of her child, including the requirement that the State prove by clear and convincing evidence at least one statutory ground for termination and that termination is in the child's best interest. I concur with the Court's decision to add another procedural safeguard by requiring the Court of Appeals to review the trial court's findings on all grounds for termination and whether termination is in the child's best interest, even if a parent does not challenge these findings on appeal. But these safeguards, as appropriate and well-meaning as they are, cannot protect a parent's rights when her lawyer is ill-prepared, fails to make an adequate pretrial investigation, fails to call a necessary witness to testify, fails to advance appropriate legal arguments, or fails to otherwise adequately represent her. I agree with the Court that termination proceedings must be fundamentally fair. But how can we assure the fairness of a proceeding without requiring the parent's lawyer to be effective? I do not think we can.

Most states require appointed counsel in termination proceedings to render effective assistance. In a proceeding that may result in the permanent severance of the parental bond, the stakes are high; the effects of a wrong decision are irrevocable and can cause lasting damage to the parent and the child. In these cases, we cannot expect counsel to be perfect, but we can require them to be adequate.

A natural parent's "'desire for and right to the companionship, care, custody, and management of his

or her children' is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)) (internal quotation marks omitted). A proceeding to terminate a parent's rights does more than infringe on a parent's fundamental liberty interest; it seeks to forever end it. *Id.* at 758. An order of termination severs "forever all legal rights and obligations of the parent." Tenn. Code Ann. § 36-1-113(l)(1) (Supp. 2015). A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, "a commanding one." *Lassiter*, 452 U.S. at 27.

Granted, not all parents are good. Some parents are bad and harm their children. The mother in this case was certainly not a model parent. But the fundamental liberty interest of parents in the care of their children does not "evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky*, 455 U.S. at 753. When the State intervenes to terminate the parent-child relationship, the process must meet Fourteenth Amendment due process standards and provide a proceeding that is fundamentally fair. *Lassiter*, 452 U.S. at 37; *see also Santosky*, 455 U.S. at 753-54; *Little v. Streater*, 452 U.S. 1, 13 (1981). As the United States Supreme Court noted in *Santosky*, "parents retain a vital interest in preventing the irretrievable destruction of their family life." 455 U.S. at 753.

In Tennessee, indigent parents are entitled to appointed counsel by statute and court rule. *See* Tenn. Code Ann. § 37-1-126(a)(2)(B) (Supp. 2012); Tenn. Sup. Ct. R. 13, § 1(c), (d)(2)(B); Tenn. R. Juv. P. 39(e)(2).

Almost all states provide indigent parents with appointed counsel in parental termination cases based on statute, constitutional provision, or court rule. *See* Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. App. Prac. & Process 179, 193 (2004).

To make the right to counsel meaningful, most states have recognized that the right to counsel in parental termination cases includes the right to effective assistance of counsel.[1] Calkins, *supra*, at 199.

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[1] *See, e.g., S.C.D. v. Etowah Cnty. Dep't of Human Res.*, 841 So. 2d 277, 279 (Ala. Civ. App. 2002) (quoting *Crews v. Houston Cnty. Dep't of Pensions & Sec.*, 358 So.2d 451, 455 (Ala. Civ. App. 1978)); *Chloe W. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 336 P.3d 1258, 1265 (Alaska 2014); *Jones v. Ark. Dep't of Human Servs.*, 205 S.W.3d 778, 794 (Ark. 2005); *In re Darlice C.*, 129 Cal. Rptr. 2d 472, 475 (Cal. Ct. App. 2003); *People ex rel. C.H.*, 166 P.3d 288, 290 (Colo. App. 2007); *State v. Anonymous*, 425 A.2d 939, 943 (Conn. 1979); *In re R.E.S.*, 978 A.2d 182, 189 (D.C. 2009); *J.B. v. Fla. Dep't of Children and Families*, 170 So. 3d 780, 790 (Fla. 2015); *In re A.R.A.S.*, 629 S.E.2d 822, 825 (Ga. Ct. App. 2006); *In re RGB*, 229 P.3d 1066, 1090 (Haw. 2010); *In re M.F.*, 762 N.E.2d 701, 709 (Ill. App. Ct. 2002); *In re A.R.S.*, 480 N.W.2d 888, 891 (Iowa 1992) (citing *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986)); *In re Rushing*, 684 P.2d 445, 448-49 (Kan. Ct. App. 1984); *In re Adoption/Guardianship of Chaden M.*, 30 A.3d 935, 942 (Md. 2011); *In re Adoption of Azziza*, 931 N.E.2d 472, 477 (Mass. App. Ct. 2010) (citing *In re Stephen*, 514 N.E.2d 1087, 1090-91 (Mass. 1987)); *In re Trowbridge*, 401 N.W.2d 65, 66 (Mich. Ct. App. 1986); *In re J.C., Jr.*, 781 S.W.2d 226, 228 (Mo. Ct. App. 1989); *In re A.S.*, 87 P.3d 408, 412-13 (Mont. 2004); *N.J. Div. of Youth & Family Servs. v. B.R.*, 929 A.2d 1034, 1037 (N.J. 2007); *State ex rel. Children, Youth & Families Dep't v. Tammy S.*, 974 P.2d 158, 162 (N.M. Ct. App. 1998); *In re Elijah D.*, 902 N.Y.S.2d 736, 736 (N.Y. App. Div. 2010); *In re S.C.R.*, 679 S.E.2d 905, 909 (N.C. Ct. App. 2009); *In re K.L.*, 751 N.W.2d 677, 685 (N.D. 2008); *In re Wingo*, 758

As many jurisdictions have observed, a right to counsel has little value unless we hold counsel's performance to some standard of effectiveness. *See, e.g.*, *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003) ("[I]t would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings [as provided by statute], and, on the other hand, not require that counsel perform effectively."); *In re E.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994) (holding that Utah's statutory right to counsel would be meaningless or illusory without an effectiveness requirement); *see also In re Stephen*, 514 N.E.2d 1087, 1090-91 (Mass. 1987) (recognizing that a right to counsel is of little value without an expectation of effectiveness); *In re Trowbridge*, 401 N.W.2d 65, 66 (Mich. Ct. App. 1986) ("It is axiomatic that the right to counsel includes the right to competent counsel."); *In re Termination of Parental Rights of James W.H.*, 849 P.2d 1079, 1080 (N.M. Ct. App. 1993) ("Representation by counsel means more than just having a warm body with 'J.D.' credentials sitting next to you during the proceedings.").

In declining to recognize a right to effective representation, the Court distinguishes between a constitutional and a statutory right to counsel, noting

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N.E.2d 780, 791 (Ohio Ct. App. 2001); *In re D.D.F.*, 801 P.2d 703, 707 (Okla. 1990); *State ex rel. Juvenile Dep't v. Geist*, 796 P.2d 1193, 1200 (Or. 1990); *In re Adoption of T.M.F.*, 573 A.2d 1035, 1040 (Pa. Super. Ct. 1990); *In re Bryce T.*, 764 A.2d 718, 722 (R.I. 2001); *In re M.S.*, 115 S.W.3d 534, 544 (Tex. 2003); *In re E.H.*, 880 P.2d 11, 13 (Utah Ct. App. 1994); *In re Moseley*, 660 P.2d 315, 318 (Wash. Ct. App. 1983); *In re M.D.(S.)*, 485 N.W.2d 52, 55 (Wis. 1992). But *see, e.g., In re Azia B.*, 626 N.W.2d 602, 612 (Neb. Ct. App. 2001) (declining to recognize a claim of ineffective assistance for parental termination cases).

that unless there is a right to counsel under the United States Constitution, there is no constitutional right to effective assistance. *See Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987); *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). This is a distinction without a difference in this case because, under the United States Supreme Court's decision in *Lassiter*, the mother in this case has a constitutional right to counsel.

In *Lassiter*, the United States Supreme Court identified a three-factor test for determining, on a case-by-case basis, whether the appointment of counsel is constitutionally required. 452 U.S. at 27-31. Factors to be considered are the parent's interest; the State's interest in the child's welfare and the need for an economic and efficient procedure; and the risk of an erroneous decision if counsel is not appointed. *See id.*; *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626 (Tenn. Ct. App. 1990). A parent's interest in the accuracy and fairness of the proceeding that will forever irrevocably end her relationship with her child is, as noted by the United States Supreme Court, a "commanding one." *Lassiter*, 452 U.S. at 27. The State has a strong interest in the welfare of the child and the correctness of the decision. *Id.* at 27-28. The State also has an interest in assuring that the proceeding is handled efficiently and economically. *Id.* at 28. The State pays the attorney fees and expenses for appointed counsel. *See* Tenn. Code Ann. § 37-1-126(a)(3). Given that the State is footing the bill, shouldn't the State expect—even demand—that appointed counsel render effective assistance? I believe it should. The third factor—the risk of an erroneous decision—often becomes the tie-

breaker in whether counsel is constitutionally required. *See Min*, 802 S.W.2d at 626-27. In *Min*, the Tennessee Court of Appeals, relying on *Lassiter*, listed several factors to consider in determining whether failing to appoint counsel is likely to produce an erroneous decision. *Id.* at 627. These factors are (1) whether expert medical and/or psychiatric testimony is presented; (2) whether the parents have had uncommon difficulty in dealing with life and life situations; (3) whether the parents are thrust into a distressing and disorienting situation at the hearing; (4) the difficulty and complexity of the issues and procedures; (5) the possibility of criminal self-incrimination; (6) the educational background of the parents; and (7) the permanency of potential deprivation of the child. *Id.* (citing *Lassiter*, 452 U.S. at 29-33; *Davis v. Page*, 714 F.2d 512, 516-17 (5th Cir. 1983)).

Based on these factors, the mother in this case was constitutionally entitled to the appointment of counsel. In applying the *Min* factors, (1) the State presented expert testimony to support its case, making representation by counsel important for the mother to effectively question the veracity of that testimony; (2) the mother had uncommon difficulty in dealing with life and life situations, having a long history of family problems, drug dependency and abuse, and mental illness; (3) the issues and procedures involved in the termination hearing were difficult and complex, particularly given the State's allegation of the mother's mental incompetency and introducing expert medical testimony; (4) the parental termination hearing would have likely been a distressing and disorienting situation for the mother; and (5) an order terminating the mother's parental rights would have

been permanent and irrevocable. In its brief, the State presumes that the mother "would meet the [*Lassiter*] balancing test . . . for assistance of counsel, and likely therefore, for effective assistance of counsel in this termination proceeding." I agree.

As the State concedes, "[i]t is generally accepted that where the *Lassiter* . . . due[]process analysis establishes a federal constitutional right to counsel, due process also entitles the parent to have a right to effective counsel." *See also* Calkins, *supra*, at 196 (noting that "presumably there is a federal constitutional right to effective assistance of counsel in every case in which a *Lassiter* analysis finds a right to counsel"). Even if this Court does not recognize the right to effective assistance of counsel in all parental termination cases, the mother in this case is constitutionally entitled to the appointment of counsel under *Lassiter* and, therefore, effective assistance of counsel.

The Court likens the statutory right to counsel in parental termination proceedings to the statutory right to counsel in post-conviction cases, which does not include a right to effective assistance. *See Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010). The litigants, however, in these proceedings are on different footing. A petitioner pursuing a petition for post-conviction relief has already been tried and convicted, most likely received at least one tier of appellate review, and otherwise afforded the full panoply of procedural protections required by the Tennessee and United States Constitutions. The post-conviction petitioner initiated the action, and if he loses, his position remains essentially the same. *Id.* at 682 (noting that "a post-conviction petitioner does not stand in the same

shoes as the criminally accused" and the provision of counsel is "not to protect them from the prosecutorial forces of the State, but to shape their complaints into the proper legal form and to present those complaints to the court"). A parent in a termination proceeding is more akin to a defendant in the trial stage of a criminal proceeding. The parent did not initiate the proceeding and has much to lose if the court renders an adverse decision. No decision has been made by a fact finder, and it is the parent's first opportunity to defend herself in court against charges brought by the State, which could forever sever the relationship with her child.

I share the Court's concern that the opportunity for repeated re-examination of a parental termination judgment through ineffectiveness claims can inflict immeasurable damage upon children and that achieving finality is imperative. A parent should not be able to repeatedly challenge the judgment terminating her parental rights. However, the interest in finality should not trump a parent's interest in maintaining the parental bond and in the correctness of the decision to terminate parental rights. Recognizing a right to effective assistance of counsel will not unduly compromise a child's interest in finality, permanency, and safety. I would recommend referring this issue to the Tennessee Advisory Commission on the Rules of Practice and Procedure to formulate a process for a parent to assert a claim for ineffective assistance of counsel. I would encourage the Commission to study the post-trial motion procedure adopted by the Florida Supreme Court in *J.B. v. Florida Department of Children and Families*, 170 So.3d 780 (Fla. 2015), and the procedures in other states that allow motions to be

filed in the appellate court for review, *see, e.g.*, *People ex rel. C.H.*, 166 P.3d 288 (Colo. App. 2007); *N.J. Div. of Youth & Family Servs. v. B.R.*, 929 A.2d 1034 (N.J. 2007); *State ex rel. Juvenile Dep't v. Geist*, 796 P.2d 1193 (Or. 1990).

Upon review of the record before us, I cannot disagree with the Court's decision that the mother was not deprived of a fundamentally fair parental termination proceeding. I regret that the mother did not have the opportunity to present any proof or evidence to support her claims of ineffectiveness.

In conclusion, Tennessee should join the majority of states and recognize that a parent has the right to effective assistance of counsel in a termination proceeding. This is a necessary step to ensure that proceedings with the effect of severing the bond between parent and child are fundamentally fair.

/s/ Sharon G. Lee
Chief Justice

ARTICLE FROM THE JOURNAL OF APPELLATE PRACTICE AND PROCESS (SEPTEMBER 22, 2004)

INEFFECTIVE ASSISTANCE OF COUNSEL IN PARENTAL-RIGHTS TERMINATION CASES: THE CHALLENGE FOR APPELLATE COURTS

Susan Calkins, JOURNAL OF APPELLATE PRACTICE AND PROCESS, September 22, 2004

I. Introduction

Appellate courts are increasingly presented with claims of ineffective assistance of counsel in proceedings that involve the termination of parental rights. These claims grow out of the burgeoning number of parental-rights termination petitions filed in the trial courts since the Adoption and Safe Families Act of 1997[1] became law. The ASFA is designed, among other things, to promote the adoption

[1] Adoption and Safe Families Act of 1997, 42 U.S.C. [section] 675(5)(E) (available at http://uscode.house.gov). For a concise background of ASFA and a brief history of national child welfare policy, see Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. Contemp. Health L. & Policy 243, 248-57 (1999). For additional background on the ASFA's requirement that termination proceedings must be initiated within strict time limits, *see* Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?* 28 Cap U. L. Rev. 97, 100 (1999).

of foster children,[2] and termination proceedings must be initiated in order to free those children for adoption.[3]

In almost every state parents have a right to counsel when the state seeks to terminate their parental rights. The vast majority of parents in termination proceedings are indigent, which often means that their counsel is appointed by the court or provided through a public defender or contract system. The representation of parents by overworked and underpaid attorneys results in claims by parents that their counsel was ineffective.

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[2] *O'Flynn*, *supra* n. 1, at 246: Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?* 2 U. Pa. J. Const. L. 141, 144 (1999); Evelyn Lundberg Stratton, *Expediting the Adoption Process at the Appellate Level*, 28 Cap. U. L. Rev. 121, 122 (1999): H.R. Rep. No. 105-77, at IA (1997).

[3] The number of children in foster care and the number of parental-rights termination proceedings filed in recent years are not negligible. In FY 2002 there were 532,000 children in foster care, and parental rights to 79,000 children were terminated. Admin. for Children & Fams., U.S. Dept. of Health & Human Servs., National Adoption and Foster Care Statistics (available at http://www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm) (accessed Apr. 13, 2004: copy on file with Journal of Appellate Practice and Process).

The states were quick to comply with the ASFA: By 1999 all states had enacted legislation that met or exceeded the requirements of ASFA. Employment & Soc. Servs. Policy Studies Div., Ctr. for Best Practices, Natl. Gov. Assn., A Place to Call Home: State Efforts to Increase Adoptions and Improve Foster Care Placements 2 (Oct. 26, 2000) (available at http://www.nga.org/cda/files/001026ADOPTIONS.pdf) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process).

This article explores both the procedural vehicles and the substantive standards adopted by appellate courts for claims of ineffective assistance when such claims brought by parents seeking to vacate or reopen judgments terminating their parental rights. I start by briefly describing the process of a typical parental-rights termination case. Next, I discuss the Supreme Court's view of the right to counsel in parental-termination cases and the status of the parent's right to counsel in the various states. I then analyze the procedures used by the courts to review a claim of ineffective assistance, and I suggest the procedure that I believe to be the most productive and efficient given the interests of the parents and the needs of the children. Next, I turn to the substantive standard for determining whether counsel is ineffective, and I summarize some states' experience with the application of the *Strickland*[4] standard to ineffectiveness claims in parental-termination cases. I also describe another ineffectiveness standard, the fundamental-fairness approach, which has been adopted by a few state courts, and I attempt to discern the practical differences between these two standards by examining the facts and outcomes of specific cases. Finally, I suggest a framework that might help appellate courts determine which standard of assessing the performance of lawyers in parental-rights cases is appropriate.

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[4] *Strickland v. Wash.*, 466 U.S. 668 (1984).

II. The Typical Proceeding for Termination of Parental Rights

Although the specific procedures for terminating parental rights vary widely from state to state, their basic processes are similar.[5] This is partly because the states conform to federal requirements in order to receive federal money for foster care,[6] and partly because the federal government has issued guidelines for use in parental-termination proceedings.[7]

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[5] *See* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings. Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 Fordham L. Rev. 2285, 2298-01 (1998) (describing typical steps in New York child-protection matters); Denise M. Faehnrich, *The "Harm" in the Application of the "Harmless Error" Doctrine to the Constitutional Defect in In re C.V.*, 44 S.D.L. Rev. 340, 362-66 (1999) (describing South Dakota termination proceedings); Jean M. Johnson & Christa N. Flowers, *You Can Never Go Home Again: The Florida Legislature Adds Incarceration to the List Statutory Grounds for Termination of Parental Rights*, 25 Fla. St. U. L. Rev. 335, 336-38 (1998) (describing Florida termination procedures); *see also* Natl. Council for Juvenile & Fam. Ct. J., Adoption & Permanency Guidelines 29-34 (Termination of Parental Rights Hearings) (available at http://www.pppncjfcj.org/html/adoptguid.html) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process) [hereinafter Adoption Guidelines].

[6] Federal funds are available to the states matching between fifty and eighty percent of the state's expenditures for foster care, depending upon the state's per capita income. Admin. for Children & Families, U.S. Dept. of Health & Human Servs., Fact Sheet 1-2 (September 22, 2000) (available at http://www.acf.dhhs.gov/programs/opa/facts/chilwelf.htm) (accessed Apr. 13, 2004; copy on file with Journal of Appellate Practice and Process).

[7] Admin. for Children &Fams., U.S. Dept. of Health & Human Servs., *Adoption 2002: The President's Initiative on Adoption and Foster Care, Guidelines for Public Policy, and State*

Generally speaking, when a state or local child-welfare agency receives a report of child abuse or neglect, it conducts an investigation. If it determines that the child is in jeopardy and that a custody order is necessary to protect the child, the agency files the necessary documents with the court. The child's parents are entitled to a hearing before the child is removed. These hearings are variously referred to as dependency proceedings, jeopardy proceedings, or child-protection proceedings, and counsel is usually appointed for indigent parents involved in them.

When custody of the child is given to the state, the court often orders the state to provide certain services for the parents or orders the parents to obtain the services. Such services may include psychological counseling, substance-abuse treatment, parenting classes, homemaker assistance, and other services to remedy the problem that led to the child's removal from the home. The purpose of such services is to facilitate the reunification of the family. However, in certain situations, the court may relieve the state from making reasonable efforts to reunify a family.[8] Once a

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Legislation Governing Permanence for Children (1999) (available at http://www.acf.hhs.gov/programs/cb/publications/adopt02/02final.htm) (accessed Apr. 23, 2004; copy on file with Journal of Appellate Practice and Process) [hereinafter Guidelines for Public Policy].

[8] In order to obtain federal funds, states are required to make reasonable efforts to reunify families. 42 U.S.C. [section] 671(a)(15) (available at http://uscode.house.gov). The states, however, do not have to make reunification efforts when the parent has subjected the child to "aggravated circumstances" which include abandonment, murder, or manslaughter of another child, aggravated assault upon another child, or the involuntary termination of the parent's rights in another child. *Id.*

child has been placed in foster care, the court holds periodic reviews with the parties. By federal mandate, before a child has been in foster care for twelve months, a permanency hearing must be held to determine whether the child will be returned to the parents or the state will proceed with terminating parental rights.[9] Additionally, the state is required to commence proceedings to terminate parental rights when a child has been in foster care under the supervision of the state for fifteen of the most recent twenty-two months.[10]

Counsel is usually appointed for the parents, and a guardian ad litem is named for the child. The burden is on the state to prove, by clear and convincing evidence, that termination is warranted.[11] The Supreme Court has noted that the New York termination proceeding resembles a criminal trial in that the state and parents are both represented by

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9 42 U.S.C. [section] 675(5)(C) (available at http://uscode.house.gov).

10 42 U.S.C. [section] 675(5)(E) (available at http://uscode.house.gov). There are exceptions to this requirement, such as situations in which the state agency has documented that there is a compelling reason that termination would not be in the best interest of the child. *Id.*

11 In *Santosky v. Kramer*, 455 U.S. 745,769 (1982), the Supreme Court held that the Due Process Clause requires the clear and convincing standard of proof for termination of parental rights. However, for cases within the purview of the Indian Child Welfare Act, proof beyond a reasonable doubt is required. 25 U.S.C. [section] 1912(f) (available at http://uscode.house.gov). New Hampshire requires proof beyond a reasonable doubt in parental-termination cases pursuant to the state constitution. *In re Shannon M.*, 766 A.2d 729, 733 (N.H. 2001) (quoting *In re Sheena B.*, 651 A.2d 7 (N.H. 1994)).

counsel and the rules of evidence apply.[12] Unlike criminal trials, however, termination hearings are bench trials in most states.[13] The substantive grounds for termination vary from state to state but typically include the abandonment, murder, or aggravated assault of a child's sibling; severe parental incapacity; and the inability or unwillingness of a parent to change the circumstances that caused the child's abuse or neglect.[14] Other grounds suggested by the federal guidelines include failure of parents to improve; extreme parental indifference; extreme or repeated abuse or neglect; and extended imprisonment.[15]

A judgment terminating parental rights has the effect of legally severing the parent-child relationship. The judgment is appealable, and, in most states, appellate counsel is appointed for indigent parents.[16]

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12 *Santos*, 455 U.S. at 762.

13 Oklahoma and Texas allow jury trials in parental-rights termination proceedings. *See In re A.E.*, 743 P.2d 1041, 1048 (Okla. 1987); *In re J.F.C.*, 96 S.W.3d 256, 259 (Tex. 2002). Wisconsin, by statute, permits a jury trial for the determination of "whether any grounds for the termination of parental rights have been proven." Wis. Stat. Ann. [section] 48.424(3) (1996).

14 *See Adoption Guidelines*, *supra* n. 5, at 32.

15 *See Guidelines for Public Policy*, *supra* n. 7.

16 *See e.g. Vernon S. v. Jerome C.* (*In re* Bryce C.), 906 P.2d 1275, 1278 (Cal. 1995); *In re T.M.C.*, 988 P.2d 241, 243-44 (Kan. App. 1999); *State ex rel. Children, Youth & Fams. Dept. v. Alicia P.* (*In re Jeramy P.*), 986 P.2d 460, 462 (N.M. App. 1999); *In re T.V.*, 8 S.W.3d 448, 449 (Tex. App. 10th Dist. 1999); *L.C. v. State*, 963 P.2d 761, 763-64 (Utah App. 1998); *Grove v. State (In re Tammy Grove)*, 897 P.2d 1252, 1259 (Wash. 1995).

III. Are Parents Being Deprived of Effective Counsel in Termination Cases?

Almost every state provides counsel to indigent parents either through public defender offices, a system of appointed counsel, or contracts with groups of attorneys. Lack of funding for public defenders and assigned counsel is a chronic problem.[17] Like defendants in criminal cases, parents who are accused of neglecting or abusing their children are seldom sympathetic figures, and they often have no political power. There is little desire by taxpayers to provide more money for their lawyers.

States have largely modeled their systems for representation of indigent parents on systems for representation of criminal defendants.[18] This generally means that the inadequacies of the criminal defense system are transferred to the representation of parents in termination proceedings. Those inadequacies include underfunding, which translates to low pay for attorneys;[19] caseloads larger than an attorney can

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17 *See e.g.* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999); Margaret H. Lemos, Student Author, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. Rev. 1808 (2000); Robert R. Rigg, *The Constitution, Compensation. and Competence: A Case Study*, 27 Am. J. Crim. L. 1 (1999); Student Author, *Gideon's Promise Unfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev,. 2062 (2000).

18 *Bailie*, *supra* n. 5, at 2305.

19 *Id.* at 2308-09.

conscientiously handle;[20] few resources for investigation of cases and little support staff;[21] and sparse, if any, continuing education or training in the specific aspects of the law of parental-rights termination.[22] California, by court rule, requires the trial courts to have standards of experience and education that attorneys must meet in order to be eligible for court appointment in child-dependency proceedings, but California appears to be an exception.[23] Indeed, there is minimal incentive for appointed or contract lawyers to participate in continuing legal education in parental-termination law because they will not be paid enough in such cases to make it worthwhile.

Not only is there little monetary incentive for attorneys to accept parental-termination cases in an assigned counsel system, there are usually several factors that provide a disincentive. The cases are sometimes factually difficult and they are often time-consuming. The parents may distrust any authority

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[20] *Rigg*, *supra* n. 17, at 30-41.

[21] *Id.*

[22] *Bailie*, *supra* n. 5, at 2324-38 (arguing for a state-certification procedure for court-appointed attorneys in dependency and termination proceedings that would require education and training).

[23] Cal. R. of Ct., R. 1438(c)(3). This rule requires attorneys to have a minimum of eight hours of education in dependency law or to have demonstrated sufficient experience in dependency proceedings. Every three years the attorneys are to complete eight hours of education in dependency proceedings. *See Santa Clara County Dept. of Fam. & Children's Servs. v. Kimberly I. (In re Kristin H.)*, 54 Cal. Rptr. 2d 722, 738 (1996) (referring to aims and requirements of Rule 1438).

figure, including their own attorney. The parents, who are usually undereducated, are often unable to assist with preparation of the case. Many parents have little insight into the problems that caused the removal of their children from their homes. Communication with the parents is sometimes difficult because they have no phone or consistent location at which to receive mail, or because they are in and out of jail, treatment centers, or mental institutions. There may be language or other cultural barriers. Attorneys handling termination cases often feel more like social workers than lawyers. Additionally, the cases can be emotionally draining.

Given the lack of funding, the disincentives for accepting termination cases, and the lack of requirements for appointment, it is not surprising that many attorneys who represent parents are inexperienced. Those few experienced attorneys who are willing to suffer the long hours and minimal pay out of a sense of moral or ethical obligation or simply a willingness to serve, often find their cup overflowing, with judges or other court personnel pressuring them to take still more cases.

In those jurisdictions where the public defender represents parents in termination proceedings, excessive caseload is the major problem.[24] Too many cases lead

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[24] For a discussion of funding problems and excessive caseloads of indigent criminal defense programs, *see* Harold H. Chen, *Malpractice Immunity. An Illegitimate and Ineffective Response to the Indigent-DefenseCrisis*, 45 Duke L.J. 783, 788-91 (1996); Richard Klein, *Legal Malpractice. Professional Discipline, and Representation of the Indigent Defendant*, 61 Temp. L. Rev. 1171, 1172-74 (1988); Rigg, *supra* n. 17, at 24-41. *See also State*

to minimal preparation for trial. Either because of inexperience or excessive caseload the attorney in a termination case may fail to obtain and review discovery materials; not know what reports, files or other materials are available from the state agency; fail to interview or call witnesses to testify for the parents; fail to develop a defense theory; or fall into one of many of the potential pitfalls awaiting the unprepared or inexperienced lawyer.

Therefore, it is not surprising that ineffective assistance of counsel has been raised as a claim in a number of reported appeals of parental-rights termination orders. Ineffective assistance of counsel has now become the most common ground alleged in proceedings to review criminal convictions,[25] and it is likely that many attorneys who accept court appointments to appeal parental-termination orders also handle appellate or post-conviction criminal cases or, particularly in the case of public defenders, practice law with attorneys who routinely handle criminal matters. Thus, lawyers who prosecute parental-termination appeals are aware, and becoming more aware all the time, of the claim of ineffective assistance of counsel. I did not find any empirical studies of the number of parental-termination cases in which a claim of ineffective assistance of counsel has been made, but a few minutes research using a computer assisted research service turns up a large number of

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v. Peart, 621 So. 2d 780, 784 (La. 1993) (reciting excessive caseload numbers of public defender).

25 John M. Burkoff & Nancy M. Burkoff, *Ineffective Assistance of Counsel* [section] 1:2(5), at p. 1-4 (West Group 2002).

cases.[26] The ineffectiveness issue was raised in a parental-termination proceeding as early as 1969,[27] but most of the reported cases are from the past decade. The ineffectiveness claim in termination cases is a substantial one that requires an examination of the procedural and substantive law in order to develop the most effective responses and solutions.

IV. The Supreme Court and the Right to Counsel in Parental-Termination Cases

The right to counsel in criminal cases is the springboard for the right to counsel in parental-termination cases. It is now well-established that the Sixth Amendment guarantees a right to counsel to any criminal defendant whose conviction will result in a jail sentence.[28] The right applies only to criminal proceedings,[29] however, and the Supreme Court has not extended it to civil cases.[30]

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26 For example, in December, 2004, a search on LEXIS using the terms "(parent! /2 rights /3 terminat!) and ((effective or ineffective)/2 (assistance/2 counsel)) in the database of "highest court, all states" yields 148 cases. When that search is expanded to include intermediate appellate courts by adding the terms "and court (supreme or appe!)" and run in the "state court cases, combined" database, it yields 1211 cases. Although not every case produced by this search includes a claim for ineffective assistance of counsel, most do.

27 *In re Orcutt*, 173 N.W.2d 66 (Iowa 1969).

28 *Scott v. Ill.*, 440 U.S. 367 (1979).

29 U.S. Const. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.").

30 There is, for example, no Sixth Amendment right to counsel in state post-conviction proceedings, *Pa. v. Finley*, 481 U.S. 551

Indeed, the Supreme Court held in *Lassiter v. Department of Social Services*[31] that the federal constitution does not require the states to appoint counsel for parents in every termination proceeding. In this five-to-four decision, Justice Stewart, writing for the majority, noted that in previous cases the right to counsel was found "only where the litigant may lose his physical liberty if he loses the litigation,"[32] and concluded that there is a presumption that the right to appointed counsel attaches only when a person may be deprived of physical liberty.[33] The Court then utilized the three factors enunciated in *Mathews v. Eldridge*[34] to analyze whether due process requires appointed counsel when the loss of parental rights is at stake. The Court weighed the factors against the

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(1987), and discretionary appeals of criminal convictions, *Ross v. Moffitt*, 417 U.S. 600 (1974). However, the Fourteenth Amendment requires appointment of counsel to an indigent defendant for a first appeal as of right. *Douglas v. Cal.*, 372 U.S. 353 (1963). The Due Process Clause requires the appointment of counsel in parole- and probation-revocation proceedings, but only in certain cases, and the decision is to be made on a case-by-case basis. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The fundamental-fairness concept of the Due Process Clause of the Fourteenth Amendment is the source of the right to counsel and other procedural protections in juvenile matters. *In re Gault*, 387 U.S. 1 (1967).

31 452 U.S. 18(1981).

32 *Id.* at 25.

33 *Id.* at 26-27.

34 424 U.S. 319 (1976) (holding that the Due Process Clause does not require an evidentiary hearing prior to the termination of Social Security disability benefits). The three factors are (1) the private interests at stake; (2) the risk of an erroneous decision; and (3) the government's interest. *Id.* at 335.

presumption that there is no right to appointed counsel in the absence of a potential deprivation of physical liberty.[35]

With regard to the first *Mathews v. Eldridge* factor, the private interest at stake, the Court reiterated that a parent's interest in her child is "an extremely important one"[36] and the parent's interest in the accuracy of a decision to terminate parental rights is commanding.[37] Concerning the next factor, the interest of the government, the Court stated that the government has a significant interest in the welfare of the child.[38] Although the state has a financial interest in limiting the expenses of termination proceedings, that interest, while legitimate, is minimal.[39]

As to the remaining *Mathews v. Eldridge* factor—the risk of an erroneous decision—the Court described the North Carolina procedures for parental-termination cases. The Court noted the state's contention that the points of law in Ms. Lassiter's case were not difficult because "the evidentiary problems peculiar to criminal trials are not present" and "the standards for termination are not complicated."[40] Nonetheless, the Court conceded (1) that the issues in a termination

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35 *Lassiter*, 452 U.S. at 31.

36 *Id.*

37 *Id.* at 27.

38 *Id*

39 *Id.* at 28.

40 *Id.* at 29. A year later, in *Santosky*, 455 U.S. at 762, the Court noted that the standards for terminating parental rights are imprecise and particularly open to influence by the subjective values of judges.

hearing could involve medical and psychiatric evidence; (2) that parents often have little education; and (3) that the entire process is "distressing and disorienting" for parents.[41] The Court recognized that for this reason state courts generally require that counsel be appointed.[42]

The Court concluded that it would adopt the standard articulated for parole- and probation-revocation hearings in *Gagnon*,[43] and

> leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.[44]

The reason for this case-by-case holding is that the *Mathews v. Eldridge* factors are not always distributed in the same manner and due process is not so rigid as to require that "informality, flexibility and economy . . . be sacrificed."[45]

Although the majority in *Lassiter* adopted *Gagnon's* case-by-case approach, it did not reexamine the reasons given in *Gagnon* for that approach. Had the court done so, it would have discovered that the probation- revocation hearings described in *Gagnon* bear little resemblance to parental-rights termination proceedings. In *Gagnon*, the Court characterized the

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41 *Lassiter*, 452 U.S. at 30.

42 *Id.*

43 411 U.S. at 778,788.

44 *Lassiter*, 452 U.S. at 31-32.

45 *Id.* at 31 (quoting *Gagnon*, 411 U.S. at 788).

probation-revocation conducted without the rules of evidence.[46] Parental-rights-termination hearings, however, are formal court proceedings, and in many states the rules of evidence are generally applicable,[47] although there may be exceptions to the application of particular evidentiary rules.[48] In many probation revocation matters, according to the Court in *Gagnon*, the probationer has admitted the charges, which means that there is no or little factual dispute.[49] In contrast, there were factual disputes in Ms. Lassiter's case, as there are in many termination proceedings.[50]

In *Gagnon*, the Court was concerned that appointment of counsel would change the very nature of the revocation proceeding: If the probationer was represented by counsel, the government would also have to

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46 *Gagnon*, 411 U.S. at 786-87.

47 *See* e.g. Iowa Code [section] 232.96(3) (2000) (providing that rules of evidence apply in child-in-need-of-assistance proceedings); Me. Rev. Stat. Ann. tit. 22. [section] 4007(1) (West 1992) (providing that rules of evidence apply in all child-protection proceedings in Maine, including those that involve the termination of parental rights); W. Va. Code [section] 49-6-2(c) (1996) (providing that rules of evidence apply in child neglect or abuse proceedings). *Santosky*, 455 U.S. at 762 (stating that formal rules of evidence apply in New York parental-termination proceedings); *In re Shannon M.*, 766 A.2d at 733 (assuming that rules of evidence apply to parental terminal proceedings). *But see State v. Andrew M.*, 622 N.W.2d 697, 702 (Neb. App. 2001) (stating that the rules of evidence do not apply in termination hearings, but only provide a "guidepost").

48 *See* e.g. Me. Rev. Star. Ann. tit. 22, [section] 4007(2) (West 1992) (making hearsay statements of children admissible in Maine child-protection and parental-termination proceedings).

49 *Gagnon*, 411 U.S. at 787.

50 *Lassiter*, 452 U.S. at 22-24.

be represented by a lawyer,[51] which would cause the government to incur the added financial cost of providing both an attorney for the probationer and an attorney for the state.[52] In parental-termination proceedings. however, the state agency is generally represented by a lawyer,[53] and the proceeding is an adversarial one, whether the parent is represented or not. In *Gagnon*, the Court suggested that the revocation-hearing body would become more like a judge if the probationer and the government were represented by attorneys.[54] This concern seems irrelevant in the termination context, because parental-termination proceedings are presided over by judges.

In *Lassiter*, Justice Blackmun, joined by three dissenters, stated that the *Mathews v. Eldridge* analysis should not be limited to the facts of the case at hand, and should not be applied on a case-by-case

51 *Gagnon*, 411 U.S. at 787.

52 *Id.* at 788.

53 *See Santosky*, 455 U.S. at 762 (stating that the state is represented by counsel in New York termination proceedings); but see *Lassiter*, 452 U.S. at 29 (noting that the North Carolina Departments of Social Services reported that social workers sometimes represented them at termination hearings when the parents were not represented by counsel).

54 411 U.S. at 788.

basis.[55] He recalled *Betts v. Brady*,[56] in which the Court had said that right to counsel in criminal cases also depended upon a case-by-case analysis, and he pointed out that *Betts* was eventually overruled by *Gideon v. Wainwright*,[57] primarily for the reason that trials can be presumed fair only if counsel is available.[58]

Although Justice Blackmun took issue with the Court's presumption that there is no right to counsel unless incarceration is at stake, his dissent is primarily focused on the "illogical" conclusion that there must be a case-by-case analysis.[59] He argued that a case-by-case approach is unworkable because an appellate court is not able to discern from the record

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55 *Lassiter*, 452 U.S. at 48-52 (Blackmun, Brennan & Marshall, JJ., dissenting). Another of the dissenters, Justice Stevens, wrote separately to express his opinion that the *Mathews v. Eldridge* analysis works better for property interests than liberty interests, and that the "natural relationship" between parents and children is a liberty interest. *Id.* at 59-60 (Stevens, J., dissenting).

56 316 U.S. 455 (1942).

57 372 U.S. 335 (1963).

58 *Lassiter*, 452 U.S. at 36.

59 *Id.* at 49 (Blackmum J. dissenting). Justice Blackmun also weighed the three *Eldridge* factors differently from the majority. Because of the significant interest in the family, he found that the first factor weighed heavily in support of appointed counsel. He found that the state's interest in not appointing counsel was limited. With regard to the risk of an erroneous determination, he concluded that the risk was substantial. The procedure utilized for termination proceedings resembles a criminal prosecution; the state marshals considerable expertise and assets in prosecuting the case; and the legal issues are not simple or well-defined. *Id.* at 44-45 (Blackmun, J. dissenting).

what a lawyer with imagination, who undertook investigation and legal research, would have been able to do with a case in which the parents did not have counsel.[60] Justice Blackmun also pointed out that the case-by-case analysis of *Betts v. Brady* had caused numerous post-conviction challenges.[61]

Even so, the *Lassiter* approach, while not as efficient as a rule that applies to every case, ought at least to mean that in almost every contested case, counsel will be appointed. The circumstances that should favor appointment of counsel[62] are, in fact, present in most parental-termination cases: The state usually presents at least one expert witness; the parents are often undereducated and inarticulate; and the court must typically resolve difficult factual issues.[63]

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60 *Id.* at 51.

61 *Id.* at 51-52. The Alaska Supreme Court, in deciding that the Alaska Constitution requires appointment of counsel for indigent parents in termination proceedings, expressly rejected *Lassiter*'s case-by-case analysis for the same reasons. *In re K.L.J.*, 813 P.2d 276, 282 n. 6 (Alaska 1991). The Alaska court discussed the burdens that the case-by-case approach imposes on the trial court, including the need to develop pretrial procedures to determine in advance whether counsel should be appointed. It noted the difficulty of foretelling accurately whether certain facts were going to be contested or what the nature of the cross-examination would be. It predicted that the pretrial determination of whether counsel should be appointed was likely to delay the proceedings and add time and issues to the appellate process. *Id.*

62 *Lassiter*, 452 U.S. at 30.

63 As a trial judge, I preferred having all parties represented by counsel because the cases proceeded more smoothly and were likely to contain less error, and the presence of counsel made general fact-finding easier. When all parties are represented by counsel, the judge does not have to step outside of the judicial

Lassiter was decided over twenty years ago, and its holding has not been questioned by the Supreme Court. That may be because most states have now moved beyond *Lassiter*, and require appointment of counsel either by state constitution, statute, rule, or case law. Nonetheless, *Lassiter* is still considered to be a setback by those advocating for the rights of parents. Because the Supreme Court has not declared that the Due Process Clause requires the appointment of counsel in every parental-termination case, the rights of indigent parents remain at risk. States may at any time repeal their statutory authority for counsel or withdraw funding for court-appointed counsel.

Parental-rights cases decided by the Supreme Court after *Lassiter* include *M.L.B. v. S.L.J.*,[64] in which the Court held that an indigent parent whose parental rights were terminated is entitled to a transcript of the proceedings at the state's expense in order to prosecute an appeal. Justice Ginsburg, joined by four other justices, was careful to distinguish *Lassiter*, writing that the right to counsel was "less encompassing" than the right of access to the courts.[65] The majority performed an equal protection analysis, weighing a mother's fundamental right to a relationship with her children against the state's economic justification for the rules that forced her to pay for a transcript. It concluded that Mississippi's

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role. As an appellate judge, I can attest to the fact that in many cases pro se appellants are simply unable to articulate what it is they are appealing except to say that the trial judge was wrong.

64 519 U.S. 102(1996).

65 *Id.* at 113.

refusal to allow M.L.B.'s appeal deprived her of equal access to the courts.[66]

Another significant post-*Lassiter* decision is *Troxel v. Granville*,[67] in which the Court found unconstitutional a Washington statute that allowed non-parents to seek a court order of visitation. The "sweeping breadth"[68] of the statute was an unconstitutional infringement on the fundamental right of the parents to make decisions concerning the care and custody of their children.[69] In reaching its conclusion, the Court examined its prior cases regarding the rights of parents and concluded that "extensive precedent" indicated that

> it cannot now be doubted that the Due Process of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.[70]

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66 *Id.* at 120-28. Justice Kennedy, in a concurring opinion, concluded that the Due Process Clause was a sufficient basis for the Court's holding, *Id.* at 129 (Kennedy, J. concurring),

67 530 U.S. 57 (2000).

68 *Id.* at 73.

69 *Id.*

70 *Id.* at 66.

V. The Status of Parents' Right to Counsel, and Their Right to Effective Counsel, in the State Courts

A. The Right to Counsel after *Lassiter*

According to *Lassiter*, thirty-three states and the District of Columbia provided counsel to parents in termination cases by 1981.[71] Twelve of the states that did not then routinely appoint counsel now do so, although in some states the appointment may depend upon the parent's request for counsel.[72] It appears that five of these states do not have a state constitutional provision, statute, or rule requiring appointment of counsel and therefore make a case-by-case determination of whether counsel should be appointed. [73]

Although *Lassiter* requires trial courts in states that do not appoint counsel in every case to perform a *Mathews v. Eldridge* analysis, at least one commentator suggests that these *Lassiter* hearings seldom take

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71 *Lassiter*, 452 U.S. at 34.

72 Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings*: *The States' Response to Lassiter*, 14 Touro L. Rev. 247, 260-62 (including discussion of provisions), 275 (containing table) (1997).

73 In 1997 Young Identified six states state without a constitutional provision, statute, or rule requiring appointment of counsel. *Id.* at 260, 275, 276. Those states were Delaware, Hawaii, Mississippi, South Carolina, Tennessee, and Wyoming. In 2002, however, Delaware enacted rules requiring appointment of counsel. *See Hughes v. Div. of Fam. Servs.*, 836 A.2d 498, 509 (Del. 2003) (citing Del. Fam. Ct. R. 206, 207), cert. denied, 2004 U.S. LEXIS 1973 (March 8, 2004).

place,[74] The denial of counsel is subject to appellate review, according to *Lassiter*,[75] and an appellate court is obligated to review the record and perform a *Mathews v. Eldridge* analysis when the lack of counsel is raised on appeal.

The Tennessee Court of Appeals has done so in several cases, and it has reminded the trial courts of their duty to determine whether a parent is entitled to appointed counsel.[76] In applying the *Mathews v. Eldridge* factors, it has found that the competing interests of the parents and the state are evenly balanced. For that reason, the factor regarding the risk of an erroneous decision is the primary consideration.[77] Furthermore, the Tennessee court, borrowing from *Lassiter* and *Davis v. Page*,[78] has detailed a number

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74 William Wesley Patton, *Standard of Appellate Review in Denial Of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 Loy. U. Chi. L.J. 195, 202 (1996).

75 *Lassiter*, 452 U.S. at 32.

76 *In re Adoption of J.D.W.*, 2000 WE 1156628 *6 (Tenn. App. Aug. 16, 2000) (citing several cases in which court performed *Lassiter* review).

77 *State ex rel. T.H. v. Min*, 802 S.W.2d 625, 626-27 (Tenn. App. 1990).

78 640 F.2d 599 (5th Cir. 1981) (en banc), vacated sub nom. *Chastain v. Davis*, 458 U.S. 1118 (1982), on remand, 714 F.2d 512 (5th Cir. 1984). *Davis*, decided three months before *Lassiter*, held that appointment of counsel was constitutionally required in child-dependency proceedings. The court expressly rejected the case-by-case method. It found that "the complexity of these proceedings always necessitates the offer of counsel." *Id.* at 604.

of factors that it considers in determining the risk of an erroneous decision.[79]

In contrast, the Mississippi Supreme Court did not perform a *Mathews v. Eldridge* analysis in an appeal in which the mother claimed that her due process rights were violated because she had no attorney.[80] Mississippi has no statute or case law requiring appointment of counsel.[81] The court affirmed the termination of the mother's parental rights, and held that she was not denied due process even though the attorney who had been representing her on a pro bono basis withdrew three days before the termination trial. The court concluded that because the mother had not requested a continuance in order to obtain a lawyer and because the evidence against her was overwhelming, she was not denied due process.[82]

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79 Those factors are: (1) expert medical or psychiatric testimony at the hearing; (2) the difficulty of the parents in dealing with life; (3) the level of distrust and disorientation thrust upon the parents at the hearing; (4) the difficulty and complexity of the issues; (5) the possibility of self-incrimination: (6) the education of the parents; and (7) the permanency of the arrangement proposed by the state. The last factor is relevant only in dependency proceedings. *Min*, 802 S.W.2d at 627.

80 *K.D.G.L.B.P. v. Hinds County Dept. of Human Servs.*, 771 So. 2d 907 (Miss. 2000).

81 *Id.* at 911, [paragraph] 14.

82 *Id.* The record showed that the children had first been removed from the mother's home in 1995; she was homeless for eighteen months while her children were in foster care; a petition for termination of parental rights was filed in 1996; in 1997 and 1998, custody of the two children was returned to her. In a few months she and her new husband moved to Florida with the children. She notified the Mississippi officials, who agreed that

Rhode Island, which has a court rule requiring appointment of counsel, has held that while the rule requires appointment of counsel, it does not require the appointment of substitute counsel if the parent discharges the appointed counsel. In *In re Bryce T.*,[83] the mother appealed the termination order on the ground that she had been denied due process because the trial court refused to appoint substitute counsel after her attorney was allowed to withdraw and she had to represent herself.[84] The court stated that it

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she could stay in Florida pending a home study. Shortly thereafter, the Florida officials removed the children when the mother was arrested for stabbing her husband with a paring knife, and the children were returned to Mississippi. *Id.* at 911-13. The court stated that the record demonstrated that the mother had suffered from deep psychological problems for a number of years; that she was unable to admit that she had been responsible for the removal of the children from her home; and that she refused to accept responsibility for being homeless for eighteen months, *Id.* at 911.

83 764 A.2d 718 (R.I. 2001).

84 On the day of the termination hearing, the mother's attorney, who was from the legal-services agency, asked to withdraw because the mother wanted to discharge her. After a lengthy discussion between the mother and the trial judge during which he tried to dissuade her from discharging her attorney and explained that the attorney was well-qualified, the court allowed the attorney to withdraw. The court postponed the hearing to allow the mother to obtain another attorney. It denied her request for an appointed attorney on the basis of a memorandum from the chief judge stating that private counsel could be appointed only if the legal services agency or the public defender was unavailable. *Id.* at 720. The appellate court stated: "[W]e believe that any duty to appoint counsel in a termination of parental rights case is discharged if counsel from Legal Services is appointed, provided that the record indicates that the appointed counsel effectively represented the parent." *Id.* at 722.

was doubtful that counsel would have affected the outcome here, given [the mother's] chronic substance abuse problem, her failure to successfully complete treatment, and the termination of her parental rights to another child.[85]

The court did not explicitly perform a *Mathews v. Eldridge* analysis, and it apparently assumed that the rights of the mother and the interests of the state were in equipoise, and that the risk of an erroneous determination was minimal because of the mother's history.

B. The Right to Effective Assistance of Counsel

In the criminal context the practical enforcement of the right to effective counsel is dependent upon whether the right to counsel is constitutionally based. In criminal prosecutions in which a defendant has a Sixth Amendment right to counsel, that right extends to the effective representation by counsel.[86] The Supreme Court has declared, however, that unless there is a federal constitutional right to counsel, there is no federal constitutional right to effective assistance of counsel even in those proceedings in which counsel has been appointed by the court.[87]

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85 *Id.*

86 *U.S. v. Cronic*, 466 U.S. 648 (1984).

87 Because there is no constitutional right to counsel for a discretionary appeal, *Ross v. Moffitt*, 417 U.S. 600 (1974). there is no right to effective assistance of counsel to prosecute a discretionary appeal, *Wainwright v. Torna*, 455 U.S. 586 (1982). Likewise, because states are not required by' the federal constitution to appoint counsel for post-conviction matters, there

In the parental-rights context, then, presumably there is a federal constitutional right to effective assistance of counsel in every case in which a *Lassiter* analysis finds a right to counsel.[88] A few states have concluded that there is a state constitutional right to counsel in parental-termination proceedings, and consequently, a cases in which the constitutional right to counsel[89] in issue of effective counsel was not raised.[90]

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is no constitutional requirement that counsel be effective. *Pa. v. Finley*, 481 U.S. 551 (1987).

88 An example of a case in which the court conducted a *Lassiter* analysis to determine whether the father in a dependency proceeding had a constitutional right to counsel which, in turn, determined whether he had a right to effective counsel, is *San Bernadino County Dept. of Pub. Soc. Servs. v. Ebrahim A. (In re Emilye A.)*, 12 Cal. Rptr. 2d 294, 302-4 (Cal. App. 1992). The court noted that the father had a statutory right to counsel, *Id.* at 300. *See also In re Doe*, 2003 Haw. App. LEXIS 192, at *14 (June 20, 2003) (assuming that appointed counsel must be effective).

89 *See V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983) (holding that due process clause of Alaska Constitution gives parents right to effective assistance of counsel); *Dept. of Soc. Servs. v. Trowbridge (In re Trowbridge)*, 401 N.W.2d 65, 66 (Mich. Ct. App. 1987) (holding that right to counsel is found in equal protection clauses of federal and Michigan Constitutions as well as in statute): *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703, 706-07 (Okla. 1990) (recognizing previous holding that Fourteenth Amendment guarantees right to counsel, and holding that after *Lassiter*, Oklahoma Constitution requires appointed counsel in all termination cases); *Dept. of Soc. & Health Servs. v. Moseley (In re Moseley)*, 660 P.2d 315, 318 (Wash. App. 1983) (holding that Washington Constitution requires effective assistance of counsel).

90 *See e.g. In re D.B.*, 385 So. 2d 83, 90 (Fla. 1980) (holding that the right to counsel stems from the Due Process Clauses of both

Many states have decided that because there is a state statutory provision for the appointment of counsel, that statutory right is meaningless unless it is the effective assistance of counsel to which the parent is entitled.[91] These courts use language such

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the federal and state constitutions); *L.W. v. Dept. of Children & Fam.*, 812 So. 2d 551, 554 (Fla. 1st Dist. App. 2002) (recognizing both state constitutional and statutory right to counsel) *O.A.H. v. R.L.A.*, 712 So. 2d 4, 7 (Fla. 2d Dist. App. 1998) (noting that Florida Supreme Court continues to confirm a state constitutional right to appointed counsel in parental-termination proceedings); *In re A.S.A.*, 852 P.2d 127, 129-30 (Mont. 1993) (holding that the Due Process Clause of the Montana Constitution guarantees appointed counsel to an indigent parent in proceedings to terminate parental rights); *In re Lindsey C.*, 473 S.E.2d 110, 122 n. 12 (W. Va. 1995) (suggesting that right to assigned counsel in parental-termination cases comes from West Virginia Constitution, and indicating that appointment of counsel is required in abuse and neglect cases). *See also D.S. v. T.D.K. (In re Adoption of K.A.S.)*, 499 N.W.2d 558, 563 (N.D. 1993) (finding that the Equal Protection Clause of the North Dakota Constitution requires court-appointed counsel in parental-termination proceedings pursuant to the Revised Uniform Adoption Act because the other statutory means of terminating parental rights provide for the appointment of counsel for parents).

91 *In re E.D. v. State Dept. of Human Resources*, 777 So. 2d 113, 115 (Ala. 2000); *In re Appeal in Gila County Juvenile Action* No. J-3824, 637 P.2d 740, 743 (Ariz. 1981) (analyzing guardian ad litem statute); *Kristin H.*, 54 Cal. Rptr. 2d 722, 736-38 (Cal. App. 6th Dist. 1996); *People In re V.A.E. EH.D.*, 605 P.2d 916, 919 (Colo. 1980); *L.W.*, 812 So. 2d at 554-55 (listing states that have recognized ineffectiveness claim, and extending it to dependency proceedings); (*Nix v. Dept. of Human Resources*, 225 S.E.2d 306, 307-08 (Ga. 1976); *In re J.P.*, 737 N.E.2d 364, 370 (111. App. 2000) (holding that right to effective counsel flows from U.S. Constitution and Illinois statutes); *In re Rushing*, 684 P.2d 445, 448 (Kan. App. 1984); *In re Care and Protection of Stephen*, 514 N.E.2d 1087, 1090-91 (Mass. 1987); *Johnson v. J.K.C. (In re J.C.)*,

as, "[a] right to counsel is of little value unless there is an expectation that counsel's assistance will be effective,"[92] and "[i]t is axiomatic that the right to counsel includes the right to competent counsel."[93] Most of the states that have grounded an ineffectiveness claim on a statutory right to counsel have ignored the proposition that there is no right to effective counsel unless it is a constitutional right.

The Utah Court of Appeals, for example, made a persuasive statement in support of finding a right to effective counsel. It said that a right to counsel is meaningless unless the right is to effective counsel, and because the court has a duty to interpret state statutes so that they are meaningful, it would interpret the statutory provision as one calling for the effective

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781 S.W.2d 226, 228 (Mo. App. 1989) (listing states that have recognized viability of ineffective-assistance claim); *State ex rel. Human Servs. Dept. (In re Termination of Parental Rights of James W.H.)*, 849 P.2d 1079, 1081 (N.M. App. 1993): *In re Erin G.*, 527 N.Y.S.2d 488, 490 (N.Y. App Div. 1988); *In re Oghenekevebe*, 473 S.E.2d 393, 396 (N.C. App. 1996); *Jones v. Lucas County Children Servs. Bd.*, 546 N.E.2d 471, 473 (Ohio App. 6th Dist. 1988); *State ex rel. Juvenile Dept. of Multnomah County v. Geist* (*In re Geist*), 796 P.2d 1193, 1200 (Ore. 1990); *In re M.S.*, 115 S.W.3d 534. 544 (Tex. 2003); *State v. A.H. (In re E.H.)*, 880 P.2d 11, 13 (Utah. App. 1994); *A.S. v. State (In re M.D.(S.))*, 485 N.W.2d 52, 54 (Wis. 1992).

For a discussion of several California Court of Appeal cases that the author terms "inconsistent," *see Patton*, *supra* n. 74, at 230-31.

92 *Care and Protection of Stephen*, 514 N.E.2d at 1090-91 (Mass. 1987).

93 *Trowbridge*, 401 N.W.2d at 66.

assistance of counsel.[94] In a similar view, the Texas Supreme Court stated:

> [I]t would seem a useless gesture on the one hand to recognize the importance of counsel in termination proceedings, as evidenced by the statutory right to appointed counsel, and, on the other hand, not require that counsel perform effectively.[95]

The Iowa Supreme Court simply assumes that due process means that if there is a statutory right to counsel, that right has to be to effective assistance of counsel.[96] In at least two states there are statutes expressly providing for effective assistance of counsel or competent counsel,[97] but in some jurisdictions there has been no determination as to whether there

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94 *A.H.*, 880 P.2d at 13. The rationale used by the New Mexico Court of Appeals is similar. *James W.H.*, 849 P.2d at 1081.

95 *M.S.*, 115 S.W.3d at 544 (quoting *In re K.L.*, 91 S.W.3d 1, 13 (Tex. App. Fort Worth Dist. 2002)).

96 *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986) (stating that "due process requires counsel appointed under a statutory directive to provide effective assistance").

97 *See* Cal. Welf. & Inst. Code [section] 317.5(a) (West 1998) ("All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.")

Minnesota's statute provides for effective assistance of counsel in termination proceedings. Minn. Stat. [section] 260C.163(3)(a) (West Supp. 2003). The Minnesota Supreme Court makes a distinction between the constitutional right to counsel and a statutory right to counsel in determining the appropriate procedure for a trial court to use when attempting to ensure that a parent's waiver of counsel is knowing and intelligent. *In re G.L.H.*, 614 N.W.2d 718, 722-23 (Minn. 2000).

is a right to effective assistance of counsel.[98] The Vermont Supreme Court has denied an ineffectiveness claim on its merits while stating that it was not deciding whether such a claim could be viable.[99] The Nebraska Court of Appeals has declined to recognize an ineffectiveness claim, stating that such claims are available only in criminal cases. [100]

In summary, many jurisdictions have finessed the constitutional/statutory dichotomy and have taken a logical and common-sense approach. In all but a few states, whether the right to counsel stems from a state constitutional provision or from a statute, it appears that parents have a right to effective assistance of counsel in proceedings to terminate their parental rights.

VI. The Procedural Vehicle for Raising a Claim of Ineffective Assistance in Parental-Termination Proceedings

The right to effective assistance of counsel is hollow if it cannot be enforced. Although most jurisdictions recognize the right to counsel in parental-termination cases and agree that it is worthy of enforcement, there is no consensus on the proper

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98 For example, in Maine there is a statutory right to counsel, 22 Me. Rev. Stat. Ann. [section] 4005(2) (West Supp. 2000), and there is apparently a state constitutional right, *Danforth v. St. Dept. of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973), but there is no reported termination case discussing ineffective assistance of counsel.

99 *In re M.B.*, 647 A.2d 1001, 1003 n. 3 (Vt. 1994) (allowing claim of ineffective assistance to be raised without discussing basis of the claim).

100 *In re Azia B.*, 626 N.W. 2d 602, 612 (Neb. App. 2001).

procedure for bringing an ineffectiveness claim to the attention of a court. In the criminal context the primary procedures for claiming ineffectiveness of counsel are direct appeal and post-conviction review, but the rules vary. A criminal defendant may be required to raise an ineffectiveness claim on direct appeal,[101] allowed in some situations to bring the claim on direct appeal,[102] or required to bring the claim in a post-conviction proceeding.[103] It is little wonder, then, that the states have various approaches to ineffectiveness claims in parental-termination proceedings as well.

While many states have statutory post-conviction procedures, equivalent statutory procedures for the collateral review of parental-termination judgments

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101 For a thorough discussion of the types of ineffectiveness claims, and conclusions about which of them can be presented on direct appeal, *see Woods v. State*, 701 N.E.2d 1208 (Ind. 1998).

102 *See State v. Litherland*, 12 P.3d 92 (Utah 2000); *see also Wayne R. LaFave, et al.*, Criminal Procedure [section] 11.7(e) (West Group 1999) (citing cases).

103 *See Cmmw. v. Grant*, 813 A.2d 726, 735-37 (Pa. 2002) (listing the relevant state statutes and stating that the "overwhelming majority" of states prefer ineffectiveness claims to be raised on collateral review); *see also* Anne M. Voigts, Student Author, *Narrowing the Eye of the Needle. Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum. L. Rev. 1103, 1127 n. 141 (1999) (listing cases in which courts have held that ineffectiveness claims cannot be brought on direct appeal).

do not exist.[104] The procedures for bringing an ineffectiveness claim in parental-termination cases have been developed by decisional law.[105]

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104 At least one state, however, has a statute permitting the reopening of a termination judgment, *see* Conn. Gen. Stat. [section] 45a-719 (West Supp. 2004).

105 Various court actions are potentially available to a parent who has been deprived of adequate counsel, but a discussion of their relative merits is beyond the scope of this article. Parents can, for example, seek monetary damages from the attorney through a professional malpractice action. Several commentators have explored in detail the difficulties in malpractice actions brought by criminal defendants against their trial or appellate counsel, and parents whose rights have been terminated would likely encounter similar difficulties. *See Chen*, *supra* n. 24; *Klein*, *supra* n. 24; David A. Sadoff, *The Public Defender as Private Offender*: *A Retreat from Evolving Malpractice Liability Standards for Public Defenders*, 32 Am. Crim. L. Rev. 883 (1995).

Another type of action to enforce the right to adequate counsel is one for prospective relief that challenges the system of providing counsel for indigent parents. Claims brought on behalf of indigent criminal defendants or the lawyers who represent them have met with varying degrees of success. *See State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (holding that contract system in one county violated right to effective counsel because attorney was so overburdened he could not adequately represent all clients, and concluding that if system continued in existence, ineffectiveness would be presumed in individual cases): *State v. Peart*, 621 So. 2d 780 (La. 1993) (holding that local public defender office was so overworked that ineffectiveness would be presumed):*State v. Lynch*, 796 P.2d 1150 (Okla. 1990) (holding that court-appointment system, as applied, violated state constitutional due process rights of appointed attorneys). *But see Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996) (finding no justiciable controversy because parties made no showing that public defender's clients were actually prejudiced). The procedure utilized in these systematic challenges are direct appeal from a criminal conviction, *Smith*, 681 P.2d at 1376; pre-trial motion in the criminal case, *Pearl*, 621 So. 2d at 784; request by attorneys for counsel fees at conclusion

A. Direct Appeal

The most common vehicle for raising an ineffectiveness claim in a parental-termination case is the direct appeal of the termination order. *In State ex rel. Juvenile Department of Multnomah County v. Geist (In re Geist)*,[106] the Oregon Supreme Court held that direct appeal is the best method for reviewing claims of ineffective assistance of counsel.[107] The court first found that the statutory right to counsel includes a right to effective counsel, but because the legislature had not established a procedure to vindicate the right to adequate counsel, the court determined that it was free to fashion an appropriate procedure.[108] It discussed the need for finality and the amount of time that passes between the filing of the original dependency petition and the granting of the parental-termination

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of criminal case, *Lynch*, 796 P.2d at 1154; and declaratory judgment action by public defender, *Kennedy*, 522 N.W.2d at 3. For commentary on systematic challenges. *see Gideon's Promise*, *supra* n. 17, at 2069-78; *Lemos*, *supra* n. 17; Marc L. Miller, *Wise Masters*, 51 Stan. L. Rev. 1751 (1999) (reviewing Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (Cambridge U. Press 1998)).

106 796 P.2d 1193 (Or. 1990).

107 *Id.* at 1201. This is in contrast to the rule in Oregon that ineffectiveness claims in criminal matters are "more properly" resolved in post-conviction proceedings so that an evidentiary record can be made. *State v. Neighbors*, 640 P.2d 643,645 (Or. App. 1982).

108 *Geist*, 796 P.2d at 1200 ("The statutory right to adequate trial counsel may prove illusory if there is no procedure for review of claims of inadequate counsel").

order.[109] It noted that protracted litigation is not in the interest of the child, the natural parents, or the prospective adopting parents:

> [A] procedure that allows a terminated parent to make a claim of inadequate counsel only after all direct statutory appeals have been exhausted would only further delay the finality of the termination decisions.[110]

The court suggested that there may be some situations in which a factual hearing in the trial court is appropriate, but it declined to express any views on how the appellate court should handle a remand or how the trial court should handle a factual hearing.[111]

The New Mexico Court of Appeals, relying on the reasons set forth in *Geist*, also held that ineffectiveness claims should be raised on direct appeal.[112] The Pennsylvania Superior Court determined that direct appeal was the appropriate method because it was expeditious and collateral attacks were not authorized.[113] The Georgia Court of Appeals has

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109 *Id.* at 1201.

110 *Id.*

111 *Id.* at 1204 n. 16.

112 *James W.H.*, 849 P.2d at 1081. in a later case the court held that a remand for an evidentiary hearing would be appropriate. *State ex rel. Children, Youth & Fares. Dept. v. Tammy*, S., 974 P. 2d 158, 163 (N.M. App. 1998).

113 *In re Adoption T.M.F.*, 573 A.2d 1035, 1043 (Pa. Super. 1990) (en banc). In another case reviewing an ineffectiveness claim in a dependency proceeding, the same court held that such claims must be raised on direct appeal, and set out the standard of review. *In re J.P.*, 573 A.2d 1057, 1066 (Pa. Super. 1990) (en banc).

allowed an ineffectiveness claim to be raised on direct appeal, but remanded for an evidentiary hearing upon determining that the record was inadequate.[114] The Missouri Court of Appeals ruled that the claim has to be raised on direct appeal or it is deemed waived.[115] The Iowa Supreme Court, in a case involving the adequacy of representation of a child, rather than a parent, ruled that because there was no procedural equivalent of post-conviction relief for proceedings to terminate parental rights, the issue had to be raised by direct appeal.[116] In a case before the Ohio Court of Appeals, appellate counsel, who also had been trial counsel, raised ineffectiveness on direct appeal.[117] The court that if the case were a criminal case, it would not permit the issue to be raised on direct appeal because where trial counsel is appellate counsel, it is presumed that appellate counsel is incapable of making the argument for ineffectiveness at the trial level. However, since there was no such thing as post-conviction relief in a termination case,

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114 *In re A.L.E.*, 546 S.E.2d 319, 325 (Ga. App. 2001).

115 *C.W.B. v. LaFata (In re C.N.W.)*, 26 S.W.3d 386, 393 (Mo. App. 2000). Nonetheless, because of the importance of the proceeding, the court examined the entire record and found that the parent's lawyer was not ineffective. *Id.* By contrast, claims of ineffective assistance of counsel in criminal cases are not cognizable on direct appeal in Missouri. *State v. Taylor*, 1 S.W.3d 610, 612 (Mo. App. 1999).

116 *In re J.P.B.*, 419 N.W.2d 387, 390 (Iowa 1988). In Iowa, ineffectiveness claims in criminal cases can be raised on post-conviction review, and if they are not raised on direct appeal, the applicant must demonstrate cause for not having raised the issue then. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991).

117 *In re Whiteman*, 1993 WL 241729 *15 (Ohio App. 6th Dist. 1993).

the court "reluctantly" addressed the merits of the claim.[118]

Many courts have allowed ineffectiveness claims in termination proceedings to be raised on direct appeal in cases in which they do not discuss their rationale for this decision.[119] In those cases in which it is determined on direct appeal that the parent was denied effective assistance of counsel, the result has been a remand to the trial court for a new trial.[120] In at least one instance an appellate court set a thirty-

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118 *Id.* Ohio requires claims of ineffectiveness in criminal cases, when appellate counsel is the not the same as trial counsel, to be brought on direct appeal. *State v. Cole*, 443 N.E.2d 169 (Ohio 1982).

119 *V.F. v. State*, 666 P.2d 42, 45-46 (Alaska 1983); *Gila County Juvenile Action*, 637 P.2d at 743: *People ex rel. V.A.E.Y.H.D*, 605 P.2d 916, 919 (Colo. 1980); *In re K.M.L.*, 516 S.E.2d 363, 366 (Ga. App. 1999); *State Dept. of Health & Welfare v. Mahoney-Williams (In re M.T.P.)*, 611 P.2d 1065. 1066-67 (Idaho 1980); *People v. KK. (In re K.R.K)*, 631 N.E.2d 449, 454-55 (Ill. App. 2d Dist. 1994); *Bickel v. St. Joseph County, Dept. of Pub. Welfare (In re Termination of Parent/Child Relationship of D.T.)*, 547 N.E.2d 278, 281 (Ind. App. 1989); *Rushing*, 684 P.2d at 448; *Trowbridge*, 401 N.W.2d at 66; *In re Erin G.*, 527 N.Y.S.2d 488, 490 (N.Y. App. Div. 1988); *Buncombe County Dept. of Soc. Servs. v. Burks (In re Bishop)*, 375 S.E.2d 676, 678-79 (N.C. App. 1989); *Jones*, 546 N.E.2d at 473; *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703,706 (Okla. 1990); *In re M.S.*, 115 S.W.3d 534, 536 (Tex. 2003); *E.H.*, 880 P.2d at 13; *Wright v. Alexandria Div. of Soc. Servs.* 433 S.E.2d 500, 502-03 (Va. App. 1993); *M.B.*, 647 A.2d at 1003; *Moseley*, 660 P.2d at 317; *In re R.J.M.* 266 S.E.2d 114, 115 (W. Va. 1980).

120 *Gila County Juvenile Action*, 637 P.2d at 746; *State ex rel. State Off. for Servs. to Children & Fams. v. Thomas (In re Stephens)*, 12 P.3d 537, 538 (Or. App. 2000); *State ex rel. State Off. for Servs. to Children & Fams. v. Rogers (In re Eldridge)*, 986 P.2d 726, 731 (Or. App. 1999).

day time limit in which the new trial was to take place.[121]

B. Post-Judgment Motions

Some courts do not allow ineffectiveness claims in termination cases to be raised on direct appeal. The Minnesota Court of Appeals, for example, did not permit a parent to raise an ineffectiveness claim on direct appeal: "An appellant is precluded from alleging other error on appeal without first providing the district court an opportunity to correct the error by filing post-trial motions."[122] The Iowa Court of Appeals has also stated that ineffectiveness cannot be raised for the first time on appeal.[123] Other courts, while not stating that direct appeal is unavailable for ineffectiveness claims, have approved the use of post-judgment motions. For example, the Alabama Supreme Court found a motion to set aside a judgment to be an "appropriate" method for raising an ineffectiveness claim, characterizing it as the civil equivalent of the criminal method.[124] The Connecticut Supreme Court held that direct appeal, although sometimes acceptable, was not appropriate in at least one case because of an inadequate record, and suggested several types of

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121 *Sheltering Arms Children's Servs. v. Harriet J. (In re Orneika J.)*, 491 N.Y.S.2d 639, 641 (N.Y. App. Div. 1st Dept. 1985).

122 *In re J.M.K.A.*, No. C0-97-1156, 1997 WL 770399 *3 (Minn. App. Dec. 16, 1997).

123 *In re B.P.*, No. 02-0422, 2002 WL 1842966 *2 (Iowa App. Aug. 14, 2002).

124 *In re E.D. v. State Dept. of Human Resources*, 777 So.2d 113, 116 (Ala. 2000).

post-judgment motions that could be utilized by a parent to raise an ineffectiveness claim.[125] It noted that a Connecticut statute allows the reopening of a parental-rights termination order.[126] It also suggested use of common law principles for reopening judgments obtained by fraud or mutual mistake, and it indicated that in some situations a parent could move for a new trial.[127] The Utah Court of Appeals indicated that Rule 60(b)(6) of the Utah Rules of Civil Procedure was an appropriate vehicle for raising an ineffectiveness claim,[128] but the Missouri Court of Appeals has held that ineffectiveness "is not one of the specified reasons for setting aside a judgment under the rule."[129]

At least one Texas appellate court permitted the ineffectiveness claim to be brought on direct appeal, but stated that it should be raised in a post-trial motion below in order to develop the record.[130] In a subsequent Texas Supreme Court case, the court

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125 *In re Jonathan M.*, 764 A.2d 739, 754-56 (Conn. 2001).

126 *Id.* at 755: Conn. Gen. Stat. [section] 45a-719 (West. Supp. 2004).

127 *Jonathan M.*, 764 A.2d at 756. The Connecticut Superior Court has recognized that a petition for a new trial is an available method for raising the ineffectiveness claim. *In re Shanice P.*, 2000 WE 1618292 *1 (Conn. Super. 2000).

128 *R.G. v. Stale (In re A.G.)*, 27 P.3d 562, 564 n. 3 (Utah App. 2001).

129 *C.N.W.*, 26 S.W.3d at 393.

130 *In re J.M.S.*, 43 S.W.3d 60.64 (Tex. App. 2001). The court added that if the claim is first brought on direct appeal, the review is limited to the record, which might not be fully developed, and the parent who has failed to raise the issue in a post-trial motion "has a difficult burden to overcome." *Id.*

allowed the claim on direct appeal, but remanded the case to the intermediate appellate court for an analysis of whether counsel's errors had caused harm.[131]

One jurisdiction that applies the established procedure for raising ineffectiveness in criminal proceedings to termination cases is Wisconsin.[132] When an ineffectiveness claim is brought in a criminal case, the trial court holds a post-judgment *Machner* hearing[133] in order to develop the evidentiary record regarding the performance of trial counsel. In a parental-rights termination case, the *Machner* hearing is likewise a prerequisite to a claim of ineffective representation: "[T]estimony from petitioners' trial counsel should be elicited to discover the underlying reasons for the trial counsels; actions and inactions."[134] The Michigan Court of Appeals limits the claim of infectiveness to the appeal record unless the parent has requested either a new trial or what is known in that jurisdiction as a *Ginther* hearing.[135]

C. Habeas Corpus

Very few cases have discussed the availability of habeas corpus petitions for claims of ineffectiveness,

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131 *In re M.S.*, 115 S.W.3d 534. 549-50 (Tex. 2003).

132 *A.S. v. State (In re M.D.*(*S.)),* 485 N.W.2d 52 (Wis. 1992). *See also Brown Country v. Kathy C.* (*In re Chrissy M.D.*), 621 N.W.2d 386, [paragraph] 7 (Wis. App. 2000); *Brown County v. Neung S.* (*In re Ounkhm S.*), 2000 Wisc. App. LEXIS 920.

133 *State v. Machner*, 285 N.W.2d 905 (Wis. App. 1979).

134 *M.D.(S.)*, 485 N.W. 2d at 56.

135 *Fam. Independence Agency v. Jones (In re S.M.J.)*, 2001 WL 1654780 *9 (Dec. 21, 2001) (referring to *People, v. Ginther*, 212 N.W.2d 922 (Mich. 1973)).

but a Florida Court of Appeal has determined that a habeas action is appropriate.[136] It rejected the use of direct appeal because the appellate attorney is often the trial attorney, and because the record is usually not sufficiently developed for the claim to become apparent; it also noted that habeas corpus had been the traditional means of raising the ineffectiveness claim in criminal cases.[137] It held that a habeas petition had to be filed in the trial court "without unreasonable delay"[138] and suggested that the doctrine of laches could bar the proceeding if there was unnecessary delay.[139] The California courts also allow the use of habeas corpus to raise the ineffectiveness claim.[140]

Other states reject the use of habeas corpus. The Connecticut Supreme Court held that a parent who claimed ineffective assistance of counsel had standing to bring the habeas petition, but that it was not an "appropriate vehicle by which he may assert a claim

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136 *L.W. v. Dept. of Children & Fams.*, 812 So. 2d 551, 557 (Fla. 1st Dist. App. 2002). One member of the three-judge panel disagreed with the conclusion that a collateral proceeding should be the exclusive means by which to raise the ineffectiveness claims. *Id.* at 560 (Wolf, J., concurring).

137 *Id.* at 557.

138 *Id.*

139 *Id.* at 557-58.

140 *See e.g. Kristin H.*, 54 Cal. Rptr. 2d 722; *see also Orange Country Soc. Serv. Agency v. Olga A. (In re Eileen A.)*, 101 Cal. Rptr. 548, 551-56 (Cal. App. 4th Dist. 2000) (finding ineffective assistance of counsel on direct appeal, and discussing why direct appeal was appropriate even though habeas is preferred method).

of ineffective assistance of counsel.[141] The court performed a *Mathews v. Eldridge* analysis in rejecting the parent's argument that he had a due process right to collaterally attack the termination order.[142] It determined that the government's interest in providing the child with a permanent home outweighed the risk of an erroneous deprivation of parental rights, given the number of procedural alternatives available to the parent.[143]

The Kansas Court of Appeals disallowed the habeas procedure because a parent whose parental rights have been terminated has no right to file a habeas writ.[144] The Utah Court of Appeals suggested that habeas is unacceptable in the parental rights termination context because of the delay it would cause.[145]

Federal habeas corpus is not an option after *Lehman v. Lycoming County Children's Services Agency*,[146] in which concerns of federalism[147] and a reluctance to expand federal habeas into the area of child custody[148] led the Supreme Court to reject the habeas petition of a mother whose parental rights had been

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141 *Jonathan M*, 764 A.2d at 744.

142 *Id.* at 752-53.

143 *Id.* at 753.

144 *Cosgrove v. Kan. St. Dept. of Soc. & Rehab. Servs.*, 786 P.2d 636, 638-39 (Kan. App. 1990).

145 *E.H.*, 880 P.2d at 13 n. 2.

146 458 U.S. 502 (1982).

147 *Id.* at 512-13.

148 *Id.* at 511.

terminated in Pennsylvania.[149] The Court was particularly concerned about the need for finality in child-custody cases and the possibility of lessening a child's chances of adoption if federal habeas were available to challenge termination orders.[150] The Court quoted at length from *Sylvander v. New England Home for Little Wanderers*[151] in which the First Circuit denied the use of habeas in a child-custody case and suggested that there is a sufficient number of other procedural vehicles available to parents hoping to raise constitutional issues,[152] including appeal, certiorari, and the civil-rights statutes.[153]

VII. A Critique of Existing Procedures for Raising the Ineffectiveness Claim in Parental-Termination Proceedings

It is apparent from the foregoing that most of the courts that have allowed ineffectiveness claims in termination cases have either required or permitted them to be raised on direct appeal. An examination of the advantages and disadvantages of the various means of bringing ineffectiveness claims illustrates why the direct appeal is the best method.

The most persuasive reason in favor of direct appeal is that, in most cases, it will consume the least amount of time. This is particularly important because

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149 *In re William C.*, 383 A.2d 1227 (Pa. 1978).

150 *Lehman*, 458 U.S. at 513.

151 584 F.2d 1103 (1st Cir. 1978).

152 *Lehman*, 458 U.S. at 515 (quoting *Sylvander*, 584 F.2d at 1111).

153 *Sylvander*, 584 F.2d at 1111.

of the need to stabilize the circumstances of the child. The longer there is uncertainty about whether a termination order will withstand appeal, the longer the child remains in limbo. The longer the child remains in limbo, the greater the possibility of emotional damage to the child; and the longer the child remains in the foster care system, the greater the financial burden upon the state. Furthermore, the longer the uncertainty about the finality of the termination order, the less likely it is that prospective adopting parents will come forward. From the parents' standpoint, the longer an erroneous termination order remains in effect, the more detrimental it is to them and their relationship with the child. This is because, in all likelihood, once the termination order is entered, the parents are not permitted to have contact with the child and the services that they may have been receiving previously from the state agency will have been terminated.

A direct appeal is likely to be faster than either a post-judgment motion or a habeas proceeding in most cases. The direct appeal has the time limits imposed by the statutes and rules governing appeals, and the majority of states have enacted expedited procedures for appeals of termination orders.[154] In contrast,

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154 Susan C. Wawrose, *"Can We Go Home Now?": Expediting Adoption and Termination of Parental Rights Appeals in Ohio State Courts*, 4 J. App. Prac. & Process, 257, 262 (2002) (stating that thirty-eight states expedite appeals in termination proceedings); *Stratton*, *supra* n. 2, at 123-24.

Examples of rules expediting these appeals include Iowa. R. Ct. 8.21 (West 2004) (notice of appeal to be filed in fifteen days); S.D. R. Civ. App. P. [subsection] 15-26A-6.1, 15-26A-75 (LEXIS 2003) (shorter periods for filing notice and briefs in termination cases than in other civil matters); and Wis. R. App. P. 809.107 (West 2003).

motions under rules equivalent to Fed. R. Civ. P. 60(b)(6) have only a "reasonable" time as the limit.[155] Although one court has held that fourteen months after the termination order was not a reasonable time,[156] it is possible that courts will consider substantial time periods to be reasonable, depending upon the reasons given for the delay. The Connecticut statue that expressly allows a post-judgment motion to reopen or set aside a judgment terminating parental rights,

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See In re Estel A., 536 N.W.2d 396 (Wis. App. 1995) (holding that court did not have power to enlarge the fifteen-day appeal period). The National Council for Juvenile and Family Court Judges recommends that the time period between the trial court's judgment terminating parental rights and a decision by the appellate court should not exceed 150 days. Adoption Guidelines, *supra* n. 5, at 40.

155 Fed. R. Civ. P. 60(b) (West 2004).

156 *Tiffany N. v. Kareem W. (In re Termination of Parental Rights to Shanay W.)*, 618 N.W.2d 273 (Wis. App. 2000). The court emphasized the need for finality in decisions affecting a child's ability to maintain a stable family relationship, quoting from a Wisconsin Supreme Court case regarding the concern for finality:

> The legislature emphasized that courts should recognize that instability and impermanence in family relationships are contrary to the welfare of children. The legislature also entreated the courts to recognize the importance to children of eliminating unreasonable periods while their parents try to correct the conditions that prevent the child's return to the family.

Id. at *5-*6 (quoting *Waukesha County v. Steven H. (In re Brittany Ann H.)*, 607 N.W.2d 607, 615 (Wis. 2000)).

though, sets four months as the time period within which the motion must be filed.[157]

Of course, rules could be promulgated setting fairly short time periods for post-judgment motions, or courts could allow the effectiveness claims to be raised in motions for new trial, which generally have a shorter time period than Rule 60(b) motions.[158] A post-judgment process for effectiveness claims with relatively short time periods would remedy one of the disadvantages to the post-judgment method. Another disadvantage, however, is that post-judgment motions involve additional hearings in the trial court, which also means more time. While it is possible for a court to design and implement a process that includes a trial court hearing for the purpose of factual findings, realistic judges know that it is easier said than done. Furthermore, to the extent that many claims of ineffectiveness will be denied in the trial court and then appealed, this process will be lengthier than one allowing the ineffectiveness claim on appeal.

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157 Conn. Gen. Stat. [section] 52-212(a) (West 1991). *See Jonathan M.*, 764 A.2d at 755-56.

158 Fed. R. Civ. P. 59(b) has a ten-day time period. This shorter time limit may create difficulties for the parent. Trial counsel may still be representing the parent, and therefore, all the problems incurred when trial counsel raises an ineffectiveness claim are present. Even if new counsel has been appointed, it would be difficult for the new counsel to gain enough information about the representation by trial counsel to make a new trial motion on the basis of ineffectiveness. *See LaFave*, *supra* n. 102, at 629-30 (discussing the difficulties of utilizing post-verdict motions to raise Sixth Amendment ineffectiveness claims in criminal cases).

Nonetheless, in some cases it will be impossible to determine the merits of an ineffectiveness claim from the appeal record. This is probably the most serious disadvantage to raising an ineffectiveness claim on direct appeal. However, in many cases the merits of an ineffectiveness claim may be determined on the appeal record alone. In most of the cases cited in this article in which an appellate court has found ineffective assistance of counsel on appeal, it has done so on the basis of the record before it, without remanding for a hearing.[159] In an Oregon case in which the court found that counsel was inadequate on the basis of the trial record, the transcript contained counsel's admission that he was not prepared for trial and had not read the discovery material.[160] The court was able to conclude that it was not inevitable that the parent's rights would have been terminated with adequate counsel.[161] in another Oregon case the claim of ineffectiveness was the failure of counsel to file a timely notice of appeal, which was apparent on the

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159 *Gila County Juvenile Action*, 637 P.2d at 743; *Eileen A.*, 101 Cal. Rptr. 2d at 551-56; *Orcutt*, 173 N.W.2d at 67-71: *Rushing*, 684 P.2d at 449-50; J.C., 781 S.W.2d at 228; *Orneika J.*, 491 N.Y.S.2d at 78-79; *In re McLemore*, 2001 WL 266947 (Ohio App. 10th Dist. Mar. 20, 2001); *State ex rel. St. Office for Servs. to Children &Fams. v. Rogers (In re Eldridge)*, 986 P.2d 726 (Or. App. 1999). But *see Kristin H.*, 54 Cal. Rptr. 2d at 744 (concluding that record demonstrated that performance of attorney was inadequate, but remanding for a hearing in the trial court on whether the performance was prejudicial).

160 *Eldridge*, 986 P.2d at 729.

161 *Id.* at 731.

record, and the court found that counsel was inadequate.[162]

When the record is insufficient for determining the merits of ineffectiveness claims, appellate courts should allow a remand to the trial court for an evidentiary hearing on ineffectiveness. This need not be done in every case, but should be reserved for only those cases in which the parent persuades the court that he or she is likely to prevail. For example, the appellate court could require by rule that when appellate counsel requests a remand in order to make the appropriate record, counsel should do so in a motion [163] that specifically describes which actions or inactions of trial counsel constitute ineffectiveness and include an offer of proof as to the evidence that would be presented on remand. The offer of proof should consist of affidavits from people with knowledge of counsel's performance. For example, if the ineffectiveness consists of trial counsel's failure to call necessary witnesses, the motion should include affidavits from the parent that she requested the attorney to call the witnesses, and affidavits from the witnesses themselves about their proposed testimony. The appellate court could then determine, in an expedited manner, whether the ineffectiveness alleged appears clearly on the record and, if not, whether the offer of proof is such that appellate counsel may be

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162 *State ex rel. St. Off. for Servs. to Children & Fams. v. Hammons*, 10 P.3d 310, 313 (Or. App. 1999). The remedy was to allow the untimely appeal. *Id.* at 315.

163 It is common for appellate rules to contain a provision for the filing of motions. *See e.g.* Fed. R. App. P. 27 (federal); Me. R. App. P. 10 (Maine).

able to establish ineffectiveness.[164] If the appellate court grants the remand request and orders a hearing for factual findings on the ineffectiveness issue, it should retain jurisdiction over the appeal. In this way delay would be minimized.

The other major disadvantage to the direct-appeal approach is that trial counsel may still be representing the parent when the notice of appeal has to be filed. However, this will also be true for any process that must be initiated within a short time of the termination judgment.[165] Whenever it becomes

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164 *In State ex rel. Children. Youth and Fares. Dept. v. David F.*, 911 P.2d 235 (N.M. App. 1995), the New Mexico Court of Appeals, which hears ineffectiveness claims on direct appeal, held that it does not remand a case to the trial court for an evidentiary hearing unless the record on appeal shows a prima facie case of ineffectiveness. It defines a prima facie case as one in which "(1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *Id.* at 242. In that case, however, after thoroughly examining all of the parents' ineffectiveness contentions and the record, the court concluded that the parents' counsel was not ineffective. *In State ex rel. Children, Youth and Fams. Dept. v. Tammy S.*, 974 P.2d 158 (N.M. App. 1998), the court remanded an ineffectiveness claim for an evidentiary hearing in the trial court where the mother's claim of ineffectiveness stemmed from the joint representation by counsel of the mother and father even though the mother was a victim of the father's domestic violence. The court quoted the prima facie test from David F., but stated: "Alternatively, this Court has utilized the standard that remand for an evidentiary hearing is required where a substantial question is raised concerning issues not adjudicated at the termination hearing." *Id.* at 163.

165 Any process with a short time limit will require a parent to decide quickly whether an ineffectiveness claim should be raised. However, most parents will have formed an opinion, by the time they receive the termination decision, as to whether they believe

apparent that an ineffectiveness claim is going to be or should be brought, trial counsel should seek to withdraw from the case and new counsel should be appointed at the earliest possible time. It is unrealistic and unworkable to expect trial counsel to raise ineffectiveness. Court rules or statutes that require trial counsel to remain in the case as appellate counsel present a particular problem.[166]

A requirement that the ineffectiveness issue be raised on direct appeal could create the consequence that if it is not raised on appeal, it will be considered waived or barred. However, in the criminal law context, the Supreme Court has held that a federal defendant who could have raised an ineffectiveness

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their attorney was effective. A parent may not be able to articulate the claim, but she will know whether her attorney represented her in the manner that she expected and aimed for the result she wanted. For example, a parent will know if the attorney called her witnesses to testify; whether the attorney sought to obtain her side of the story or met her for the first time in the courthouse on the day of the hearing; whether the lawyer reviewed a trial strategy with her; and whether the attorney acted in a professional manner toward her, the court, and the process. The parent will not know the technical aspects to her defense, such as whether the attorney properly made evidentiary objections, and there may be aspects of the parent's case that the attorney should have told her but did not, such as a settlement offer that was not communicated. Nonetheless, in most situations in which an ineffectiveness claim should be brought, the parent will have formed an opinion, in a relatively short time, as to whether the lawyer's representation was adequate.

166 *See e.g.* 22 Me. Rev. Stat. Ann. [section] 4006 (West Supp. 2003) (requiring attorney in the trial court proceeding to continue representing the client "unless otherwise ordered by the court"); *Brown v. Div. of Fam. Servs.*, 803 A.2d 948, 958 (Del. 2002) (describing Del. S. Ct. R. 26.1 as imposing "a continuing obligation upon the attorney who represented the parents in the Family Court").

claim on direct appeal is not barred from raising the claim in a post-conviction proceeding.[167] A rule that may better fit the termination setting would bar a claim of ineffectiveness if not raised on direct appeal unless the incident of ineffectiveness was unknown to the parents and not reasonably apparent to appellate counsel.

From the perspective of the child, the adoptive parents, and the state agency, the direct appeal is the best route. In spite of the few disadvantages to the direct-appeal approach, the relative speed of the direct appeal, when compared to post-judgment or habeas proceedings, even with the occasional remand for an evidentiary hearing, outweighs the disadvantages.

Regardless of the procedural vehicle, there should be an absolute time bar for the ineffectiveness issue to be brought forward, and a requirement that in no case may the claim be made after an adoption of the child has been finalized.[168] If prospective adoptive parents knew that an adoption could be jeopardized by a court ruling for a parent on an ineffectiveness claim, the number of people willing to adopt children from families in which an involuntary termination of parental rights had taken place would drop precipitously. Children would remain much longer in the foster care system.

In addition to suggesting that courts adopt the procedure of allowing ineffectiveness claims to be

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167 *Massaro v. U.S.*, 538 U.S. 500, 504 (2003).

168 The Connecticut statute states that no motion to reopen a judgment terminating parental rights may be granted if a decree of adoption has been finalized. Conn. Gen. Stat. [section] 45a-719 (West 2004).

raised on direct appeal with a provision for remand when required, I also suggest that the procedure be set forth in a court rule. A rule allows all parties to know beforehand the appropriate procedure. In addition to promoting certainty, a rule would promote efficiency by reducing disputes about procedure, and the rule-making process also permits input and advice from a wide range of interested people and institutions.

VIII. Standards for Determining Ineffectiveness in Parental-Termination Cases

Once a suitable procedural vehicle has brought the ineffectiveness claim of a parent to a court for resolution, the court must decide upon the appropriate standard for judging the ineffectiveness claim. The criminal arena, the birthplace of the claim, has developed a rigid standard for ineffectiveness based on *Strickland v. Washington*.[169] That standard has been adopted by a number of courts deciding claims of ineffective assistance in parental-termination cases, often without analysis of its applicability in a non-criminal context.

A. The *Strickland* Standard

The criminal standard was announced in *Strickland*,[170] in which the Supreme Court delineated the two-part test for judging whether counsel in a criminal trial or death sentence proceeding was ineffective:

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169 466 U.S. 668 (1984).

170 *Id.*

> First, the defendant must show that counsel's performance was deficient. This requires demonstrating that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must convince the court that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[171]

The shorthand term for the first component is the performance prong, and the second component is known as the prejudice prong.

With regard to the performance prong, the Court held that there is a strong presumption "that counsel's conduct falls within the wide range of reasonable professional assistance,"[172] which presumption the defendant must overcome, and judicial scrutiny of the lawyer's performance is "highly deferential."[173] "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."[174] Furthermore, a defendant who raises an ineffectiveness claim must be specific in identifying the acts or omissions by the attorney that give rise to the claim.[175]

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171 *Id.* at 687.

172 *Id.* at 689.

173 *Id.*

174 *Id.* at 688.

175 *Id.* at 690.

With regard to the prejudice prong, the Court said:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[176]

When a conviction is challenged, this means a reasonable probability that, but for the lawyer's errors, the factfinder would have had a reasonable doubt of the defendant's guilt.[177] The Supreme Court also noted that a court does not have to decide both prongs. If a defendant fails to demonstrate prejudice, for example, a court need look no further.[178] In a small subset of cases, where there has been an actual or constructive denial of counsel, prejudice is presumed.[179]

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176 *Id.* at 694.

177 *Id.* The Supreme Court has held that when the claim is ineffectiveness at the sentencing stage and the defendant can demonstrate that counsel's error led to even a slight increase in the sentence, the defendant has shown prejudice. *Glover v. U.S.*, 531 U.S. 198, 204 (2001).

178 *Strickland*, 466 U.S. at 697.

179 *In United States v. Cronic*, 466 U.S. 648 (1984), a case decided the same day as *Strickland*, the Court said that in some cases the circumstances were "so likely to prejudice the accused" that prejudice does not have to be proven. *Id.* at 658. *In Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Supreme Court attempted to clarify when prejudice can be presumed. In cases involving "mere 'attorney error,'" *Strickland's* prejudice prong is applicable.

The *Strickland* standard has been adopted in most jurisdictions for determining ineffectiveness of counsel in termination proceedings.[180] Some courts, however, follow a *Strickland* standard without mentioning *Strickland*.[181] In almost all of the cases in

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Id. at 482. In those situations where counsel was denied, either actually or constructively, the adversary process is presumptively unreliable, and, therefore, prejudice is presumed. *Id.* at 483-84. But when the proceeding in question was presumptively reliable, a showing of actual prejudice is required. *Id.* at 484.

180 *People In re V.M.R.*, 768 P.2d 1268, 1270 (Colo. App. 1989); *L.W. v. Dept. of Children & Fams.*, 812 So. 2d 551, 556 (Fla. 1st Dist. App. 2002); *In re A.H.P.*, 500 S.E.2d 418, 422 (Ga. App. 1998); *K.R.K.*, 631 N.E.2d 449, 454-55 (holding that *Strickland* applies to ineffectiveness claims in abuse and neglect cases); *People v. Bilyeu (In re D.B.)*, 615 N.E.2d 1336, 1342 (Ill. App. 4th Dist. 1993); *Tavorn v. Marion County Off. of Fam. & Children (In re Involuntary Termination of Parent-Child Relationship of J.T.)*, 750 N.E.2d 1261, 1265 (Ind. App. 2000); *In re D. W.*, 385 N.W.2d 570, 579-80 (Iowa 1986); *Rushing*, 684 P.2d at 449-50 (Kan. App. 1984); *Lenawee County Dept. of Soc. Servs. v. Currier (In re Rogers)*, 409 N.W.2d 486, 488 (Mich. Ct. App. 1987); *In re J.M.K.A.*, 1997 WL 770399 *3 (Minn. App. Dec. 16, 1997); *N.J. Div. of Youth and Fam. Servs. v. V.K. (In re J.K.)*, 565 A.2d 706, 712 (N.J. Super. App. Div. 1989); *In re Colbert*, 2000 WL 1687602 *3 (Ohio App. 11th Dist. Nov. 9, 2000); *Chappell v. State (In re K.L.C.)*, 12 P.3d 478, 480-81 (Okla. Civ. App. 2000); *State v. Christensen (In re C.C.)*, 907 P.2d 241, 245 (Okla. App. 1995); *In re M.S.*, 115 S.W.3d 534, 544, 545 (Tex. 2003) (adopting *Strickland*, and listing other states that have adopted it); *E.H.*, 880 P.2d at 13; MB., 647 A.2d at 1004; *Brown County Dept. of Human Servs. v. Neung S. (In re Ounkhm S.)*, 2000 WL 1341883 [paragraph] 10 (Wis. App. 2000). *See D.S.H.S. v. A.S. (In re M.I.S.)*, 95 Wash. App. 1049, *5 n. 1 (Wash. App. May 24, 1999) (applying *Strickland* test without formally adopting it, and listing eases that have adopted *Strickland*).

181 *See Kristin H.*, 54 Cal. Rptr. 2d at 741; *In re Alexander V.*, 613 A.2d 780, 787 (Conn. 1992); *In re V.K.*, 766 A.2d 958, 963-64

which *Strickland* is applied, either expressly or impliedly, the courts decline to find ineffectiveness. In some cases this is because the courts do not find that counsel's performance was defective;[182] in other cases it is because the courts do not find that the performance prejudiced the parent;[183] and in some the courts conclude that the parent has met neither prong of the *Strickland* test.[184] In a recent case, in which the Texas Supreme Court adopted the *Strickland* standard, the court concluded that counsel's error may have amounted to ineffective assistance and remanded the case for a determination as to whether the error was unjustified and prejudicial. [185]

(D.C. App. Nov. 2, 2000); *State v. A.W. (In re W.L.W.)*, 702 N.E.2d 606, 609 (Ill. App. 1998); *Bickel v. St. Joseph County Dept. of Pub. Welfare (In re D.T.)*, 547 N.E.2d 278, 282 (Ind. App. 1989); *Care and Protection of Stephen*, 514 N.E.2d at 1091; *Annette F.*, 911 P.2d at 241-42; *In re Oghenekevebe*, 473 S.E.2d 393, 396 (N.C. App. 1989) (citing a criminal case).

182 *See e.g. In re K.M.L.*, 516 S.E.2d 363, 366 (Ga. App. 1999); *Chappell v. State (In re K.L.C.)*, 12 P.3d 478 (Okla. Ct. Civ. App. 2000).

183 *See e.g. In re Matthew S.*, 758 A.2d 459, 461 (Conn. App. 2000); *W.L.W.*, 702 N.E.2d at 609-10; *In re B.N.*, 2001 WL 57987 *2 (Iowa App. Jan. 24, 2001); *James W.H.*, 849 P.2d at 1082; *Colbert*, 2000 WL 1687602 at *3; *E.H.*, 880 P.2d at 14.

184 *See e.g. In re Mariah S.*, 763 A.2d 71, 83 (Conn. App. 2000); *In re A.H.P.*, 500 S.E.2d 418, 422 (Ga.App. 1998); *People v. Denise M. (In re D.M.)*, 631 N.E.2d 341, 345 (Ill. App. 1994); *D.T.*, 547 N.E.2d at 282; *In re K.G.*, 2000 WL 145070 *4, *4-*5 (Iowa App. Feb. 9, 2000); *Rogers*, 409 N.W.2d at 489.

185 *In re M.S.*, 115 S.W.3d 534, 548-49 (Tex. 2003). Trial counsel had failed to move for a new trial, a procedural requisite to preserving the issue of the sufficiency of the evidence. In an interesting *Mathews v. Eldridge* analysis of the issue preservation

There are very few exceptions to the general observation that courts applying *Strickland* usually fail to find ineffectiveness. The exceptions are primarily in those cases in which the courts presume prejudice, either explicitly or implicitly, because of the actual or constructive denial of counsel. For example, in a Kansas case, the court concluded that the attorney's withdrawal from the case in mid-trial constituted a complete denial of counsel.[186] Citing *Strickland* and *Cronic*, the court reversed the termination judgment and ordered a new trial.[187] In a New York case the

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requirement, the Texas Supreme Court concluded that when counsel failed unjustifiably to follow the established procedure and thereby failed to preserve the issue of the sufficiency of the evidence for appellate review, the risk of erroneous deprivation was too high. *Id.* at 549. The court remanded the matter to the intermediate appellate court to determine whether counsel's defective performance caused harm. *Id.* at 550.

186 *Rushing*, 684 P.2d at 450. The father was not present at the termination hearing, and after the government presented its first two witnesses, both state workers who testified that he was largely unknown to them, the father's attorney believed that there was nothing further he could do. The hearing resumed, and the only evidence of the father's unfitness came from the mother's testimony. The mother testified that the father had not supported the child in two years; that they had been separated; and that he had only sporadic contact with the child. *Id.* at 446-48.

187 *Id.* at 450. In contrast, the Rhode Island Supreme Court held that a mother was not entitled to substitute counsel once she had discharged her appointed attorney, who was "overworked and overburdened" and not representing her effectively. *In re Bryce T.*, 764 A.2d 718, 720 (R.I. 200l). The mother requested that another attorney be appointed, but the trial court refused, and the mother represented herself. The reviewing court also found that the discharged attorney, was not ineffective, and that it was doubtful that appointing new counsel would have changed the outcome.

mother's attorney failed to appear for the termination hearing, and the court implicitly presumed prejudice.[188]

B. The *Geist* Fundamental Fairness Standard

Not all courts employ the *Strickland* standard in parental-rights cases. The leading case articulating a different standard is *State ex rel. Juvenile Dept. of Multnomah County v. Geist (In re Geist)*,[189] in which the Oregon Supreme Court expressly rejected application of the *Strickland* standard for determining ineffectiveness.[190] *Geist* is the only case in which a state's highest court has examined the rationale for the *Strickland* standard and explained why it is not appropriate in parental-termination cases.[191]

Choosing to apply what is now known as the fundamental-fairness standard, the *Geist* court stated that it was adopting "a standard which seeks to determine whether a termination proceeding was

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188 *Constance R. v. Erie County Dept. of Soc. Servs. (In re James R.)*, 661 N.Y.S.2d 160, 161 (N.Y. App. Div. 1997). Not only did counsel fail to appear for the hearing, but also failed to clear up a misunderstanding that led the mother to miss the hearing. Furthermore, after the termination order was entered by default, mother's counsel said she would bring a motion to vacate the judgment but did not. *Id.*

189 796 P.2d 1193 (Or. 1990).

190 *Id.* at 1201-02.

191 Appellate courts in Missouri, Pennsylvania, and Washington have all rejected *Strickland* and applied a different standard. *See J.C.*, 781 S.W.2d at 228; *In re Adoption of T.M.F.*, 573 A.2d 1035 (Pa. Super. 1990); *Moseley*, 660 P.2d 315.

"fundamentally fair,"[192] and referred to the *Strickland* standard as "more stringent."[193]

In *Geist*, the court first noted that differing substantive and procedural rules have long been applied in civil and criminal cases, and also considered additional factors unique to parental-termination cases.[194] Courts dealing with children function in a *parens patriae* capacity, and the goal is to act in the best interests of a child.[195] When a parent is unable or unwilling to provide appropriate care, the child's best interests may require the termination of the parent's rights. "To secure a parent's rights in the context of those underlying determinations, courts seek to determine whether the proceedings were fundamentally fair."[196] The court went on to state that the essence of fundamental fairness is the right to be heard at a meaningful time and in a meaningful manner. "The requirements of notice, adequate counsel, confrontation, cross-examination, and standards of proof flow from this emphasis."[197] The court then explained that "although no client has a constitutional or statutory right to a 'perfect' defense, fundamental fairness requires that appointed counsel exercise professional skill and judgment."[198] Tactical decisions,

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192 796 P.2d at 1201 (citing *McKeiver v. Pa.*, 403 U.S. 528 (1971)).

193 *Id.* at 1203.

194 *Id.* at 1202.

195 *Id.*

196 *Id.* at 1203 (citations omitted).

197 *Id.*

198 *Id.* (citation omitted).

such as the choice to call a witness or to ask particular questions of a witness, or to make a certain argument, will not amount to ineffectiveness of counsel unless a court finds that no responsible attorney in those particular circumstances would have chosen that tactic.[199] Like the *Strickland* standard, the fundamental -fairness standard looks to the "totality of the circumstances" in determining the adequacy of counsel.[200]

The *Geist* approach also requires the party challenging the adequacy of counsel to demonstrate that her lawyer's ineffectiveness prejudiced her case.[201] *Strickland* describes the prejudice prong as requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[202] *Geist* requires a showing that the attorney's performance denied the parent a fair trial and is sufficiently poor to call the trial court's decision "into serious question."[203] Furthermore, the trial court's decision terminating parental rights should not be reversed if the reviewing court is satisfied that even with adequate counsel the result would "inevitably" have been the same.[204]

Applying the fundamental-fairness standard to the facts of the case before it, the court decided that

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199 *Id.*

200 *Id.*

201 *Id.* at 1204.

202 *Strickland*, 466 U.S. at 694.

203 *Geist*, 796 P.2d at 1204.

204 *Id.*

the record did not demonstrate that the mother's attorney was ineffective.[205] The court first determined that the record was adequate to allow it to reach the ineffectiveness issue.[206] The mother claimed that her attorney's trial preparation was inadequate, that the attorney's skills were deficient, and that the attorney based the mother's defense on post-traumatic-stress disorder and battered-woman's syndrome, which theories the mother claimed were untenable.[207] However, at the termination hearing, the mother stated on the record that she was satisfied with the representation provided to her by trial counsel.[208] Upon review of the record, the Oregon Supreme Court found that the mother's counsel

> advocated vigorously for her, sought and obtained discovery, used an investigator, interviewed witnesses, briefed the pertinent legal issues, spent appropriate time and energy preparing for trial, effectively cross-examined the state's witnesses, and called witnesses in support of her theory of the case, which, we find, was tenable.[209]

Two cases from the Oregon Court of Appeals illustrate the practical application of *Geist's* fundamental-fairness standard. In both, the court

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205 *Id.* at 1204-05.

206 *Id.* at 1204.

207 *Id.* at 1205.

208 *Id.* at 1198-99, 1205.

209 *Id.* The court did not explain how the record demonstrated the interviewing of witnesses by the attorney or the time and energy spent by the attorney in preparation.

found that counsel was inadequate. In *State ex rel. State Office for Services to Children & Families v. Thomas (In re Stephens)*,[210] the father failed to appear for the termination hearing. He was in a residential treatment center at the time of the hearing, and his attorney did not obtain a subpoena for his attendance or notify personnel at the center about the need to have the father at the hearing.[211] Although counsel was present at the hearing, he made no opening statement except to say that his client could be a good father and was in treatment, and he also made no closing argument. He did not call witnesses, offer any exhibits, or cross-examine most of the witnesses.[212] Counsel also admitted that he was not prepared for trial, in part, because of the father's absence.[213] The court concluded that the attorney's lack of preparation and failure to advocate any theory for the father rendered his performance inadequate.[214]

With regard to the prejudice prong of the *Geist* standard, the court noted that the father was undergoing substance-abuse treatment,[215] and it was

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210 12 P.3d 537 (Or. App. 2000).

211 *Stephens*, 12 P.3d at 541-42. The Court of Appeals noted that there was an indication that the father wanted to attend the hearing, but that if he left the treatment center without being subpoenaed, it was likely that his probation would have been violated. *Id.*

212 *Id.* at 543.

213 *Id.*

214 *Id.* at 543-44.

215 *Id.* at 544 (emphasis in original).

unwilling to assume a poor prognosis. The court stated:

> Essential to our conclusion is the fact that the trial court was not given the opportunity to judge the credibility of the father's case or his evidence, whatever father's case and evidence may in fact be . . . . In a situation, as here, where father wanted to put on a case, where there is some credible evidence that father could be a resource for child, and where counsel has not effectively advocated any theory of father's case, father has not been heard. Accordingly, we will not conclude that the result would have inevitably been the same.[216]

In *State ex rel. State Office for Services to Children & Families v. Rogers (In re Eldridge)*,[217] trial counsel at the commencement of the termination hearing explained to the judge that he was not prepared for the trial; that he had never talked to his client, the children's mother, who lived on the other side of the state; that he had not read the 800-page agency file that had been furnished to him two days earlier; and that he had come to court only to withdraw from the case.[218] Counsel then moved to withdraw or, in the alternative, for a continuance, and the court denied both motions, but allowed a ten-minute recess for the

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216 *Id.*

217 986 P.2d 726 (Or. App. 1999).

218 *Eldridge*, 986 P.2d at 729.

attorney to prepare.[219] The trial court blamed the mother for counsel's lack of preparation because she had failed to keep in touch with him.[220] On appeal, the Oregon Court of Appeals held that the termination proceeding was fundamentally unfair because of counsel's inadequacy.[221]

The state agency argued that there was no prejudice to the mother because she had failed to keep in touch with her lawyer and because there was no indication that she would be any better able to care for these children than she was able to care for another child who was the subject of a prior termination order. The appellate court disagreed, stating that the record showed that the mother, who previously had been homeless and suffering from substance abuse, was at the time of the termination hearing living in a clean home large enough for her two children, and there was no indication of current alcohol or drug problems. The court also said that while the record showed that the mother had not been good at "follow through" with the social workers and her attorney, who were on the other side of the state, their attempts at working with her were "half-hearted, at best."[222]

Missouri has also adopted, for termination cases, what has been termed a more "relaxed" standard[223] or

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219 *Id.* The mother also requested that the attorney be allowed to withdraw. *Id.*

220 *Id.* at 730-31.

221 *Id.* at 731.

222 *Id.* at 731.

223 *J.C.*, 781 S.W.2d at 228 (quoting *Moseley*, 660 P.2d at 318).

a "lesser" requirement[224] than the *Strickland* standard. In *J.C.*, the Missouri Court of Appeals found that the parents were deprived of adequate counsel, holding that the test of ineffectiveness was whether the attorney was effective in providing a meaningful hearing.[225] The parents' counsel was passive throughout the termination hearing; he stipulated to the admission of all reports; he called no witnesses, not even the parents. In fact, the parents, who were in the courthouse, were not present in the courtroom during the hearing.[226] The appellate court reversed the termination order, stating that "[t]he right to counsel means nothing if the attorney does not advocate for his client and provide his client with a meaningful and adversarial hearing."[227] The court did not, however, discuss the

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224 *James W.H.*, 849 P.2d at 1082.

225 *J.C.*, 781 S.W.2d at 228-29. After citing several cases in which the *Strickland* test was applied, the Missouri court stated: "Other states have relaxed the criminal standard and have held the test of ineffectiveness to be that 'if it appears from the record that an attorney was not effective in providing a meaningful hearing, due process guaranties have not been met.'" *Id.* at 228 (quoting *Moseley*, 660 P.2d at 318).

226 *J.C.*, 781 S.W.2d at 228.

227 *Id.* at 228-29. The J.C. court relied on *Moseley*, a *pre-Strickland* case from Washington. "Procedural fairness" is the term used by the court in *Moseley* for the standard it applied to determine the ineffectiveness of counsel in a termination case. *Moseley*, 660 P.2d at 318: "[I]f it appears from the record that an attorney was not effective in providing a meaningful hearing, due process guaranties have not been met." In *Moseley*, the mother claimed ineffective assistance because her counsel did not develop details of an automobile accident that had occurred eleven years earlier. The Court of Appeals, however, concluded that the trial court was aware of the accident and the impact it had on the mother's life, and that counsel's failure to highlight it

prejudice to the parents caused by the attorney's performance or explicitly state that it was presuming prejudice.

Statements in the Pennsylvania Superior Court's reported decisions indicate that it uses a fundamental -fairness standard. but its standard appears to be stricter even than *Strickland*.[228] The mother in one Pennsylvania case claimed that her attorney failed to call witnesses who would have testified that she had a possibility of recovering from drug addiction. The court said that such testimony—in light of the overwhelming evidence of drug abuse—would not have been believed.[229] The court concluded that the

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further did not deprive the mother of a meaningful hearing. *Id.* at 318-19. A more recent Washington appeal in which the court applied the *Strickland* standard is *D.S.H.S. v. A.S.* (*In re M.I.S.*), 1999 WL 325442 (Wash. App. May 24, 1999).

228 *In re Adoption of T.M.F.*, 573 A.2d 1035 (Pa. Super. 1990). The court phrased the question in the case as "[I]f the evidence was so convincing and overwhelming that, pursuant to statute, termination of parental rights was mandated, may ineffectiveness of counsel be a basis for setting aside that finding?" *Id.* at 1039. The court stated that ineffectiveness in parental-termination cases is not as serious as in criminal cases because the role of the lawyer in termination cases does not carry the same impact as in criminal cases. *Id.* at 1042. The court concluded that, upon a review of the record as a whole, an appellate court must determine whether the attorney's ineffectiveness was the cause of the termination order. If it is unlikely that the result in the case would have been different in spite of a more perfect representation by the attorney, the termination order must stand. *Id.* at 1044.

229 *Id.* at 1045.

hearing was fundamentally fair and any ineffectiveness by the attorney "played no part in the result."[230]

C. The Practical Differences between the *Strickland* and *Geist* Standards

Is there an actual and practical difference between the fundamental-fairness standard as articulated in *Geist* and the *Strickland* standard? At least one court has suggested that the standards are essentially the same.[231] Others have suggested that the results under the two standards may not differ. [232] A comparison of cases with similar facts decided under

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230 *Id.* One of the judges who wrote a separate opinion stated that ineffectiveness should be more difficult to prove in a termination case than in a criminal case because of the extraordinary need for finality in the termination case. *Id.* at 1055 (Beck, J. concurring). He would require parents to make a "strong showing" of ineffectiveness. *Id.* (Beck, J. concurring). Another separate opinion found essentially no difference between the standard that the majority claimed to be using and the standard in criminal cases. *Id.* at 1046 (Montemuro & Johnson, JJ., concurring and dissenting).

231 *E.H.*, 880 P.2d at 13 n. 2. ("We believe that *Geist* essentially adopts the *Strickland* test in holding that the parent must show inadequate performance by counsel and that the inadequacy prejudiced the parent's case.").

232 *James W.H.*, 849 P.2d 1079 at 1082 (describing *Strickland* as the majority position, and noting that although "contrary authority appears to provide lesser standards, ... we are not certain that the result reached would have been different under the criminal law standard."). *See also L. W. v. Dept. of Children & Farms.*, 812 So. 2d 551, 556 (Fla. 1st Dist. App. 2002) (applying *Strickland* and stating that "[i]t is not clear to us how these civil standards of ineffective assistance of counsel differ in practice from the criminal standard announced in *Strickland*").

the different standards demonstrates, however, that there is a difference in practical application.

(1) The Performance-of-Counsel Prong

The performance of counsel is the focus of the first prong of both the *Strickland* standard and the fundamental-fairness test. The *Strickland* inquiry is whether counsel's performance was reasonable under all of the circumstances.[233] Under *Geist*, the court looks at the totality of circumstances and determines whether the parent was denied a fair trial because of counsel's performance.[234] With both standards the burden of proof is on the person claiming ineffective assistance of counsel.[235] *Strickland* calls for a "strong" presumption that counsel's performance was adequate, with a "highly deferential" review of the attorney's performance,[236] whereas *Geist* does not mention any presumption of adequacy.

It is likely that in both Stephens and Eldridge[237] the Oregon court would not have come to the same result on the performance prong if it had applied the *Strickland* standard. The Stephens opinion does not state what attempts, if any, the attorney made to assist the father, who was at a substance-abuse treatment center, to obtain permission to leave the center so that he could attend the termination

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233 *Strickland*, 466 U.S. at 689.

234 *Geist*, 796 P.2d at 1203.

235 *Strickland*, 466 U.S. at 690; *Geist*, 796 P.2d at 1203.

236 *Strickland*, 466 U.S. at 689.

237 For additional discussion of the facts in these cases, *see supra* at 218-20.

hearing. In *Strickland*, the Court said the reasonableness of an attorney's conduct could be "determined or substantially influenced by the defendant's own statement or actions."[238] A court using the *Strickland* standard would likely determine that it was reasonable for the attorney to expect that the father would appear at the hearing on his own unless he notified the attorney that there was a problem. *Strickland's* presumption that counsel's performance was adequate would not have been overcome in Stephens without a showing that counsel had a duty to ensure the presence of his client at the hearing, or that the attorney's failure to do so was unreasonable.

In Eldridge the mother apparently never attempted to make contact with her attorney even though he had been appointed several months earlier. Because counsel had not heard from the mother, he did not prepare for the termination hearing. In a *Strickland* jurisdiction, a court would likely say that the mother's own conduct substantially influenced her counsel's lack of preparation. Given *Strickland's* presumption of the reasonableness of attorney performance and highly deferential manner of reviewing that performance, it may, then, be reasonable for counsel in a *Strickland* jurisdiction who has not heard from the parent to assume that he does not need to prepare for the hearing.[239]

The Missouri Court of Appeals upheld an ineffectiveness claim in *J.C.*, in which the parents'

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238 *Strickland*, 466 U.S. at 691.

239 This determination may depend upon the practice in the jurisdiction: Must the court-appointed attorney contact the parent, or is the parent to contact the attorney?

counsel was passive through the hearing, did not object to any of the reports that composed the state's entire case, and did not bring the parents into the courtroom. The appellate court concluded that the attorney's failure to advocate for the parents deprived them of a meaningful opportunity to be heard.[240] In a *Strickland* jurisdiction, however, the failure to demonstrate what adequate counsel would have presented on behalf of the parents or what documents an effective attorney reasonably would have objected to, and why, would have been fatal to the ineffectiveness claim.

In an Oklahoma case applying *Strickland*,[241] the mother claimed that her attorney was ineffective. She was stowing a jail sentence for grand larceny at the time of the termination trial,[242] her lawyer had not been in touch with her for several months, and he did not know that she was incarcerated.[243] At the trial the mother asked that her attorney withdraw from representing her because he was not prepared.[244] The trial court blamed the mother for not keeping in touch with her attorney, and told her to choose between keeping her present attorney and representing herself. She chose the former.[245] The mother's

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240 *J.C.*, 781 S.W.2d at 228-29.

241 *Chappell v. State (In re K.L.C.)*, 12 P.3d 478 (Okla. Civ. App. 2000).

242 *Id.* at 479.

243 *Id.* at 481.

244 *Id.*

245 *Id.* The court first attempted to reschedule the matter, but was unable to do so. *Id.*

attorney was able to interview some witnesses before they testified because the trial went into a second day.[246] The appellate court, applying *Strickland*, found that the mother had not shown that her counsel was deficient.[247] If this appellate court had applied the standard used by the Oregon court in Eldridge, however, it would have focused on the fundamental fairness of the proceeding and concluded that counsel's lack of preparation constituted inadequate performance.

A Vermont case[248] also illustrates the practical differences between the two standards. The father had been accused of sexually abusing his two children. The termination hearing, in which the father's attorney zealously represented him during the first few trial days, took seven days, spread over several months.[249] Prior to the fifth day of trial, the attorney learned that the father had been charged with sexually abusing his two stepchildren, and that the allegations were similar to those made by the children who were the subjects of the termination proceeding. The father's attorney then attempted unsuccessfully to withdraw from the case, telling the court that he could no longer represent the father and that he had serious doubts about the father's conduct.[250] Instead of calling the large number of witnesses that the attorney originally planned to present, he called only four, including the

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246 *Id.* at 482.

247 *Id.*

248 *M.B.*, 647 A.2d 1001.

249 *Id.* at 1003.

250 *Id.*

father and the foster parents. The direct examination of the witnesses was brief. On appeal, the father argued that counsel's inadequate performance was shown by the motion to withdraw, the attorney's statement to the court that he had serious doubts about the father, the brevity of the father's case in chief and the failure to call the additional witnesses. Applying the *Strickland* standard, the court noted that the father did not specify what additional evidence would have come from the witnesses who were not called, and concluded that the father failed to show that his counsel was inadequate.[251]

It is possible to view this attorney's performance, as the Vermont court implicitly did, as warranted by the strategic or tactical decisions he had to make when the new sexual-abuse allegations came to light. It is also possible to view the case as denying the father a fair trial once the attorney moved to withdraw, because the attorney effectively abandoned the father after that point in the process. If the case is viewed from the latter perspective and the fundamental-fairness standard is applied, the attorney's performance would appear to be inadequate.

(2) The Prejudice Prong

Both *Strickland* and *Geist* require a showing of prejudice. Under *Strickland*, this means that the parent must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result

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251 *Id.* at 1005. The court also concluded that the father failed to specify the ways in which any incompetence of counsel prejudiced his case to the extent that it could infer a reasonable probability of a different outcome. *Id.*

of the proceeding would have been different."[252] The *Geist* prejudice test is whether counsel's inadequate performance denied the parent a fair trial, and whether the result would have been the same if the parent had adequate counsel.[253] The prejudice prongs of both standards are articulated in similar fashion, and it is difficult to discern from the words alone whether the results obtained would differ depending upon which standard was used. Both seem to have a "but for" test: a requirement that the parent show that but for the attorney's performance, the parent would have prevailed. Regardless, however, of whether the verbal descriptions of the two prejudice prongs indicate that similar or dissimilar results would be obtained, in practice the results prove to differ.

For example, in *Stephens*,[254] it appears that the court shifted the burden of showing prejudice from the father to the state. The opinion does not recite what testimony the father would have given if he had been at the hearing or if his lawyer had been competent, except that the court reports that the record contained evidence that the father was undergoing substance-abuse treatment, was working on his domestic-violence issues, and was loving and gentle to the child.[255] The court said that it did not know what evidence the father could present about his treatment progress, but it would not assume that his prognosis

252 *Strickland*, 466 U.S. at 694.

253 *Geist*, 796 P.2d at 1204.

254 12 P.3d 537.

255 *Stephens*, 12 P.3d at 540.

was poor.[256] Under a *Strickland* standard, the father would have had to come forward with evidence that would have been presented if he had received adequate representation, and that evidence would have had to demonstrate a probability that his parental rights would not have been terminated. Without that evidence, it is difficult to see how he could have prevailed on the *Strickland* prejudice prong. Although the court seems to rely on the attorney's lack of a theory of the case, there is no suggestion as to what theory counsel could have presented that would have been likely to result in a different outcome. There is consequently a strong likelihood that *Stephens* would have turned out differently under the *Strickland* prejudice prong.

In *Eldridge*[257] the Oregon court found prejudice despite the state's argument that the termination of the mother's parental rights was inevitable. The record showed that the mother had a home where she could live with the children, and there was no evidence of current substance abuse. The court noted that although the record showed that the mother had been homeless with a serious alcohol problem a few years earlier, she now had a clean home with enough space for her children. She had two prior drug convictions, but there was no evidence of a current drug or alcohol problem. She had not cooperated with the social workers or her attorney, but the record showed that the efforts of the social workers and her attorney were half-hearted. Thus, the court said, it could not find that it was inevitable that her parental rights would

256 *Id.* at 544.

257 986 P.2d 726.

be terminated.[258] The court's analysis, however, relies more on what the record doesn't show than it does on any affirmative demonstration by the mother of a reasonable probability that her parental rights would not have been terminated if her attorney had been prepared. *Strickland* requires a greater showing of prejudice than this.

Likewise, in *J.C.*,[259] the failure of the parents to make any demonstration as to what their witnesses would have presented, or what theory or defense would have been made for them by an adequate attorney, goes to the prejudice prong as well as to the performance prong. In a *Strickland* jurisdiction, the court would require some showing that the outcome would have been different unless it were willing to presume prejudice.

It is arguable that a *Strickland* jurisdiction may be willing to presume prejudice in cases with facts similar to those in *Stephens*, *Eldridge*, and *J.C.*[260] A presumption of prejudice is doubtful, however, because in all three cases there was representation, albeit minimal, by the attorneys. Following the

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258 *Eldridge*, 986 P.2d at 731.

259 781 S.W.2d 226.

260 *Geist* does not mention a presumption of prejudice or suggest that there are circumstances in which prejudice need not be shown. Given the emphasis in *Geist* on fairness, however, it seems likely that a jurisdiction employing the fundamental-fairness standard would presume prejudice when there was an actual or constructive denial of the right to be heard. Nonetheless, the opinions in *Rogers*, *Thomas*, and *J.C.* do not discuss the presumption of prejudice.

Supreme Court's decision in *Flores-Ortega*,[261] It is not likely that minimal participation by an attorney will lead to a court's presuming prejudice. Instead, courts may view these cases as involving "mere attorney error,"[262] which makes the prejudice prong of *Strickland* applicable, and refuse to presume prejudice. Nonetheless, particularly in *J.C.*, there does appear to have been a failure by trial counsel to subject the state's case to "meaningful adversarial testing," which under *Cronic* would be a sufficient basis on which to presume prejudice.[263]

With regard to both the performance and prejudice prongs, then, these few cases from Oregon, Missouri, Oklahoma, and Vermont illustrate that there can be a real and practical difference in the outcome of ineffectiveness claims between jurisdictions that apply the fundamental-fairness standard of *Geist* and those that have adopted *Strickland*.

IX. A Framework for Determining the Ineffectiveness Standard in Parental-Rights Termination Cases

When a court is presented with an ineffectiveness claim as a matter of first impression in a parental-termination case, it must determine which ineffectiveness standard to adopt.[264] Although a court in a

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261 528 U.S. 470.

262 *Id.* at 482.

263 *Cronic*, 466 U.S. at 659.

264 While it is possible for a legislature or a rule-making body to prescribe the ineffectiveness standard in a statute or rule, I have found no jurisdiction in which that has been done. It is through decisional law that standards for judging ineffectiveness have been developed.

jurisdiction that applies the *Strickland* standard in criminal cases may be inclined to adopt *Strickland* for parental-rights cases, that adoption should not be automatic. As the Oregon Supreme Court pointed out in *Geist*, the substantive and procedural rules applicable to criminal cases have differed historically from the rules applicable to cases involving children.[265] Termination proceedings, while formal, do not have all of the procedural safeguards of criminal proceedings. With few exceptions, proof beyond a reasonable doubt is not required in termination cases; the parents are not judged by a jury; and there are often significant exceptions to the application of the rules of evidence. The procedural safeguards protecting a criminal defendant against an erroneous determination of guilt may justify a stricter standard than that necessary in parental-termination hearings where the procedural safeguards are diminished, and so the risk of an erroneous decision is greater than in a criminal case.

Instead of assuming that *Strickland* should apply to termination cases because it applies to criminal cases, courts should focus on the purpose of the requirement for effective counsel in termination cases, and on how a particular ineffectiveness standard will effect that purpose. Courts should also consider whether there are additional purposes to be achieved by the ineffectiveness standard. Finally, courts should examine the standards adopted by other jurisdictions, assess

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265 *See e.g. V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983); *Danforth v. St. Dept. of Health & Welfare*, 303 A.2d 794, 796-801 (Me. 1973); *In re A.S.A.*, 852 P.2d 127, 129-30 (Mont. 1993); *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703, 706 (Okla. 1990).

their practical impact, and compare their advantages and disadvantages.

A. The Purpose of Effective Counsel in Parental-Termination Cases

The reason generally given for requiring effective counsel in parental-termination cases is the importance of the fundamental rights at issue.[266] A fair trial is necessary to protect the basic parental interest at stake and to achieve a result upon which everyone can rely. Effective counsel is essential to a fair trial and to reducing the risk of an erroneous deprivation of the parent's rights. Counsel plays a critical role in exposing any weaknesses in the government's evidence and arguments, and in presenting evidence and argument in support of the parent.

Because the purpose of effective counsel is a fair trial, the ineffectiveness standard must be aimed at ensuring one. If the sole purpose of the ineffectiveness standard is to achieve a fair trial, then the standard is simple: If the level of counsel's performance is inadequate, a fair trial has not been achieved, and the judgment should be vacated. In other words, there would be no separate prejudice prong because the prejudice suffered by the parent is the lack of a fair trial.

A court could decide, however, that there are several objectives to be obtained by an ineffectiveness

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266 *See e.g. V.F. v. State*, 666 P.2d 42, 45 (Alaska 1983); *Danforth v. St. Dept. of Health & Welfare*, 303 A.2d 794, 796-801 (Me. 1973); *In re A.S.A.*, 852 P.2d 127, 129-30 (Mont. 1993); *Michael F. v. State ex rel. Dept. of Human Servs. (In re D.D.F.)*, 801 P.2d 703, 706 (Okla. 1990).

standard, and that the assurance of a fair trial is merely one among them. If so, methods for accomplishing the other objectives will have to be considered in deciding upon the ineffectiveness standard.

Secondary goals play an important role in the *Strickland* standard. While *Strickland* is based on the belief that a fair trial is the basis for the Sixth Amendment's right to counsel,[267] the *Strickland* standard is also aimed at securing at least two additional goals. The first is to discourage the proliferation of ineffectiveness challenges" by unhappy litigants.[268] Another is to promote the efficiency of the process. Because of the number of ineffectiveness claims in criminal cases, the Court wanted to keep them from overwhelming the judicial system by both discouraging the claims, and by requiring the courts to process them in an efficient manner.

The legitimacy of these secondary goals in the criminal arena cannot be disputed. Undoubtedly, there are a number of criminal defendants who, once incarcerated, occupy their time by attempting to vacate their convictions. The Court was rightly concerned that an easily surmountable ineffectiveness standard would flood the courts with their claims. *Strickland's* high standard discourages those claims, and also effects the desirable goal of processing them as efficiently as possible.

Limiting claims, efficiently processing claims, and disallowing attacks on the competency of the lawyers who serve the system are all worthwhile

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267 *Id.* at 686.

268 *Id.* at 690.

objectives of an ineffectiveness standard for parental-termination cases, just as they are for criminal cases. Whether these secondary objectives should receive such prominence, and whether they distract from the primary goal of a fair trial, however, is open to debate. Also, whether these same objectives should rise to the level of importance in parental-termination proceedings that they have in criminal cases is likewise subject to argument.

The prominence of secondary objectives in parental-termination cases should be considered in light of the procedural safeguards granted to criminal defendants that are not available to parents. The lesser procedural safeguards afforded the parents may make it more important for courts hearing parental-termination claims to avoid reflexively adopting an ineffectiveness standard that discourages claims or dooms most of them to failure.

One secondary objective that a court should consider in the termination arena, however, is finality. Because of the strong societal interest in stabilizing the child's situation and allowing a child who has been abused or neglected to be loved and cared for by adoptive parents, both the finality of the termination order and the speed with which finality is achieved are more important in a termination judgment than they are in a criminal conviction. To the extent that discouraging ineffectiveness claims helps to achieve finality sooner rather than later, then, a court may want to consider adopting mechanisms in the chosen standard that discourage ineffectiveness claims.

B. Assessing Differences Between the Established Standards and Considering Their Individual Advantages

In addition to reviewing the objectives to be achieved by adopting an ineffectiveness standard, a court will also want to assess the practical differences between those it is considering because case outcomes under the *Strickland* standard differ from those under the fundamental-fairness standard. The strong presumption of counsel's adequacy in *Strickland* makes jurisdictions applying it more likely to find an attorney's performance adequate. Although the words used in both the *Strickland* standard and *Geist's* fundamental-fairness standard to describe the prejudice prong are similar, the fundamental-fairness jurisdictions are more willing to find that the attorney's inadequate performance has prejudiced the parent. Therefore, in assessing which of these two standards to adopt, a court should expect to face more successful ineffectiveness claims under the fundamental-fairness standard than under the *Strickland* standard. Additionally, courts should consider the advantages and disadvantages of the standards.

1. Advantages of the *Strickland* Standard

The advantages of the *Strickland* standard are several. First, it has been clearly enunciated and refined by the Supreme Court. Second, because it is the standard used in the large number of Sixth Amendment ineffectiveness cases, it is known to both judges and to attorneys who practice in the criminal courts, some of whom also represent parents in termination proceedings. Third, the *Strickland* standard

is so often applied that a large body of case law has developed on both its performance and its prejudice prongs.[269] This large body of precedent guides attorneys and judges involved in termination proceedings as to the quality of performance expected from lawyers, and increases the courts' and the parties' ability to predict the result of an ineffectiveness claim.

The *Strickland* standard also has drawbacks. It has been widely criticized[270] for, among other things, encouraging—or at least tolerating—a low level of attorney competence because so little is expected of an attorney under *Strickland*. It is also charged that this low level of competence results in the underfunding of public-defender offices, contract programs, and appointed-counsel systems, for if little is expected of defense attorneys, funds do not have to be expended on attracting highly qualified lawyers to these jobs, upgrading their status, or supporting continuing-education programs that would raise their level of competence. *Strickland's* history also demonstrates

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269 *See Burkoff & Burkoff*, *supra* n. 25, a treatise devoted to Sixth Amendment ineffectiveness cases.

270 *See e.g.* Martin C. Calhoun, *Student Author, How to Thread the Needle. Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 Geo. L.J. 413 (1988); Richard L. Gabriel, Student Author, *The Strickland Standard for Claims of Ineffective Assistance of Counsel. Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. Pa. L. Rev. 1259 (1986); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 Am. Crim. L. Rev. 180 (1984); Klein, *supra* n. 17; Michael Patrick O'Brien, student author, *Judicial Jabberwocky or Uniform Constitutional Protection? Strickland v. Washington and National Standards for Ineffective Assistance of Counsel Claims*, 1985 Utah L. Rev. 723 (1985).

that ineffectiveness claims brought where its standards apply are seldom successful. While this may be a secondary purpose of the *Strickland* standard, discouraging claims can be viewed as a disadvantage if it keeps worthwhile claims out of court. *Strickland's* prejudice prong, for example, excuses the incompetence of an attorney when there is unassailed evidence of the parent's unfitness. This is true even in cases in which the trial record does not demonstrate the defenses to, or the weaknesses of, the government's case because incompetent counsel failed to make that demonstration.

2. Advantages of the Fundamental-Fairness Standard

The advantages and disadvantages of the fundamental-fairness standard are somewhat the opposite of those for the *Strickland* standard. The fundamental-fairness standard has not been articulated by the Supreme Court, and it has been described in slightly varying versions by state courts. It is not widely applied, and is unfamiliar to judges and lawyers. Only a small body of precedent applying it has developed. On the other hand, the fundamental-fairness standard seems likely to raise the level of attorney competence because it makes counsel more responsible for ensuring that the parents receive a fair trial. It can also be seen as more flexible because it is less doctrinaire than the *Strickland* standard.

C. Considering Alternate Standards

In addition to the *Strickland* standard and the fundamental-fairness standard, it may be useful for courts to look at the standards developed by those few

jurisdictions that have rejected or modified *Strickland* for criminal cases. These modifications have had the effect of making ineffectiveness claims slightly easier to prove.[271] Commentators have also suggested standards that they believe would better ensure a fair trial and that have the secondary benefit of raising the level of attorney competence.[272]

A variation of *Strickland* that a court may want to consider is to adopt the performance prong of *Strickland* and to require the parent to make a showing of prejudice, but to place the burden on the state once the parent comes forward with specific examples of substantial errors or omissions by counsel.[273] This would be analogous to the harmless-error rule adopted by the Supreme Court when the

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271 Hawaii rejected *Strickland* as being "unduly restrictive" and almost impossible to meet. *Briones v. State*, 848 P.2d 966, 977 (Haw. 1993). Hawaii requires the criminal defendant to point to specific errors or omissions that show counsel's lack of skill, judgment, or diligence, and to demonstrate that the errors or omissions result "in either the withdrawal or substantial impairment of a potentially meritorious defense." *State v. Antone*, 615 P.2d 101, 104 (Haw. 1980). New York's standard appears less exacting than *Strickland*. Whether the defendant would have obtained a different result but for counsel's error is relevant, but it is not dispositive. *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998). Alaska's prejudice prong is said to be "significantly less demanding than *Strickland*'s." *State v. Jones*, 759 P.2d 558, 572 (Alaska App. 1988).

272 *See e.g. Calhoun*, *supra* n. 270, at 437-48.

273 *See U.S. v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973) (indicating, before *Strickland* was decided, that once the defendant showed a substantial error by counsel, the state had to prove the absence of prejudice beyond a reasonable doubt).

error is of constitutional dimension.[274] Utilizing this traditional harmless-error analysis, if a parent demonstrates that her attorney was incompetent, the burden shifts to the government to show that the attorney's errors were harmless.[275] One reason to adopt an ineffectiveness standard that places the burden of showing lack of prejudice on the state is because doing so emphasizes the fair-trial objective over the objective of discouraging claims.

D. Summary

Appellate courts faced with choosing a framework to use when deciding upon an ineffectiveness standard for termination cases should start by considering the purposes they want to achieve. A court should explore the standards adopted by other jurisdictions and determine which will best accomplish the purposes it

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274 *Chapman v. Cal.*, 386 U.S. 18 (1967). The constitutional error in Chapman was the prosecutor's comment on the defendants' failure to testify. Both the majority opinion (written by Justice Black) and Justice Stewart's concurring opinion noted that prior cases had held the right to counsel so fundamental that the denial of the right could never be considered harmless. *Id.* at 827-28, 837 (Stewart, J., concurring).

275 An additional variation on this theme would be to substitute the burden of clear and convincing evidence for the *Chapman* burden of proof beyond a reasonable doubt because the former burden is the one already used for termination cases in most states.

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hopes to achieve. In reviewing other standards, a court should look at the ways in which they have been applied and assess actual case outcomes. Comparing the advantages and disadvantages of the standards is also useful. Once a court has made the analysis suggested by this framework and articulated its reasons for choosing a standard, the resulting standard is likely to accomplish both its primary objective--fair trials--and any secondary purposes that the court considers important.

X. Conclusion

Because of the large number of cases in which the state seeks to terminate parental rights, and because the parents in such cases are usually represented by inexperienced, underpaid, and overburdened counsel, the number of cases in which a parent claims ineffective assistance of counsel is mounting. To deal with the ineffectiveness claims in parental-termination cases, courts must establish a procedure by which these claims can be brought to their attention. That procedure must balance the needs of the child with the interests of the parent and those of the government.

The three procedures generally considered for this purpose are direct appeal, post-judgment motions, and habeas corpus. Because delay is adverse to the interests of all the parties, and especially to the interests of the child, the procedure likely to generate the least delay is the most advantageous. That procedure will in most jurisdictions be a direct appeal with a mechanism for remand when the appellate court is persuaded that a remand to the trial court for further development of the record is appropriate.

Appellate courts must also determine which standard of ineffectiveness to apply to ineffectiveness claims in parental-rights cases. No court should adopt the *Strickland* standard for parental-termination cases simply because it applies *Strickland* to criminal cases. Both the *Strickland* standard and the fundamental-fairness standard have advantages and disadvantages, all of which should be carefully examined by a court facing its first ineffectiveness claim in a parental-rights termination proceeding.