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6-1-1990

## California Welfare and Institutions Code Section 317: Advocating a Change to Require Independent Counsel for All Children

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### Recommended Citation

Martha Helppie, *California Welfare and Institutions Code Section 317: Advocating a Change to Require Independent Counsel for All Children*, 23 Loy. L.A. L. Rev. 1385 (1990).

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# CALIFORNIA WELFARE AND INSTITUTIONS CODE SECTION 317: ADVOCATING A CHANGE TO REQUIRE INDEPENDENT COUNSEL FOR ALL CHILDREN

## I. INTRODUCTION

Children have been viewed traditionally as extensions of their parents<sup>1</sup> rather than as individuals in their own right.<sup>2</sup> The traditional focus is on the parental duty to protect and the right to care for children because children lack the maturity and rationality to care for themselves.<sup>3</sup> The assumption is that a child and his or her parent will usually have identical interests.<sup>4</sup> A child's right to personal autonomy<sup>5</sup>— including the right to protection from intervention by the state<sup>6</sup>— actually derives from the parent's right to make important choices in family matters.<sup>7</sup>

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1. The use of the word "parent" encompasses both the singular and plural.

2. Coons & Mnookin, *Toward a Theory of Children's Rights*, in *THE CHILD AND THE COURTS* 391 (1978). See also McGough & Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 *EMORY L.J.* 209, 210 (1978). The traditional view is a product of English common law as it was at the time of the American colonization. *Id.* at 217.

3. Montgomery, *Children as Property?*, 51 *MOD. L. REV.* 323, 332 (1988).

4. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem*, 13 *CAL. W.L. REV.* 16, 18 (1976).

5. See *Parham v. J.R.*, 442 U.S. 584, 604 (1979).

6. W. WADLINGTON, C. WHITEBREAD & S. DAVIS, *CHILDREN IN THE LEGAL SYSTEM* 47 (1983) [hereinafter *CHILDREN IN THE LEGAL SYSTEM*].

7. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). The United States Supreme Court has said that the fourteenth amendment to the United States Constitution gives parents the "freedom of personal choice in matters of family life." *Id.* The Court has noted that the "Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

In 1923, the Court had to decide the constitutionality of a Nebraska statute which mandated that only the English language be taught in private or public school. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court noted that education had "always" been extremely important to the American people. *Id.* at 400. The Court concluded that parents had a duty to educate the children they had control over. *Id.* If parents wanted to allow their children to learn another language, the Court said, the parents had the right to such instruction. *Id.* Following *Meyer*, the Court has repeatedly held that parents have a duty to their children as well as the power to control them. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (state law requiring all children to attend school until age 16 must exempt children whose parents' religious beliefs do not allow such attendance); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (federal act requiring parents to send children to public school interferes with liberty of parents to direct children's upbringing and education).

However, sometimes a parent will act in a manner that may be contrary to the best interests of the child.<sup>8</sup> When the state decides that a parent is not acting in his or her child's best interests,<sup>9</sup> the state may bring an action against the parent.<sup>10</sup>

In California, if the state brings an action against the parent, alleging child abuse or neglect, the very young child could well become a mere bystander in a game of legal "tug-of-war." The quiescent child waits as the state and the parent, two forceful sources of power, struggle to gain control. Both the state and the parent proclaim that they are maintaining the struggle so as to attain the child's best interests. Sometimes the child's interests would be best served if the parent prevailed; at other times, the child might be in a better position if the court were to follow the state's recommendations; sometimes neither the parent's position nor the state's position will adequately further the child's interests. The child's best interests would be furthered by the appointment of an independent advocate who could participate in the struggle on behalf of the child.<sup>11</sup>

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8. See, e.g., *In re Patricia E.*, 174 Cal. App. 3d 1, 4, 219 Cal. Rptr. 783, 784 (1985); *In re Edward C.*, 126 Cal. App. 3d 193, 198, 178 Cal. Rptr. 694, 697 (1981); *In re La Shonda B.*, 95 Cal. App. 3d 593, 596, 157 Cal. Rptr. 280, 281 (1979).

9. See *Parham*, 442 U.S. at 603; *In re Laura F.*, 33 Cal. 3d 826, 836, 662 P.2d 922, 928, 191 Cal. Rptr. 464, 470 (1983). This "best interests" standard is codified in California law. See CAL. WELF. & INST. CODE § 245.5 (West 1984). Its basic purpose is to "maximize a child's opportunity to develop into a stable, well-adjusted adult." *In re Michelle T.*, 44 Cal. App. 3d 699, 704, 117 Cal. Rptr. 856, 858 (1975). See also *In re Jessica B.*, 207 Cal. App. 3d 504, 254 Cal. Rptr. 883 (1989); *In re Solomon L.*, 190 Cal. App. 3d 1106, 236 Cal. Rptr. 2 (1987); *In re Raymond H.*, 175 Cal. App. 3d 556, 221 Cal. Rptr. 165 (1985); *In re Jamie M.*, 134 Cal. App. 3d 530, 184 Cal. Rptr. 778 (1982). But see *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) ("the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values").

10. The state may regulate families based on the doctrine of *parens patriae* as well as through its police power. Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198 (1980) [hereinafter *Developments in the Law*]. Under the police power, the state may prevent one citizen from harming another. *Id.* In contrast, *parens patriae* revolves around the state's paternalistic interest in protecting children. *Id.* at 1199. *Parens patriae* "refers traditionally to [the] role of [the] state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 579 (5th ed. 1983). In the child-dependency area, the state may supersede parental power if the child's parents are "unfit" or "unable" to properly care for the child. *Developments in the Law, supra* at 1201-02. The state seeks justice by becoming a quasi-parent for a child alleged to be at risk of parental abuse. *Child Abuse and Neglect*, 1 CHILDREN'S LEGAL RTS. J., July/Aug. 1979, at 36, 37.

11. See, e.g., *In re Melissa S.*, 179 Cal. App. 3d 1046, 1056-59, 225 Cal. Rptr. 195, 201-03 (1986); *Patricia E.*, 174 Cal. App. 3d at 7-10, 219 Cal. Rptr. at 786-88; *In re David C.*, 152 Cal. App. 3d 1189, 1207-08, 200 Cal. Rptr. 115, 127 (1984). See also *infra* notes 222-88 and accompanying text.

California Welfare and Institutions Code section 317<sup>12</sup> addresses the right to counsel in the juvenile dependency court system, which operates to protect the abused or neglected child.<sup>13</sup> Under section 317, the California Legislature does not provide mandatory independent counsel for children.<sup>14</sup> The statute allows independent representation to be accorded at the court's discretion.<sup>15</sup> The court will accord a child independent counsel providing the court determines that the child would benefit from counsel or finds that a conflict exists between the child and the child welfare agency.<sup>16</sup> However, in practice, a child must rely on the agency's attorney to disclose a conflict to the court.<sup>17</sup> If the court fails to find a conflict between the child welfare agency and the child, the child will be represented by the agency's counsel.<sup>18</sup> This practice fails to take into account the state's inherent conflict with the child's interests.<sup>19</sup> The practice is ineffective in furthering the child's best interests because the agency's attorney is advocating for a client who can never solely focus on

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12. CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

13. Specifically, this section of the Code provides:

317. Appointment of counsel

(b) When it appears to the court that a parent . . . of the minor is unable to afford and cannot for that reason employ counsel, and the minor has been placed in out-of-home care, or the [child welfare] agency is recommending that the minor be placed in out-of-home care, the court *shall* appoint counsel, unless the court finds that the parent . . . has made a knowing and intelligent waiver of counsel.

(c) In any case in which it appears to the court that the minor would benefit from the appointment of counsel the court shall appoint counsel for the minor. . . . The court shall determine if representation of both the [child welfare] agency and the minor constitutes a conflict of interest. If the court finds there is a conflict of interest, separate counsel shall be appointed for the minor.

*Id.* (emphasis added).

California supports a child welfare system through county child welfare agencies. *Id.* § 16500. Each county maintains operation of a child welfare service program. *Id.* Per Code section 16501, "child welfare services" are directed at the following: "(a) protecting and promoting the welfare of all children . . . (b) preventing or remedying, or assisting in the solution of problems which may result in the neglect, abuse, exploitation, or delinquency of children; (c) preventing the unnecessary separation of children from their families . . ." *Id.* § 16501.

If a report of neglect or abuse is made to the county welfare agency, then the agency must assess the situation through the use of "collateral contacts, a review of previous referrals, and other relevant information . . ." *Id.* § 16504.

14. *Id.* § 317.

15. *Id.*

16. *Id.*

17. See *In re Melissa S.*, 179 Cal. App. 3d 1046, 1054, 225 Cal. Rptr. 195, 199 (1986); Demchak, *Abused and Neglected Children*, YOUTH L. NEWS 23, 28 (1988). This practice is particularly dangerous for children four years of age or younger because a young child cannot verbalize to the agency that he or she is aware of a conflict. Further, even children who can verbalize a conflict may not have the conflict recognized. Kline, *Children of the Court*, CAL. LAW., Sept. 1989, at 69, 72.

18. CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

19. See *infra* notes 53-65 and accompanying text.

the child's best interests.<sup>20</sup>

Section 317 has additional inadequacies. For example, section 317(e) requires that the child be "interviewed" by the child's counsel at or prior to the detention hearing *if* the child is four years of age or older.<sup>21</sup> The purpose of this interview is to "determine the minor's wishes *and* to assess the minor's well-being."<sup>22</sup> Children under four years of age do not have to be interviewed by counsel.<sup>23</sup> Without an interview, the well-being of young children cannot be assessed by counsel.<sup>24</sup> Consequently, counsel lacks personal knowledge about the child and can show neither that independent counsel would benefit the child nor that a conflict exists between the state and the child. This, in essence, completely obliterates the chances of a child under the age of four being granted independent counsel.

The United States Supreme Court has not yet addressed the issue of whether children in juvenile dependency court proceedings are constitutionally guaranteed independent counsel.<sup>25</sup> In the absence of a Supreme Court holding that these children have the right to independent counsel, children's rights advocates will need to convince state legislatures that independent counsel is necessary for fair proceedings that will further the child's best interests.<sup>26</sup>

This Comment addresses the need for independent counsel for each child<sup>27</sup> entering the California juvenile dependency court system. First, the Comment gives an overview of the protective service system and de-

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20. See *Baltimore City Dep't of Social Servs. v. Bouknight*, 58 U.S.L.W. 4184 (1990); see also *infra* notes 53-65 and accompanying text.

21. CAL. WELF. & INST. CODE § 317(e) (West Supp. 1990).

22. *Id.* (emphasis added).

23. *Id.*

24. See, e.g., *David C.*, 152 Cal. App. 3d at 1207, 200 Cal. Rptr. at 127. See also *Michelle T.*, 44 Cal. App. 3d at 702, 117 Cal. Rptr. at 860.

25. Demchak, *supra* note 17, at 28. The Court has, however, held that independent counsel must be granted to juveniles in delinquency court proceedings. *In re Gault*, 387 U.S. 1, 41 (1966).

26. Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1879 (1987). Unfortunately, children cannot vote or lobby; thus, they are economically and politically powerless to advocate their own position. *Id.*

27. Although the proposed amendment to the Code, see *infra* notes 352-58 and accompanying text, will affect all children, the focus is on children under four years of age because these children cannot usually verbalize a conflict and the state does not require an independent assessment of these young children's well-being. See *supra* notes 17-24 and accompanying text. Although section 317 does give the courts discretion to appoint independent counsel for a child, most of the time the courts automatically appoint the local child welfare agency's counsel to represent the child. S. HONEA, ATTORNEYS' GUIDE TO CALIFORNIA DEPENDENCY CHILD CUSTODY LAW 68-69 (1980). The courts do so in the belief that the agency will serve the child's best interests. *Id.*

scribes the inherent conflict between the parent, the child, and the state. The Comment then analyzes both the conflict and state practices in detail, highlighting United States Supreme Court decisions, California case law, and the rationales which support requiring independent counsel for children in dependency court. The analysis will show why section 317 is not effective in furthering a child's best interests. Finally, the Comment proposes an amendment to section 317 of the California Welfare and Institutions Code. The author concludes that anything less than mandatory independent counsel for children conflicts with the state's intent—clearly outlined in both the statute and in case law—to further a child's interests in dependency proceedings.

## II. BACKGROUND

Traditionally, family matters have been the concern of the state, as opposed to the federal, government.<sup>28</sup> Although the "integrity of the family" is protected by the Due Process Clause of the fourteenth amendment of the United States Constitution,<sup>29</sup> the state may control families within certain parameters.<sup>30</sup>

The conflict between family members, as where a parent abuses a child, and the conflict between the state and family members create impediments to the California Legislature's drafting of child-protective statutes. Under current Welfare and Institutions Code sections 300 through 399,<sup>31</sup> the state is placed in the impossible position of protecting the interests of the child *and* the parent.<sup>32</sup> In addition, the state is interested in protecting its own interests.<sup>33</sup> The state's legal position is further complicated because the state's counsel is also commonly appointed to represent

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28. See *Developments in the Law*, *supra* note 10, at 1159.

29. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

30. *Minow*, *supra* note 26, at 1882 n.82. The expansion of protection for children has led to "greater judicial power and discretionary control over families." *Id.* The state can regulate family life in order to "[strengthen] the family as a valuable social institution." *Developments in the Law*, *supra* note 10, at 1160.

31. CAL. WELF. & INST. CODE §§ 300-99 (West 1984 & Supp. 1990).

32. For example, the Code emphasizes that the state should protect the best interests of the child. CAL. WELF. & INST. CODE § 245.5 (West 1984). This best interests standard must consider the child's "need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." *Id.* § 352(a). At the same time, the Code protects parental interests by providing that the state will not dictate specific parenting methods. *Id.* § 300(j) (West 1984 & Supp. 1990). The Code also provides that the state should focus on family reunification, which furthers parents' interest in the care and control of their children, but which may not coincide with the child's best interests. *Id.* §§ 361.5, 300(j).

33. See *infra* notes 53-65 and accompanying text.

the dependent child,<sup>34</sup> particularly the child who is four years of age or younger.<sup>35</sup> If section 317 were amended to require independent counsel for every child entering the system, the state would no longer be in such a difficult legal position. Most importantly, the individual rights of each child would be more specifically addressed.

To comprehend why this change is necessary and how it can be accomplished, an understanding of certain code sections and court procedures is essential. Such knowledge will clarify the current situation and emphasize how the legislature can minimize the problem of conflicting rights and interests.

### A. California Juvenile Dependency Procedures

In California, a child may be removed from the home of his or her parent and placed into temporary protective custody<sup>36</sup> if a peace officer has reasonable cause to believe that the child has suffered harm or there is a risk that the child will suffer harm<sup>37</sup> from parental abuse or

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34. See S. HONEA, *supra* note 27, at 68-69.

35. The court only declares a conflict if a conflict is presented to the court. CAL. WELF. & INST. CODE § 317 (West Supp. 1990). A child does not even have to be seen or interviewed by counsel unless the child is four years of age or older. *Id.* See also *supra* notes 17-25 and accompanying text. Thus, the court must rely on the state agency's evaluation of the child's situation.

36. CAL. WELF. & INST. CODE. § 305 (West 1984 & Supp. 1990). Under section 305, a peace officer may take a child into temporary custody if he or she has reasonable cause to believe the child falls within one of the provisions of section 300. *Id.* "Protective custody" has been defined as "[t]he condition of one who is held under force of law for his own protection . . . ." BLACK'S LAW DICTIONARY 639 (5th ed. 1983).

37. CAL. WELF. & INST. CODE § 300 (West Supp. 1990). This section defines the children who come within the jurisdiction of the court. Section 300 provides in pertinent part:

Any minor who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court:

(a) The minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm inflicted nonaccidentally upon the minor by the minor's parent . . . . For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the minor or the minor's siblings, or a combination of these and other actions by the parent . . . which indicate the child is at risk of serious physical harm. For purposes of this subdivision, "serious physical harm" does not include reasonable and age appropriate spanking to the buttocks where there is no evidence of serious physical injury.

(b) The minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the minor, or the willful or negligent failure of the minor's parent . . . to adequately supervise or protect the minor from the conduct of the custodian with whom the minor has been left, or by the willful or negligent failure of the parent . . . to provide the minor with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent . . . to provide regular care for the minor due to the parent's . . . mental illness, developmental

neglect.<sup>38</sup> The peace officer then contacts the county child welfare

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disability, or substance abuse. No minor shall be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family. . . .

(c) The minor is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, untoward aggressive behavior toward self or others, as a result of the conduct of the parent. . . .

(d) The minor has been sexually abused, or there is a substantial risk that the minor will be sexually abused . . . by his or her parent . . . or member of his or her household, or the parent . . . has failed to adequately protect the minor from sexual abuse when the parent or guardian knew or reasonably should have known that the minor was in danger of sexual abuse.

(e) The minor is under the age of five and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the minor. For the purposes of this subdivision, "severe physical abuse" means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness. . . .

(f) The minor's parent . . . has been convicted of causing the death of another child through abuse or neglect.

(g) The minor has been left without any provision for support; the minor's parent has been incarcerated or institutionalized and cannot arrange for the care of the minor; or . . . the whereabouts of the parent is unknown, and reasonable efforts to locate the parent have been unsuccessful.

(h) The minor has been freed for adoption . . . .

(i) The minor has been subjected to an act or acts of cruelty by the parent . . . or a member of his or her household . . . .

(j) The minor's sibling has been abused or neglected . . . .

*Id.*

38. *Id.* The number of reported cases of child abuse is increasing. Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 SANTA CLARA L. REV. 201, 203 n.5 (1987). Statistics reveal that in 1980, California had 175,200 reported child abuse cases. *Id.* There was an increase in 1985 to 295,769 reported cases. *Id.* The number of children under three years of age who are entering the dependency court system is increasing at an "alarming" rate. *Health Alarm for Foster Care*, L.A. Times, Nov. 30, 1989, at A3, col. 2. Between 1986 and 1989, the number nearly doubled, rising from 9,500 in 1986 to more than 18,000 in 1989. *Id.*

Further, a report by the Inter-Agency Council on Child Abuse and Neglect shows that child-abuse related deaths have substantially increased. *Area Child-Abuse Deaths Double*, Daily News (L.A.), Oct. 18, 1989, at 4, col. 2. The Los Angeles juvenile courts supervise 35,000 abused children and receive approximately 1,200 new cases each month. Kline, *supra* note 17, at 69. Some of this increase is due to an increase in actual incidents of abuse. Demchak, *supra* note 16, at 23. However, the increase also reflects the expansion of child protective services. *Id.* Children's Services workers in Los Angeles County currently average 60 ongoing cases per month. Kline, *supra* note 17, at 70. Recently, the union representing Los Angeles County Children's Services social workers sought to put a cap on social worker caseloads. *Children's Social Workers Threaten Strike in County*, Daily News (L.A.), Sept. 8, 1989, at 4, col. 2. The Service Employees International Union (Union) successfully negotiated a new contract with Los Angeles County, averting a walkout. *Child Welfare Workers' Union Ratifies Contract*, Daily News (L.A.), Oct. 3, 1989, at 4, col. 5. The County promised to hire 269 additional caseworkers. *Id.* According to the news report, the hiring of new caseworkers



agency,<sup>39</sup> and the agency decides whether it should take custody of the child.<sup>40</sup>

In deciding whether to take custody of the child or to release the child to his or her parent, the county child welfare agency must consider if there is any reasonable way to insure the child's safety without removing the child from parental custody.<sup>41</sup> If the agency feels that the child needs to remain in the agency's custody, the agency retains the child and then informs the parent of the child's detention.<sup>42</sup> The agency may then place the child in the home of a relative, in a foster home, or in a community care facility.<sup>43</sup>

Next, the county child welfare agency files a petition against the parent.<sup>44</sup> The first hearing, the detention hearing,<sup>45</sup> is held two judicial days later.<sup>46</sup> At the detention hearing, the child (if present) and the parent of the child are told why the child was taken into protective cus-

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will result in a reduction of worker caseloads from between 80 and 120 cases to between 40 and 50 cases. *Id.*

The agreement between the Union and the County did not *require* a "cap" on caseloads. *Id.* Further, even though the County will now be decreasing caseloads to between 40 and 50 cases per social worker, it should be noted that the Child Welfare League of America recommends that social workers have an ongoing caseload of not more than 17 cases per month. Kline, *supra* note 17, at 70. Thus, even with the new contract, the average Los Angeles County social worker still handles more than twice as many cases as is recommended. This places a difficult burden on each worker.

39. CAL. WELF. & INST. CODE § 306 (West 1984 & Supp. 1990). Section 306 pertains to the duties of the county child welfare agency. This section provides: "Before taking a minor into custody a social worker shall consider whether there are any reasonable services available to the worker which, if provided to the minor's parent . . . would eliminate the need to remove the minor from the custody of his or her parent. . . ." *Id.* The California Legislature expressly notes that preservation of the family is the focus of the dependency court. *Id.* § 300(j). The Code also provides that the court "shall order" the child welfare agency to provide services to the child and the child's parents in order to facilitate reunification. *Id.* § 361.5(a). At least one California court has noted the "dual purpose" of dependency proceedings. *See In re La Shonda B.*, 95 Cal. App. 3d 593, 599, 157 Cal. Rptr. 280, 283 (1979). The dual purpose, according to the court, is "to protect the welfare of the minor *and* to safeguard parents' right to properly raise their own child." *Id.* (emphasis added). In *Santosky v. Kramer*, Justice Rehnquist in his dissent also noted this dual purpose. 455 U.S. 745, 780 (1982) (Rehnquist, J., dissenting).

40. CAL. WELF. & INST. CODE § 306 (West 1984 & Supp. 1990). The duties of the county child welfare agency are subject to the regulations of the State Department of Social Services. *Id.* § 202.5. Although this section of the Code discusses "probation officers," the Code includes child welfare agency social workers within this definition. *Id.* § 215.

41. *Id.* § 306.

42. *Id.* § 307.4.

43. *Id.* § 361.2.

44. *Id.* § 332.

45. *Id.* § 315. This section states that the detention hearing is held to "determine whether the minor shall be further detained." *Id.*

46. *Id.* § 313.

today.<sup>47</sup> These parties are also informed of their right to representation by court-appointed counsel.<sup>48</sup> The parent is advised that counsel will be appointed if he or she cannot afford to employ counsel.<sup>49</sup> The court has the discretion to appoint independent counsel for the child.<sup>50</sup>

### B. *The Conflicting Interests of State, Parent and Child*

A parent has a duty to protect his or her child.<sup>51</sup> In California, if a parent fails to protect the child, then the state, through each county child welfare agency, may supersede parental authority and retain jurisdiction over the child.<sup>52</sup> However, although the parent and the state have duties to protect the child, it cannot be assumed that either of them will completely serve the child's interests.<sup>53</sup>

The state's duty to protect the child is coupled with the state's duty to the parent who has allegedly harmed the child.<sup>54</sup> However, this duty to the parent is joined with the state's duty to file an action *against* the parent.<sup>55</sup>

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47. *Id.* § 316. To be considered a dependent child and thus made a dependent of the juvenile court system, a child must meet one of the definitions set forth in section 300. See *supra* note 37 for the relevant provisions of section 300. In general, the definition of "dependent child," for the purposes of the juvenile dependency court system, includes children who have been neglected, or who have been physically, emotionally or sexually abused. CAL. WELF. & INST. CODE § 300 (West Supp. 1990).

48. *Id.* §§ 316-17.

49. *Id.* § 317(b).

50. *Id.* § 317(c).

51. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

52. See CAL. WELF. & INST. CODE §§ 306, 16501, 16504 (West 1984 & Supp. 1990).

53. The United States Supreme Court has stated, "[T]he state [and] the natural parents . . . are parties, and [both] contend that the position they advocate is most in accord with the rights and interests of the [child]." *Smith v. Organization of Foster Families*, 431 U.S. 816, 841 n.44 (1977). Since both the state and the parent will likely recommend that the court follow positions most favorable to their individual interests, it cannot be assumed that either party can protect the child's best interests. Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CALIF. L. REV. 681, 686 (1987).

54. *Parham*, 442 U.S. at 605 (*parens patriae* power of state also involves interest in "helping parents") (emphasis added). In *Parham*, the issue presented to the Court concerned the due process required for a child when the child's parents or the state determined that the child should be confined to a mental care facility. *Id.* at 587.

In *Santosky v. Kramer*, Justice Rehnquist noted that New York's child welfare system "seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role." 455 U.S. 745, 780 (1982) (Rehnquist, J., dissenting). "Fully understood," Justice Rehnquist explained, "the New York system is a comprehensive program to aid parents . . ." *Id.* (Rehnquist, J., dissenting). See also CAL. WELF. & INST. CODE § 300(j) (West Supp. 1990).

55. CAL. WELF. & INST. CODE § 311 (West 1984). This section provides in pertinent part:

In addition, the state has administrative burdens that conflict with the child's best interests. For example, the time spent on each case decreases as the number of children entering the juvenile system increases.<sup>56</sup> Due to time constraints, many social workers disregard the child-protective rules to which they should adhere.<sup>57</sup> This leads to an increase in error.<sup>58</sup> One county child welfare agency, the Department of Children's Services in Los Angeles County, recently has been accused of failing to take prompt action in dangerous situations.<sup>59</sup> In one incident, a foster home had ten children sleeping on the floor of the garage.<sup>60</sup> Ten more children were living in a single bedroom.<sup>61</sup> Another foster home had twenty infants sleeping in ten cribs, although the home was only licensed for four children.<sup>62</sup> In this last incident, when the County finally took action and removed the infants from the foster home, social workers had difficulty identifying the children.<sup>63</sup>

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(a) If the probation officer [or other child protection services representative] determines that the minor shall be retained in custody he [or she] shall immediately file a petition . . . with the clerk of the juvenile court who shall set the matter for hearing on the detention hearing calendar. The probation officer shall thereupon notify each parent . . . of the hearing . . . and shall serve those persons entitled to notice of the hearing . . . with a copy of the petition and notify those persons of the time and place of the detention hearing.

*Id.*

56. Patton, *Forever Torn Asunder: Charting Evidentiary Parameters, the Right to Competent Counsel and the Privilege Against Self-Incrimination in California Child Dependency and Parental Severance Cases*, 27 SANTA CLARA L. REV. 299, 300-02 (1987). See also *supra* note 38 for an overview of the increase in child abuse and the burden such increase puts on the agency workers.

57. Patton, *supra* note 56, at 300-01.

58. *Id.* See also *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989). In this case, a four-year-old child, Joshua, was rendered permanently and profoundly retarded due to his father's abuse. *Id.* at 1002; see also Reidinger, *Why Did No One Protect This Child?*, A.B.A. J., Dec. 1, 1988, at 48, 49. The county child welfare agency of Winnebago County, Wisconsin, in a gross error, had made a decision "not to devote [its] limited resources to [the] particular task" of protecting Joshua. Reidinger, *supra*, at 51.

The mother of Joshua brought an action under 42 U.S.C. § 1983 (1982), stating that Joshua's due process liberty interest in bodily integrity had been violated by the state's actions. *DeShaney*, 109 S. Ct. at 1000. Section 1983 provides that a person may bring suit against another when deprived of a constitutional right. *Id.* The United States Supreme Court held that the state should not be held responsible for the actions of private actors. *Id.* at 1007. According to the Court, the due process clause does not impose a duty on a state to protect its citizens from one another. *Id.* at 1003. The Court said the harm to Joshua did not occur when he was in the state's custody; thus, there was no constitutional duty to protect him. *Id.* at 1006.

59. *County Accused of Letting Foster Children Suffer Abuse*, L.A. Times, Mar. 8, 1990, at A3, col. 1.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at A25, col. 1.

The decisions of child welfare agencies are also affected by budgetary concerns. The state wants judicial decisions to be made economically, which may include limiting the number of court-appointed counsel.<sup>64</sup> Based on the state's varied concerns, it is not surprising that studies indicate that the agencies may be parenting as poorly as the parents.<sup>65</sup>

Just as it cannot be assumed that the state is exclusively pursuing the child's interests, it is also wrong to presume that the parent is concerned exclusively with the child's best interests. Dependency proceedings are instigated because of alleged parental abuse.<sup>66</sup> Parental abuse of a child evinces the parent's failure to protect the child and clearly conflicts with the child's interests. In dependency proceedings, the parent may be more concerned about regaining custody and control over his or her child and opposing the allegations made by the state rather than concerned with the child's best interests.<sup>67</sup>

The child has an interest in a stable, loving home.<sup>68</sup> Denial of stability courts "emotional disaster."<sup>69</sup> The need for love and stability does not require biological ties.<sup>70</sup> A child's interest in love and stability, thus, may conflict with the birth parent's traditional right to parent. It may

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64. *Lassiter*, 452 U.S. at 28 (States want decisions "to be made as economically as possible . . . to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his [or her] presence may cause."). Foster care of children taken into state custody is also an economic concern for the state. Patton, *supra* note 56, at 313.

65. See, e.g., *Health Alarm for Foster Care*, L.A. Times, Nov. 30, 1989, at A3, col. 2.

66. See CAL. WELF. & INST. CODE § 300 (West Supp. 1990).

67. See, e.g., *In re Melissa S.*, 179 Cal. App. 3d 1046, 1051, 225 Cal. Rptr. 195, 197-98 (1986); *In re Jamie M.*, 134 Cal. App. 3d 530, 533, 184 Cal. Rptr. 778, 780 (1982); *In re Edward C.*, 126 Cal. App. 3d 193, 197, 178 Cal. Rptr. 694, 698 (1981).

68. See *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 513 (1982). It has been noted that "[e]ven beyond theories of child development, psychologists have begun to identify the capacity to form commitments and connections to others, rather than autonomy, as the destination for the maturing person." Minow, *supra* note 26, at 1883-84. See also *In re Raymond H.*, 175 Cal. App. 3d 556, 564, 221 Cal. Rptr. 165, 169 (1985) (best interest of child served by giving child stability and security); *In re Michelle T.*, 44 Cal. App. 3d 699, 706, 117 Cal. Rptr. 856, 860 (1975) (noting importance to child of continuity of parental relationships) (citing J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 32 (1973)).

69. *In re Marcos*, 73 Cal. App. 3d 768, 783, 140 Cal. Rptr. 912, 920 (1977). See also *Michelle T.*, 44 Cal. App. 3d at 706, 117 Cal. Rptr. at 859-60. In *Michelle T.*, the appellate court took judicial notice of an authority on child development, noting that the Supreme Court of California had already cited the source. *Id.* (citing J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)). The court stressed that "'[p]hysical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental process during the period of development needs to be offset by stability and uninterrupted support from external sources.'" *Id.* (quoting *BEYOND THE BEST INTERESTS OF THE CHILD*).

70. McGough & Shindell, *supra* note 2, at 242.

also conflict with the state's duty to protect the birth parent's interest in rearing his or her own birth child. The child, then, may not receive the full benefit of legal services from either the parent's or the state's attorney. Neither attorney can adequately represent both the child and the attorney's primary client in dependency proceedings.<sup>71</sup> Under California's welfare and Institutions Code, the parent's attorney never represents the child; the Code allows the state's attorney, however, to represent the child.<sup>72</sup>

## 1. Parental interests in child protection proceedings

### *a. the constitutional source*

The parental interest in the custody and care of children "occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility."<sup>73</sup> The law presumes that the "natural bonds of affection lead parents to act in the best interests of their children."<sup>74</sup> A parent's interest is deferred to and protected unless there is a "powerful countervailing interest."<sup>75</sup>

Birth parents have a fundamental right to the care and custody of their children.<sup>76</sup> The United States Supreme Court has expressly stated that this fundamental interest does not "evaporate simply because [the parents] have not been model parents."<sup>77</sup> Due to this fundamental right to parent, state laws may not punish those parents who do not conform to model standards.<sup>78</sup> The law is not intended to punish non-conformity, because child-care customs may vary from culture to culture.<sup>79</sup> Constitutionally, parents have the right to raise their children in the manner the parents deem appropriate, although this right may be limited by the state.<sup>80</sup>

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71. Doing so would impinge on the duty of an attorney to zealously represent his or her client and the duty to avoid a conflict of interest. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980); CAL. R. PROFESSIONAL CONDUCT 3-310.

72. CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

73. *Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting).

74. *Parham*, 442 U.S. at 602.

75. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

76. *Id.* *See also supra* notes 1-7 and accompanying text.

77. *Stanley*, 405 U.S. at 651 ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

78. *In re Laura F.*, 33 Cal. 3d 826, 837, 662 P.2d 922, 929, 191 Cal. Rptr. 464, 471 (1983).

79. *Montgomery*, *supra* note 3, at 326.

80. *See supra* notes 1-7 and accompanying text.

b. *the state source*

Parents have the right to raise their children because the law assumes that parents will provide for their children what their children cannot provide for themselves.<sup>81</sup> The state's policy to avoid interfering in parenting decisions is codified in California. For example, section 300 of the California Welfare and Institutions Code expressly states that protection of a child "shall focus on the preservation of the family whenever possible."<sup>82</sup>

The right to parent is also evident in California case law. The fundamental right to parent is supreme; thus, the state may only disturb this right if a parent acts in a manner inconsistent with parenthood.<sup>83</sup> The California courts have reiterated statutory intent by noting the "[j]udicial concern . . . for the need to strengthen family ties."<sup>84</sup>

The courts construe statutes and examine the circumstances to encourage a parent's right to parent, generally allowing a parent more than one chance to accomplish successful parenting.<sup>85</sup> Of course, if the parent does jeopardize the child's health or safety, the state steps in.<sup>86</sup>

2. State interests in child protection proceedings

a. *the constitutional source*

Parental rights have always been recognized in the United States.<sup>87</sup> A legal presumption exists that a parent does what is best for his or her child, although the presumption may be rebutted by evidence of child neglect or abuse.<sup>88</sup> Thus, if a parent does not protect a child, the state

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81. See, e.g., *In re Marriage of Carney*, 24 Cal. 3d 725, 739, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979) (the "essence [of parenting] lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. . . . [I]ts motive power is parental love and concern for the child's well-being.").

82. CAL. WELF. & INST. CODE § 300(j) (West Supp. 1990). The statute further provides: "Nothing in this section is intended to disrupt the family unnecessarily or to intrude inappropriately into family life, to prohibit the use of reasonable methods of parental discipline, or to prescribe a particular method of parenting." *Id.* See also section 16507, which states that family reunification services shall be provided or arranged by county welfare department staff in order to reunite the child separated from his or her parent because of abuse, neglect, or exploitation. *Id.* § 16507.

83. See, e.g., *In re Solomon L.*, 190 Cal. App. 3d 1106, 1112, 236 Cal. Rptr. 2, 4 (1987).

84. *Edward C.*, 126 Cal. App. 3d at 205, 178 Cal. Rptr. at 701.

85. See generally *Solomon L.*, 190 Cal. App. 3d 1106, 236 Cal. Rptr. 2 (1987); *In re Christina P.*, 175 Cal. App. 3d 115, 220 Cal. Rptr. 525 (1985).

86. *Parham*, 442 U.S. at 603.

87. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 975 (1988).

88. *Parham*, 442 U.S. at 602.

can intervene under its power of *parens patriae*.<sup>89</sup> Under the doctrine of *parens patriae*, the state may protect the child by extending its dominion over the child, thereby usurping parental authority.<sup>90</sup> This doctrine permits the state to determine what steps are necessary to protect the health, safety and welfare of the child.<sup>91</sup> The state also has a substantial interest in children growing up to become self-sufficient adults capable of assuming the responsibility of governing.<sup>92</sup> Thus, the state has an interest paramount to that of the parent when it finds a parent unfit.<sup>93</sup>

*b. the state source*

Under its power of *parens patriae*, California established the Juvenile Court<sup>94</sup> to protect children's interests.<sup>95</sup> The California Legislature expressly stated that its intent was to "provide *maximum* protection for children who are . . . at risk."<sup>96</sup>

At one time, parental rights were nearly limitless.<sup>97</sup> However, in the 20th century, states began to exercise power over the child in cases of abuse.<sup>98</sup> In the mid-1960s,<sup>99</sup> California and other states began to pass child-protective statutes that gave the states jurisdiction to render services to both the child and the child's family<sup>100</sup> and established that the

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89. *Developments in the Law*, *supra* note 10, at 1198. See also *supra* notes 8-10 and accompanying text.

90. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978). See also *In re Gault*, 387 U.S. 1 (1966). In *Gault*, the Supreme Court noted that *parens patriae* "proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme," but, the Court said, "its meaning is murky . . ." *Id.* at 16.

91. Demchak, *supra* note 17, at 24.

92. *Santosky*, 455 U.S. at 790 (Rehnquist, J., dissenting) (society relies on " 'healthy, well-rounded growth' " of children into " 'full maturity as citizens' ") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)). Justice Rehnquist also noted that "children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens," and that "[t]he same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline." *Santosky*, 455 U.S. at 789 (Rehnquist, J., dissenting). See also *Lassiter*, 452 U.S. at 27 (state has "urgent interest" in child welfare); *Child Abuse and Neglect*, *supra* note 10, at 43.

93. *Lehman*, 458 U.S. at 524 (Blackmun, J., dissenting). Dissenting in *Lehman*, Justice Blackmun cited the common law for the proposition that a parent "is liable to be defeated by his own wrongdoing or unfitness and by the demands and requirements of society that the well-being of the child shall be deemed paramount to the natural rights of an unworthy parent." *Id.* (citations omitted) (emphasis added).

94. See CAL. WELF. & INST. CODE § 245 (West 1984).

95. *Id.* § 245.5.

96. *Id.* § 300(j) (West 1984 & Supp. 1990) (emphasis added).

97. Fraser, *supra* note 4, at 25.

98. *Id.* at 26.

99. Demchak, *supra* note 17, at 23.

100. See *Child Abuse and Neglect*, *supra* note 10, at 36.

rights of parents were not absolute.<sup>101</sup> Since then, parents' right to raise their children has been subject to the state's statutory right to intervene to protect the child's interests.<sup>102</sup>

In juvenile dependency court proceedings in California, the child welfare agency's attorneys advocate the agency's position against the parent, supporting the allegations with evidence supplied by social workers.<sup>103</sup> For example, one piece of evidence admissible in juvenile dependency proceedings is a social study report compiled by the child welfare agency workers.<sup>104</sup> In preparing this report, the assigned social worker interviews persons the worker feels have significant information.<sup>105</sup> The agency's counsel then submits the report into evidence.<sup>106</sup>

In general, even if the parent has counsel, the state's vast resources increase its chances of prevailing.<sup>107</sup> The county child welfare agency has an attorney armed with "professional social workers who are empowered to investigate the family situation and to testify against the parent."<sup>108</sup> To prevail, "[t]he State marshals an array of public resources to prove its case and disprove the parents' case."<sup>109</sup> By advocating its position vigorously, the state purports to protect its interest in the welfare of its child citizenry.

### 3. The rights of children in child protection proceedings

#### a. *the constitutional source*

In 1979, in *Parham v. J.R.*,<sup>110</sup> the United States Supreme Court ex-

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101. See Demchak, *supra* note 17, at 23.

102. *Santosky*, 455 U.S. at 759.

103. See CAL. WELF. & INST. CODE § 358(b) (West 1984 & Supp. 1990).

104. CAL. WELF. & INST. CODE § 358(b) (West 1984 & Supp. 1990); see also *In re Courtney S.*, 130 Cal. App. 3d 567, 575, 181 Cal. Rptr. 843, 847-48 (1982).

105. See *Child Abuse and Neglect*, *supra* note 10, at 43. For example, information can be garnered from teachers, neighbors or psychiatrists. *Id.*

106. CAL. WELF. & INST. CODE § 358(b) (West 1984 & Supp. 1990).

107. *Santosky*, 455 U.S. at 763 ("State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense.").

108. *Lassiter*, 452 U.S. at 43 (Blackmun, J., dissenting).

109. *Santosky*, 455 U.S. at 760.

The United States Supreme Court has tellingly used the word "win" in discussing the adversarial tone of juvenile dependency court proceedings. *Id.* at 764. The Court noted that "[i]f the state initially fails to win termination . . . it always can try once again . . . after gathering more or better evidence." *Id.* (emphasis added). Although initial proceedings in juvenile court might not result in actual termination of parental rights (as was the case in *Santosky*), the detention of children by the state has been termed a constructive termination. See Note, *Parental Rights Termination: Are the Interests of Parents, Children, and the State Mutually Exclusive?* 17 STETSON L. REV. 295, 302-03 (1987).

110. 442 U.S. 584 (1979).



pressly stated that children, in general, were protected by the same constitutional rights accorded adults.<sup>111</sup> The Court stated that parental rights and the theory of familial autonomy could not bar children's individual constitutional rights.<sup>112</sup> Parental rights were "limited by the legitimate rights and interests of their children."<sup>113</sup> The Court noted the existence of state statutes which limited parental rights by allowing "intervention on behalf of neglected or abused children."<sup>114</sup> The Court thus implied that the states have a legitimate interest in ensuring the rights of children, and that legislatures should enact statutes to protect these rights.<sup>115</sup>

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111. *Id.* at 627 (Brennan, J., concurring in part and dissenting in part) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976); *Breed v. Jones*, 421 U.S. 519 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967)). *Parham* involved a class action by children whose parents had voluntarily committed them to state mental institutions under a state statute. *Id.* at 587-88. The children contended that the statute was unconstitutional, depriving them of their due process right to liberty because the statute required no formal adversarial hearing prior to the child's detention. *Id.* at 588. The children argued that a parent's decision to admit a child to a mental institution must be examined by a "formal, adversarial, pre-admission hearing." *Id.* at 603.

The Court acknowledged that the children who had been committed to state mental institutions had a liberty interest, but held that the due process liberty interest could be protected by a "neutral factfinder." *Id.* at 601, 606. This factfinder would determine whether the child met statutory requirements for admission to the institution. *Id.* The Court noted that the factfinder did not have to be either a judicial or administrative officer. *Id.* at 607. The staff physician could serve as the factfinder if he or she could independently evaluate the child's need for treatment from the perspective of the child's best interests. *Id.* at 618. Due process did not require that the hearing be formal. *Id.* The Court said it did not believe that the risks of error would be lessened by a formal hearing. *Id.* at 613. However, the Court admitted that when the state—as the child's guardian—requested commitment, the risk was that the child might become "lost in the shuffle." *Id.* at 619. In fact, one witness testified that child welfare agencies misused the mental institutions as a dumping ground for children. *Id.* at 597, n.8.

112. *Id.* at 631 (Brennan, J., concurring in part and dissenting in part).

113. *Id.* at 630 (Brennan, J., concurring in part and dissenting in part).

114. *Id.* (Brennan, J., concurring in part and dissenting in part).

115. Although the Court espoused the constitutional rights of children, it then declared the state's existing procedures constitutional, even though non-adversarial. *Id.* at 620. The Court relied on the traditional presumption that parents act in the best interests of their children, and the assumption that the state has an economic interest in institutionalizing only those children who are in need of mental health treatment. *Id.* at 604-05. The Court said that the state's interest included minimizing procedural obstacles so parents were not discouraged from seeking help for their children. *Id.* at 605. The Court felt that adversarial procedures might stop parents from getting their child help. *Id.*

*Parham's* factual situation can be distinguished from the circumstances that occur in the juvenile dependency court system. In California, dependency proceedings are adversarial if there are contested issues of fact or law. *See* CAL. WELF. & INST. CODE § 350 (West 1984 & Supp. 1990). Additionally, the state does not have to minimize "procedural obstacles" because a parent in juvenile dependency proceedings is not seeking help for his or her child; a child comes to the attention of the juvenile dependency court when the state acts against the parent

Three years later, in *Lehman v. Lycoming County Children's Services*,<sup>116</sup> the Court further enunciated children's rights and interests, declaring that it is "undisputed that children require secure, stable, long-term, continuous relationships."<sup>117</sup> In addition, the Court has recognized that children have an interest in their own in safety.<sup>118</sup> The Court has also noted that familial relationships are important to individuals because of the "emotional attachments" that occur, and that such emotional attachments are a protected liberty interest.<sup>119</sup>

*b. the state source*

Prior to the late 19th century, a child's interest in freedom from parental abuse was not recognized in the United States.<sup>120</sup> In 1874, however, a suit was brought against the stepmother of a child who had been repeatedly beaten and assaulted with a pair of scissors.<sup>121</sup> In finding the stepmother guilty of child abuse, the court relied on the argument that

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by alleging abuse of the child. Thus, *Parham's* rationale is incongruent with what occurs in juvenile dependency proceedings.

What is gained from the *Parham* Court's decision is that children have the same constitutional rights as adults. It does not follow that *Parham* stands for the proposition that children in adversarial juvenile dependency court proceedings should go unrepresented by independent counsel.

116. 458 U.S. 502 (1982).

117. *Id.* at 513. It has also been acknowledged that children need "[a] stable, loving home-life," and that a stable, loving home is "essential to a child's physical, emotional, and spiritual well-being." *Santosky*, 455 U.S. at 788-89 (Rehnquist, J., dissenting). See also *Laura F.*, 33 Cal. 3d at 832, 662 P.2d at 926, 191 Cal. Rptr. at 468 (1983); McGough & Shindell, *supra* note 2, at 211-12 ("In the area of the emotional deprivation or harm to [a child's] psychological development . . . the law has been [slow] to intervene on the child's behalf"). See also *Children of Divorce: Do They Have a Right to Counsel?*, 3 CHILDREN'S LEGAL RTS. J. Sept/Oct. 1981, at 24, 26 [hereinafter *Children of Divorce*] ("the child's emotional concerns often fall on deaf ears").

118. See *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (personal safety of severely retarded persons in state custody is constitutionally protected). See also *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1005-06 (1989). In *DeShaney*, the Court clarified that *Youngberg* does not stand for the proposition that an individual has a substantive due process right to governmental aid. *Id.* Rather, the Court said, *Youngberg* stands for the idea that the state acquires a duty to protect when the state takes an individual into custody against the individual's will, thus impinging a due process liberty interest. *Id.* The Court noted that the courts of appeals in several circuits have held that the state could be liable for "failing to protect children in foster homes from mistreatment at the hands of their foster parents." *Id.* at 1006 n.9 (citations omitted). The Supreme Court expressed no view because the issue was not before the Court. *Id.* See also *Baltimore City Dep't of Social Servs. v. Bouknight*, 58 U.S.L.W. 4184 (1990) (state has interest in "care and safety" of child under supervision of juvenile dependency court system).

119. *Smith*, 431 U.S. at 854.

120. McGough & Shindell, *supra* note 2, at 210.

121. *Id.* at 210 n.7 (citing *Mary Ellen Wilson*, N.Y. Times, April 10, 1874, at 8, col. 2, reprinted in 2 CHILDREN AND YOUTH IN AMERICA 185-87 (R. Bremner ed. 1971)).

children deserved protection because they were members of the animal kingdom, and there were laws against cruelty to animals.<sup>122</sup>

Through the subsequent enactment of child-protective statutes, states have attempted to secure the safety and best interests of each child.<sup>123</sup> In California, the central premise behind the enactment of juvenile laws is the child's best interests.<sup>124</sup>

California addresses this best interest standard in several areas. For example, the Code provides that mere temporary removal of the child by a county child welfare agency is not always in the child's best interests.<sup>125</sup> The Code also notes that reunification with the parent is not necessarily in the child's best interests.<sup>126</sup> The Code recognizes the drawbacks of

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122. *Id.* (citing *Mary Ellen Wilson*). Children have been detained by the county child welfare agencies for good reasons: In one case, a two-month-old infant was kicked and stomped by a parent, leading to multiple skull fractures. *La Shonda B.*, 95 Cal. App. 3d at 596, 157 Cal. Rptr. at 281. In another case, a child was removed after repeated beatings by her father and was forced to sleep "in her underwear on a plastic sheet on the floor with no bedding in 60 degree weather as a punishment for [bed]wetting." *Edward C.*, 126 Cal. App. 3d at 198, 178 Cal. Rptr. at 697. In yet another case, a nine-month-old was removed from her parents' custody after sustaining a skull fracture, broken wrists and ankle, and assorted bruises and abrasions. *Patricia E.*, 174 Cal. App. 3d at 4, 219 Cal. Rptr. at 784. Aside from such physical abuse, in 1986 alone, the Los Angeles County child welfare agency staff reported 3,126 cases of child sexual abuse to the State Department of Social Services. Shafer, *Child Sexual Abuse and the Law*, 12 L.A. LAW. SEPT. 1986, at 46.

123. See, e.g., ARIZ. REV. STAT. ANN. § 13-3623 (1989); ARK. STAT. ANN. § 9-30-102 (1989); COLO. REV. STAT. § 19-10-101 (1986); FLA. STAT. § 415.501 (1986 & Supp. 1990); GA. CODE ANN. § 74-601 (Harrison Supp. 1989); HAW. REV. STAT. § 587-1 (1985 & Supp. 1987); IDAHO CODE § 16-1601 (1979 & Supp. 1989); IND. CODE § 31-6-11-1 (1987); ME. REV. STAT. ANN. tit. 19, § 218 (1981); MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1989); MICH. STAT. ANN. § 25.248 (Callaghan 1984 & Supp. 1989-90); N.Y. SOC. SERV. LAW § 411 (McKinney 1983 & Supp. 1990). See also Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 131 (1984); see also CAL. WELF. & INST. CODE § 300 (West Supp. 1989) (describing dependent children subject to court's jurisdiction and stating legislative intent to protect children).

124. See CAL. WELF. & INST. CODE § 245.5 (West 1984).

125. See CAL. WELF. & INST. CODE § 361.5 (West Supp. 1990).

126. See *infra* notes 127-29 and accompanying text. California favors reunification of a child with the parent. See CAL. WELF. & INST. CODE § 361.5(a) (West Supp. 1990). Reunification services include providing a "full array of social and health services to help the child and family and to prevent reabuse of children." *Id.* § 300(j) (West 1984 & Supp. 1990). If the child is old enough, the child can voice an opinion of what is in her or his best interest. *Id.* § 317(e). Section 317 of the Code provides that "[i]n any case in which the minor is four years of age or older, counsel shall interview the minor to determine the minor's best wishes and to assess the minor's well-being." *Id.*

California has stressed not only family reunification, but also the need to provide for stable, permanent homes for children if family reunification is not successful. *Id.* § 366.25. Section 366.25 provides:

(a) In order to provide stable, permanent homes for children, a court shall, if the minor cannot be returned home . . . conduct a permanency planning hearing to make a determination regarding the future status of the minor no later than 12

reunification and thus provides that reunification services are not necessary when a parent's whereabouts are unknown.<sup>127</sup> Similarly, reunification is not the focus when a parent is so mentally disabled that he or she cannot utilize reunification services.<sup>128</sup> In addition, a parent who has caused the death of another child because of abuse or neglect may be denied reunification services.<sup>129</sup>

### III. STATEMENT OF THE PROBLEM

California Welfare and Institutions Code section 317 does not require mandatory independent counsel for children entering the juvenile dependency court system.<sup>130</sup> Currently, even though an inherent conflict exists among the state, parent and child,<sup>131</sup> and all three are separate parties in a juvenile dependency court action,<sup>132</sup> section 317 allows a child to be represented by the same counsel as the county child welfare agency. The court has the discretion to appoint independent counsel for a child.<sup>133</sup> However, before the court will grant independent counsel, the agency attorney must declare that a conflict exists.<sup>134</sup> This procedure creates an inherent conflict because, without independent counsel, the child is relying on the agency attorney to present the conflict to the court. This lack of independent counsel may result in unfair court proceedings.<sup>135</sup> The child may end up abandoned in the juvenile dependency court system.<sup>136</sup>

Without independent counsel, a child involved with the juvenile dependency court never has an independent evaluation regarding his or her best interests.<sup>137</sup> The dependency hearings and the process leading to the

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months after the original dispositional hearing . . . and in no case later than 18 months from the time of the minor's original placement. . . .

*Id.*

This section also provides that, to give stability, the court consider adoption first, then legal guardianship and, finally, long-term foster care. Further, if the child is currently in a foster home, the foster parents will have priority in adopting the child. *Id.*

127. CAL. WELF. & INST. CODE § 361.5 (West Supp. 1990).

128. *Id.*

129. *Id.*

130. CAL. WELF. & INST. CODE § 317(c) (West Supp. 1990).

131. See *supra* notes 51-72 and accompanying text.

132. Edwards, *supra* note 38, at 217.

133. Demchak, *supra* note 17, at 28. See also *supra* notes 17-24 and accompanying text.

134. See Demchak, *supra* note 17, at 28. See also *supra* notes 17-24 and accompanying text.

135. See, e.g., *In re Gault*, 387 U.S. 1, 35-42 (1967).

136. See *supra* note 111. See also Kline, *supra* note 17, at 69.

137. The proposed statutory amendment requires that the child's independent counsel assess and then relay to the court what would be in the child's best interests. See *infra* notes 352-58 and accompanying text. In presenting facts to the court, counsel would take into account the age and circumstances of the child, coupled with psychological recommendations made by

dependency hearings may be conducted in a manner contrary to the child's interests.<sup>138</sup> If the county child welfare agency fails to act and the child is harmed or neglected within the dependency court system,<sup>139</sup> no one independently confronts the agency on the child's behalf. Thus, without independent counsel, the child may be saved from parental abuse only to be subsequently abused by the state.<sup>140</sup>

#### A. *State Practices and Interests that Conflict with the Child's Interests*

The county child welfare agency will often share its attorney with

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experts in child development who are not affiliated with either the state or the parent. Independent counsel would focus solely on the child's best interests, which would include assessing the state's and the parent's positions in relation to the child's best interests. The state's and parent's position is pertinent to independent counsel's evaluation because both the state and parent assert that they are seeking the child's best interests.

138. A most recent example that came to the national forefront is *Baltimore City Dep't of Social Servs. v. Bouknight*, 58 U.S.L.W. 4184 (1990) (holding that parent who had custody of her child pursuant to juvenile dependency court order may not invoke fifth amendment privilege against self-incrimination to resist order by court that she produce child). In this case, the county child welfare agency of Baltimore had detained the three-month-old infant, Maurice, after he was hospitalized with a fractured left femur, partially healed bone fractures and other signs of *extreme* physical abuse. *Id.* at 4185. Hospital personnel had also seen Maurice's mother, Bouknight, shaking the injured infant and dropping him into his crib. *Id.*

After several months in a foster home, Maurice was, in Justice O'Connor's words, "inexplicably" returned to his mother's custody. *Id.* Bouknight, who had an attorney, agreed to cooperate with the agency, continue therapy and parental training classes and "refrain from physically *punishing* [Maurice]." *Id.* (emphasis added). Approximately eight months later, the agency reported to the local authorities and the juvenile court that Maurice was missing and feared dead. *Id.*

The agency's decision to return Maurice to the home of the mother only months after she had severely injured him is "inexplicable." It is also inexplicable that the agency allowed the return of a six-month-old infant on the condition that the mother not "punish" the infant. Punishment constitutes "a penalty imposed on an offender for a crime or wrongdoing." WEBSTER'S UNABRIDGED DICTIONARY 1462 (1983). Synonyms include to chastise, correct or discipline. *Id.* Defining the abuse Bouknight rendered on Maurice as overly-severe punishment is illogical and profoundly disturbing. The agency's use of the word "punish" implies that Maurice could behave in a manner that justified discipline. The author questions a six-month-old infant's capability to behave in a manner that warrants discipline. However, because Maurice did not have independent counsel, there was no one to confront the state agency's judgment and lack of common sense. See also *DeShaney v. Winnebago County Dep't of Children's Servs.*, 109 S. Ct. 998 (1989).

139. *Parham v. J.R.*, 442 U.S. 584, 619 (1979). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 836 (1977) (noting that many children end up in foster-care limbo); *In re Michelle T.*, 44 Cal. App. 3d 699, 708, 117 Cal. Rptr. 856, 861 (1975) (discussing bureaucratic uncertainty).

140. See CHILDREN IN THE LEGAL SYSTEM, *supra* note 6, at 752 (citing J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 187-96 (1979)). Child abuse by the state occurs when the child has been improperly removed from his or her family or when the state improperly returns the child to the parent. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 187-96 (1979).

the young child in juvenile dependency court.<sup>141</sup> The child without independent counsel, therefore, will be subject to the agency's determination of the situation. For example, if the agency determines the child is safe at home, the agency's counsel will advocate this position.

The child's interests might further suffer because the state must protect not only the child's interests, but also parental interests.<sup>142</sup> For example, under section 330, even if the agency takes a child into custody, the agency may immediately return the child to the parent's home if the parent agrees to informal supervision.<sup>143</sup> In a section 330 action, the petition is dismissed and in-home services are provided.<sup>144</sup> If this occurs, the child never has an independent investigation initiated for him or her; such an investigation might reveal facts suggesting that formal supervision is needed rather than informal supervision.<sup>145</sup>

The state is intertwined with both the parent and the child, even though all three are parties to the action and even though all interests may not coincide. In addition, the state has separate economic and regulatory concerns that may further erode the child's rights.

The state has an economic interest in bargaining with the parent.<sup>146</sup> The state might settle with the parent and amend the petition's language if the parent will agree to a *nolo contendere* plea.<sup>147</sup> Typically, the settlement between the state and the parent requires that the parent behave in a particular manner.<sup>148</sup> When the state settles with the parent, the state avoids the time and expense of a myriad of juvenile dependency court hearings.<sup>149</sup>

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141. S. HONEA, *supra* note 27, at 68-69 (1980). See also *supra* notes 14-25 and accompanying text.

142. See *supra* notes 54-55 and accompanying text.

143. CAL. WELF. & INST. CODE § 330 (West 1984 & Supp. 1990).

144. *Id.*

145. Further, the parent may choose to waive counsel. *Id.* § 317 (West Supp. 1990). If the parent waives counsel, the presumption that the child's interests are being met by the balance between the parent's counsel and the agency's counsel no longer applies.

146. Patton, *supra* note 56, at 321. See also *supra*, notes 143-45 and accompanying text.

147. *Id.* A *nolo contendere* plea is one in which the party pleading is not admitting or denying the charges, but merely saying he or she will not contest the charges. BLACK'S LAW DICTIONARY 545 (5th ed. 1983).

148. See, e.g., *In re Laura F.*, 33 Cal. 3d 826, 834, 662 P.2d 922, 927, 191 Cal. Rptr. 464, 469 (1983) (children placed under jurisdiction of court and detained in foster homes; mother told to get job, establish stable home, stay out of jail and show court she would be able to care for children if they were returned to her); *In re Jessica B.*, 207 Cal. App. 3d 504, 509, 254 Cal. Rptr. 883, 886-89 (1989) (child returned to home of mother but father not allowed to visit without supervision by county welfare agency; father also required to admit he abused child).

149. Once the protective service agency determines that a child should at least be temporarily separated from the parent, the agency files a petition with the juvenile court. CAL. WELF. & INST. CODE § 311 (West 1984). A detention hearing is then set on the juvenile court calen-

A full seventy-to-eighty percent of juvenile court dependency cases are resolved between the county child welfare agency and the parent without any contested hearing.<sup>150</sup> This is cause for concern because a child not accorded independent counsel falls to the mercy of an agreement made between the other two parties to the case.<sup>151</sup> Settlement itself may not be problem-free. Even if the county child welfare agency and the parent agree to a plan, the agency may fail to properly implement it, thus putting the child at continued risk.<sup>152</sup> A child welfare worker, already overburdened with cases, may be unable to adequately protect the child.<sup>153</sup>

Further, the judgment and biases of the agency social workers may also affect the proceedings. Social workers may rely too heavily on information gleaned from others,<sup>154</sup> even though the information gathered

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dar. *Id.* The parent may agree to plead guilty to the petition or may adjudicate the jurisdictional facts. *Id.* § 355. If the parent did not receive actual notice of this hearing, the matter may be continued. *Id.* § 321. At the detention hearing, the court determines whether the petition should be sustained. *Id.* § 315. If the court sustains the petition, the next hearing will be the dispositional hearing. *Id.* § 358. At the disposition, the evidence presented to the court includes a social study of the child, with information compiled and written by the county child welfare agency social worker. *Id.* This hearing may also be continued on motion by the parent, child or court. *Id.* Review hearings are held by the court to review the status of the child. *Id.* § 366.2. If the child cannot be returned home, then a permanency planning hearing is held. *Id.* § 366.25. Jurisdiction over the child continues until the child is returned to the home of a parent or is legally adopted. *Id.* § 366.3. If jurisdiction is retained, the status of the child is reviewed every six months. *Id.* At these hearings, the parent may be represented by counsel. At any hearing, the parent may offer evidence to counter the agency's evidence. *Id.* § 350.

150. *When a Child Needs Protection*, (Cal. Community Colleges Foster Parent Training Program), 1987 (videotape on file at College of the Canyons, Valencia, Cal.) [hereinafter *When a Child Needs Protection*]. Essentially, the parties agree to modify the petition, which usually minimizes the impact of the facts stated in the count(s). Demchak, *supra* note 17, at 26. This process is similar to plea bargaining in criminal cases. *Id.*

151. Duquette & Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 J.L. REFORM 341, 355 (1987). According to these authors, cases are settled in spite of the need of a child for "aggressive and ambitious representation . . . that addresses legal and nonlegal interests of the child." *Id.*

152. *See id.*

153. Kline, *supra* note 17, at 70. According to one study, the primary court-related responsibilities of child welfare social workers consist of deciding which cases should be disposed of, investigating facts to substantiate allegations, interviewing medical personnel or police officers who may have pertinent information, developing a social history of the case, determining a plan for the child and family, and implementing the court's eventual order. Russel, *Role Perceptions of Attorneys and Caseworkers in Child Abuse Cases in Juvenile Court*, 67 CHILD WELFARE 205, 209 (1988).

154. *Parham v. J.R.*, 442 U.S. 584, 636 (Brennan, J., concurring in part and dissenting in part) (citing *Goss v. Lopez*, 419 U.S. 565, 580 (1975)). This risk of error due to human failing is "not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the . . . process . . ." *Id.* (Brennan, J., concurring in part and dissenting in part) (quoting *Goss v. Lopez*, 419 U.S. 565, 580 (1975)).

could be disputed.<sup>155</sup> Thus, the child without independent counsel does not have an advocate to dispute agency findings. One commentator has written that “[d]espite [the Legislature’s attempt] to codify good judgment, human beings still have to make [the] decisions.”<sup>156</sup>

In one case, for example, a social worker’s investigative report noted that the foster home where the child resided had “lots of extra homey touches, such as handiwork, decorations, and the aroma of freshly baked cookies.”<sup>157</sup> On the other hand, the social worker reported that the birth mother resided in a “filthy home,” and had lived with a “four-foot python.”<sup>158</sup> It is arguable that the worker’s subjective enjoyment of “homey touches” influenced her recommendation to the court. A social worker’s affection for cozy middle-class existence is not the aim of the Code; the California Legislature’s focus in enacting Welfare and Institutions Code sections 300 through 399 is on protecting abused and neglected children.<sup>159</sup>

Social worker bias may taint the dependency court hearings. The primary witnesses are social workers.<sup>160</sup> By the time of the hearings, these workers will have already investigated the family and addressed familial needs, and yet are now expected to render objective opinions and professional advice when testifying.<sup>161</sup> Through these social workers, then, the state may have the “power to shape the historical events that form the basis for [the proceeding].”<sup>162</sup>

The state’s power to influence the court is evident in the provisions of section 317.<sup>163</sup> The county child welfare agency and the child will share counsel if there is no conflict declared by the court or if the court decides that independent counsel would not be to the child’s benefit.<sup>164</sup> As indicated above,<sup>165</sup> section 317 and the state’s interests and practices

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155. *Id.*

156. Siegel, *Shadow of Doubt*, L.A. TIMES MAG., Nov. 19, 1989, at 12, 15. Of course, individual judgments and biases would still exist where independent counsel was appointed. However, independent counsel could make *independent decisions* in the best interests of the child and focus on the need for safety and stability. Independent counsel for the child would be investigating and advocating solely for the benefit of the child, and would take into account both the parent’s and state’s stance.

157. *In re Christina P.*, 175 Cal. App. 3d 115, 122, 220 Cal. Rptr. 525, 527 (1985).

158. *Id.* at 124, 220 Cal. Rptr. at 528.

159. See *supra* note 37 for the provisions of California Welfare and Institutions Code section 300.

160. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

161. *Id.*

162. *Id.*

163. See CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

164. *Id.*

165. See *supra* notes 54-72 and accompanying text.



do not further the child's best interests because the state cannot singularly focus on the child. Thus, when the child is represented by the state agency's counsel, the recommendations made to the court are a hybrid of compliance with state statutory obligations, the state's varied concerns and finally, recognition of the child's best interests.

#### IV. ANALYSIS

This analysis begins with an overview of two United States Supreme Court cases which may provide a basis for asserting that allegedly abused or neglected children have a constitutional right to independent counsel. Next, the analysis addresses the reasons why effective independent counsel will further children's best interests and fair proceedings, focusing on California statutes and case law. This part of the analysis centers on appellate cases which point out the conflict among the state, parent, and child and the need for independent counsel. Finally, the author notes that children will probably have to rely on the state legislature or the United States Supreme Court to require independent counsel due to a Supreme Court of California decision that denied independent counsel to children in termination proceedings. Thus, the analysis concludes by relying on United States Supreme Court precedent to establish the right to independent counsel for every child entering the juvenile dependency court system.

##### *A. The United States Supreme Court: Support for a Constitutional Right to Independent Counsel*

The United States Supreme Court has not yet determined whether due process requires appointment of independent counsel for children in dependency proceedings.<sup>166</sup> However, in other contexts, the Court has declared that due process entitles juveniles to fair proceedings.<sup>167</sup>

##### 1. Independent counsel for a minor in juvenile court delinquency proceedings

*In re Gault*<sup>168</sup> involved a 15-year-old boy who was committed to an

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166. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 43 n.10 (1981) (Blackmun, J., dissenting). Justice Blackmun noted that the notion of independent counsel in dependency proceedings would require "consideration of interests different from those presented [in *Lassiter*], and . . . might yield a different result with respect to the right to counsel." *Id.* at 43 n.10 (Blackmun, J., dissenting).

167. *Schall v. Martin*, 467 U.S. 253, 268 (1984); *In re Gault*, 387 U.S. 1, 18 (1967).

168. 387 U.S. 1 (1967).

Arizona school for juvenile delinquents.<sup>169</sup> In appealing his detention, the minor, Gerald Gault, claimed prejudicial error because he had not been notified of his right to counsel.<sup>170</sup> Gerald asserted that a part of Arizona's Juvenile Code was unconstitutional because it called for taking the youth from the custody of his parents and detaining him in a state institution without requiring the Juvenile Court to appoint counsel.<sup>171</sup>

The Supreme Court of Arizona focused on what it believed to be the adequacy of the state's Juvenile Code, which provided that the probation officer would be the party advocating the minor's interests in juvenile court.<sup>172</sup> Countering the state court, the United States Supreme Court stated that the probation officer could not adequately represent Gerald's interests because the probation officer initiated the proceedings and filed the petition in the juvenile court.<sup>173</sup> Thus, the Court held that minors in juvenile delinquency court proceedings were to be accorded independent counsel.<sup>174</sup>

In its holding, the Court focused on the minor's individual needs and rights. The Court observed that a juvenile delinquent before a court needed "the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings . . ."<sup>175</sup> The Court noted that, from the juvenile court system's inception, the system applied different procedural standards for minors than those accorded adults.<sup>176</sup> These procedural differences, the Court said, were intended to serve the minor's interests.<sup>177</sup> The system, the Court noted, was geared toward providing the minor with the "care and solicitude" of the state.<sup>178</sup> In order to foster this cause, the proceedings had been designed to be non-adversarial.<sup>179</sup>

The Court went on, however, to point out that "[t]he absence of procedural rules . . . ha[d] not always produced fair, efficient, and effec-

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169. *Id.* at 4. Gerald was sent to a state school for delinquents after being charged with making lewd phone calls, which violated Arizona's Criminal Code. *Id.* at 7-8. When taken into police custody on this charge, he was still subject to probation as a result of involvement with the stealing of a purse. *Id.* at 4.

170. *Id.* at 10.

171. *Id.* at 34.

172. *Id.* at 35. Under the Arizona Juvenile Code, the Court noted, minors who were to be looked after by the probation officer included not only delinquent minors, but neglected and dependent children as well. *Id.*

173. *Id.* at 35-36.

174. *Id.* at 18.

175. *Id.* at 36.

176. *Id.* at 14.

177. *Id.* at 15.

178. *Id.*

179. *Id.* at 16.

tive procedures.”<sup>180</sup> The Court reasoned that “loose procedures, high-handed methods and crowded court calendars, . . . all too often, ha[d] resulted in depriving some juveniles of fundamental rights.”<sup>181</sup> Unfairness to minors, the Court feared, had resulted in “*inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy.*”<sup>182</sup> To the Court, provision of counsel to minors in delinquency actions would afford these minors a constitutionally adequate level of protection.<sup>183</sup>

## 2. Discretionary provision of independent counsel for indigent parents in dependency proceedings

Fourteen years after *Gault*, the Court addressed the issue whether an indigent parent had a right to counsel in parental termination proceedings. *Lassiter v. Department of Social Services*<sup>184</sup> involved an infant, William,<sup>185</sup> who had been detained by the Durham County, North Carolina child welfare agency after a report had been made to the agency that the child had been medically neglected.<sup>186</sup> The child was subsequently placed in a foster home.<sup>187</sup> Three years after the child’s initial detainment, the agency had petitioned the juvenile court to terminate parental rights.<sup>188</sup> The mother, Abby Gail Lassiter, who was incarcerated with a 25-to-40 year sentence for second-degree murder,<sup>189</sup> had been served with the petition and termination hearing notice.<sup>190</sup> She had attended the termination proceeding, but had not been appointed counsel.<sup>191</sup> At the conclusion of the termination hearing, the state court found that terminating Lassiter’s parental status was in the child’s best interests.<sup>192</sup> Lassiter appealed, alleging that the court had erred by not appointing counsel for her.<sup>193</sup> She maintained that the Due Process Clause of the fourteenth amendment to the United States Constitution entitled her to counsel.<sup>194</sup>

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180. *Id.* at 18.

181. *Id.* at 19.

182. *Id.* at 19-20 (emphasis added).

183. *Id.* at 36.

184. 452 U.S. 18 (1981).

185. *Id.* at 32 n.7.

186. *Id.* at 22. The county child welfare agency in Durham County, North Carolina was called the Department of Social Services. *Id.*

187. *Id.* at 32 n.7.

188. *Id.* at 20-21.

189. *Id.* at 20.

190. *Id.* at 21.

191. *Id.* at 24.

192. *Id.*

193. *Id.*

194. *Id.*

The Supreme Court began its analysis with the presumption that no due process right to appointed counsel exists unless physical liberty is at stake.<sup>195</sup> However, the Court noted that due process could still require that counsel be appointed if a personal freedom might be lost because of the state's action.<sup>196</sup> The Court said a parent's interest was great when the state sought to end parental rights.<sup>197</sup> After determining that Lassiter's personal freedom in parenting her birth child was affected by the state's action, the Court balanced three interests against one another to determine whether the state must guarantee counsel:<sup>198</sup> (1) the private interests at stake; (2) the state's interests; and (3) the risk that the lack of counsel would lead to erroneous decisions.<sup>199</sup>

In balancing the interests, the Court noted that "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one."<sup>200</sup> However, the Court continued, the state shared the parent's interest in an accurate decision and in the child's welfare.<sup>201</sup>

Additionally, the Court recognized that the state's interest diverged from the parent's because the state had an interest in avoiding "the expense of appointed counsel and the cost of the lengthened proceedings [counsel's] presence [could] cause."<sup>202</sup> However, the Court stressed that the state's pecuniary interest could not vanquish important private interests, particularly when the costs to the state were *de minimis*.<sup>203</sup>

Finally, the Court considered the risk of erroneously depriving Lassiter of her child in the absence of appointed counsel.<sup>204</sup> On this point, the Court stated that the presumption that counsel should not be appointed could only be overcome by strong parental interests coupled with a high risk of error.<sup>205</sup> In this particular case, the Court determined that the presumption had not been negated because the parental interest was low,<sup>206</sup> and thus Lassiter had not been erroneously deprived of coun-

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195. *Id.* at 25-27.

196. *Id.* at 27.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 27-28.

202. *Id.* at 28.

203. *Id.*

204. *Id.*

205. *Id.* at 31.

206. The Court noted that Lassiter had shown little interest in William. *Id.* at 32. In addition, Lassiter had "expressly declined" to attend the initial juvenile dependency hearing. *Id.* at 33. Further, after Lassiter was notified of the pending termination proceeding, she failed to

sel.<sup>207</sup> However, the Court noted that the Constitution might require the appointment of counsel for indigent parents in juvenile dependency court termination proceedings in other circumstances.<sup>208</sup> Whether counsel should be appointed for indigent parents would be determined by the trial court subject to appellate review.<sup>209</sup>

Four Justices dissented. First, Justice Blackmun, joined by Justices Brennan and Marshall, incorporated the majority's three-part balancing process,<sup>210</sup> yet arrived at a different result.<sup>211</sup> Justice Blackmun disagreed with the majority's holding, and wrote that due process required Lassiter to be accorded counsel.<sup>212</sup> Using the majority's method, Justice Blackmun determined that the risk of deprivation suffered by a parent outweighed the state's interest in avoiding the cost and administrative inconvenience that might result due to appointed counsel.<sup>213</sup> He emphasized that procedures had to be "devised to ensure that justice may be done in every case."<sup>214</sup> Justice Blackmun also criticized the majority for creating a case-by-case approach that "place[d] an even heavier burden on the trial court, [which would now require the trial court] to determine in advance what difference legal representation might make."<sup>215</sup>

Justice Stevens, in his own dissenting opinion, stated that due process required that counsel be appointed for indigent parents when parental rights termination was possible.<sup>216</sup> Completely disapproving of any ad hoc balancing method, Justice Stevens maintained:

The issue is one of *fundamental fairness*, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the *fairness* of criminal proceedings, I would reach the same result in this category of

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contact her retained counsel. *Id.* The Court emphasized that a trial court should not ignore "a parent's plain demonstration that [she or he] is not interested in attending a hearing." *Id.*

207. *Id.*

208. *Id.* at 31-32.

209. *Id.* at 32.

210. *Id.* at 37-38 (Blackmun, J., dissenting).

211. *Id.* (Blackmun, J., dissenting).

212. *Id.* at 35 (Blackmun, J., dissenting).

213. *Id.* at 48 (Blackmun, J., dissenting). Justice Blackmun suggested that the "due process analysis takes full account of the fundamental nature of the parental interest, the permanency of the threatened deprivation, the gross imbalance between the resources employed by the prosecuting State and those available to the indigent parent, and the relatively insubstantial cost of furnishing counsel." *Id.* (Blackmun, J., dissenting).

214. *Id.* at 50 (Blackmun, J., dissenting).

215. *Id.* at 51 n.19 (Blackmun, J., dissenting).

216. *Id.* at 59-60 (Stevens, J., dissenting).

cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.<sup>217</sup>

*Lassiter's* Court denied mandatory independent counsel to the indigent parent in juvenile dependency court termination proceedings. However, the holding was not a unanimous one. The Court could, therefore, hold differently if a child alleged a due process violation because of the denial of mandatory independent counsel.

### B. California Statutory Construction and Case Law

Once a child enters the California juvenile dependency system, his or her rights might be in danger. This is due to the "dual purpose" of dependency hearings—the proceedings are designed, first, to protect the welfare of the child and second, to safeguard a parent's right to properly raise his or her own child.<sup>218</sup> The Supreme Court of California has observed that "[t]he Legislature . . . directed the courts to balance the interest of the child in secure and sufficient parenting with the interests of all parties in maintaining the family."<sup>219</sup>

California Welfare and Institutions Code section 317 does not require appointment of independent counsel for every child entering the juvenile dependency court system.<sup>220</sup> As noted above, current section 317 is inadequate even though it explicitly states that counsel will be appointed at the court's discretion.<sup>221</sup> The rationale behind several California cases demonstrate the inadequacy of section 317 by noting the importance of independent counsel.

#### 1. *In re Melissa S.*

*In re Melissa S.*<sup>222</sup> involved former section 318 of the California Welfare and Institutions Code<sup>223</sup> which required that independent coun-

217. *Id.* at 60 (Stevens, J., dissenting).

218. *In re La Shonda B.*, 95 Cal. App. 3d 593, 599, 157 Cal. Rptr. 280, 283 (1979).

219. *In re Laura F.*, 33 Cal. 3d 826, 836, 662 P.2d 922, 928, 191 Cal. Rptr. 464, 470 (1983).

220. CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

221. See *supra* notes 14-25 and accompanying text.

222. 179 Cal. App. 3d 1046, 225 Cal. Rptr. 195 (1986).

223. CAL. WELF. & INST. CODE § 318 (repealed 1987). Section 318 stated in pertinent part:

(a) Notwithstanding the provisions of Section 317, when a minor who is alleged to be a person described in subdivision (d) of [former] Section 300 appears before the juvenile court at a detention hearing, the court shall appoint counsel . . .

(b) The counsel appointed by the court shall represent the minor at the detention hearing and at all subsequent proceedings before the juvenile court.

...

(d) The counsel shall be charged in general with the representation of the child's interests. To that end, he shall make such further investigations as he deems

sel be appointed for a child whose home was deemed unfit because of "neglect, cruelty, depravity, or physical abuse of either of his parents."<sup>224</sup> In *Melissa S.*, the court of appeal held that the dependency court's failure to appoint counsel for the child amounted to prejudicial error.<sup>225</sup>

*a. the facts*

A six-year-old child, Melissa, was taken into protective custody when the child welfare agency of Kern County<sup>226</sup> received an anonymous report that the child's eleven-year-old sister, Wendy, had been sexually molested by the girls' stepfather.<sup>227</sup> After receiving this report, a social worker interviewed both children.<sup>228</sup> Melissa and Wendy told the social worker that their stepfather had molested them.<sup>229</sup> The children relayed identical stories that same day to a sheriff's deputy.<sup>230</sup> However, prior to the detention hearing, Wendy retracted her story.<sup>231</sup>

The mother and stepfather attended the detention hearing.<sup>232</sup> The

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necessary to ascertain the facts, including the interviewing of witnesses, and he shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings; he may also introduce and examine his own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child. In addition, the counsel shall investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may be protected by other administrative or judicial proceedings. . . . The court shall take whatever appropriate action is necessary to fully protect the interests of the child. . . .

*Id.* Section 300 of the Code, prior to a 1987 amendment, provided:

Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court:

- (a) Who is in need of proper and effective parental care or control. . . .
- (b) Who is destitute. . . .
- (c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.
- (d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents. . . .

*Id.*

224. CAL. WELF. & INST. CODE § 318 (repealed 1987). *See also Melissa S.*, 179 Cal. App. 3d at 1059, 225 Cal. Rptr. at 200.

225. *Melissa S.*, 179 Cal. App. 3d at 1057, 225 Cal. Rptr. at 201-02.

226. This matter occurred in Kern County; there, the county child welfare agency is under the auspices of the Kern County Welfare Department. *Id.* at 1050, 225 Cal. Rptr. at 196-97.

227. *Id.* at 1052, 225 Cal. Rptr. at 198.

228. *Id.*

229. *Id.* Wendy said the molestation had occurred one and one-half years earlier, prior to the marriage of her mother and stepfather. *Id.* Melissa described the molestation, but did not date it. *Id.*

230. *Id.* at 1053, 225 Cal. Rptr. at 198.

231. *Id.*, 225 Cal. Rptr. at 199.

232. *Id.* at 1051, 225 Cal. Rptr. at 197-98.

mother was appointed counsel, as was the stepfather.<sup>233</sup> Although the mother and stepfather denied the allegations set forth in the petitions, the petitions were sustained.<sup>234</sup> On appeal, the children's appellate counsel contended that the trial court had been required to appoint independent counsel for the girls at the detention hearing and had failed to do so.<sup>235</sup>

*b. the court's analysis*

Before the court of appeal, the county child welfare agency defended its position that independent counsel for the children was not required, focusing on the literal language of then-existing section 318.<sup>236</sup> The agency argued that section 318 was not applicable because the children had not "appeared" at the detention hearing.<sup>237</sup> The agency also argued that even if counsel should have been appointed for the children, no prejudice existed because the count under section 300(d)<sup>238</sup> had been dropped after negotiations between the agency's attorney and the mother's attorney.<sup>239</sup> The court of appeal called this argument "illogical."<sup>240</sup>

In arguing that a minor who is not present at a detention or other juvenile court proceeding is not entitled to appointed counsel, the [agency] is actually contending that such a child is entitled to no voice at all in a proceeding which will impact upon the child's ongoing relationship with a parent. . . .<sup>241</sup>

The court further stated that "[r]egardless of any 'plea bargain' agreement between a welfare [agency] and a parent, if the child's interests are unrepresented because counsel has never been appointed, the protection required by statute is sabotaged."<sup>242</sup> Continuing, the court stressed that

both the welfare [agency] and the parent may have an interest in letting the allegations of the petition and the substance of the report pass unchallenged. This does not, however, assure that the best interests of the minor are being served, precisely the

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233. *Id.*

234. *Id.*

235. *Id.* at 1054, 225 Cal. Rptr. at 199.

236. *Id.*

237. *Id.*

238. Under former section 318, a child who met the definition of section 300(d) was to have independent counsel appointed for him or her in every case. CAL. WELF. & INST. CODE § 318 (repealed 1987).

239. *Melissa S.*, 179 Cal. App. 3d at 1055-57, 225 Cal. Rptr. at 200-01.

240. *Id.* at 1056, 225 Cal. Rptr. at 201.

241. *Id.*

242. *Id.* at 1057, 225 Cal. Rptr. at 201 (emphasis in original).



reason that independent counsel is statutorily required.<sup>243</sup>

The court of appeal noted that it was apparent "that the trial court might well have benefitted from additional evidence, assembled and presented by independent counsel, from the standpoint of the minor's best interests."<sup>244</sup>

The court's analysis is significant for several reasons: (1) the court stressed that the children's best interests were not being served if the parent and state agency could bargain away the children's rights;<sup>245</sup> (2) the court noted the fallaciousness of ignoring children in proceedings which greatly affect them;<sup>246</sup> and (3) the court declared that a state agency and a parent may have interests that do not coincide with those of the children.<sup>247</sup>

## 2. *In re Patricia E.*

*In re Patricia E.*<sup>248</sup> also concerned the appointment of independent counsel under former section 318.<sup>249</sup> As in *Melissa S.*,<sup>250</sup> the court's rationale stressed the reasons independent counsel for children in dependency cases should be required.<sup>251</sup>

### a. *the facts*

In this case, Patricia, a nine-month-old infant, was taken into protective custody after she was found to have sustained a skull fracture, two broken wrists, a broken ankle and assorted contusions and abrasions.<sup>252</sup> After ten months in a foster home, Patricia was returned to her parents.<sup>253</sup> Five months later, Patricia suffered a fractured right femur and tibia.<sup>254</sup> Once again, she was placed outside the parental home.<sup>255</sup> A little over three years later, when Patricia was approximately five and one-half years old, a review hearing was held.<sup>256</sup> A public defender was appointed for the father, and county counsel was appointed to represent

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243. *Id.* at 1059, 225 Cal. Rptr. at 203.

244. *Id.* at 1058, 225 Cal. Rptr. at 202.

245. *See supra* notes 240-43 and accompanying text.

246. *See supra* notes 240-42 and accompanying text.

247. *See supra* notes 242-43 and accompanying text.

248. 174 Cal. App. 3d 1, 219 Cal. Rptr. 783 (1985).

249. *Id.* at 5, 219 Cal. Rptr. at 784-85.

250. *See supra* notes 222-47 and accompanying text.

251. *See Patricia E.*, 174 Cal. App. 3d at 7-10, 219 Cal. Rptr. at 786-88.

252. *Id.* at 4, 219 Cal. Rptr. at 784.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

both the child welfare agency and Patricia.<sup>257</sup> Patricia was not present at this hearing nor was she interviewed by the agency or its counsel.<sup>258</sup> At the review hearing, the agency recommended that Patricia remain in a foster home.<sup>259</sup> The court ordered that Patricia remain in the foster home where she had been living, and the father appealed.<sup>260</sup>

*b. the court's analysis*

The appellate court explained that even assuming counsel could jointly represent both the agency and the child (which the court did not assume), there had to be a showing that there was no conflict between the two.<sup>261</sup> The court stated:

[C]ounsel must certify that the preliminary duties of section 318 have been completed and that counsel is of the opinion, *wholly independent of the views and interests of his or her client the welfare [agency]*, that joint representation will present no actual conflicts of interest. *This is the minimum we would allow as an adequate affirmative showing warranting exercise of discretion to permit joint representation.*<sup>262</sup>

The appellate court reversed the lower court's decision,<sup>263</sup> holding that the lower court's failure to consider the need for appointment of independent counsel for Patricia was prejudicial.<sup>264</sup> In its reversal, the appellate court stated that the child had a statutory right to counsel, which necessarily included a right to effective assistance of counsel.<sup>265</sup> The court emphasized that counsel dealing with the conflicting interests of two parties to the action would be less effective in many ways.<sup>266</sup> The

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257. *Id.* at 4-5, 219 Cal. Rptr. at 784. The court of appeal noted that at the lower court level there was no record of a showing of a conflict between the agency and the child. *Id.*

258. *Id.* at 5, 219 Cal. Rptr. at 784.

259. *Id.* at 6-7, 219 Cal. Rptr. at 786.

260. *Id.*

261. *Id.* at 8, 219 Cal. Rptr. at 787.

262. *Id.* (emphasis added). In a footnote, the court continued: "We imply no view on the ability of a county counsel to make such a representation where the investigation of the case reveals that reasonable persons could disagree regarding the appropriate position that the child ought to take. This may place counsel in an ethical quandary." *Id.* at 8 n.7, 219 Cal. Rptr. at 787 n.7 (emphasis added) (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (B) & (C) (1983)).

263. 174 Cal. App. 3d at 10, 219 Cal. Rptr. at 788.

264. *Id.*

265. *Id.* at 9, 219 Cal. Rptr. at 788.

266. *Id.* The court focused on the fact that the child had not been interviewed by counsel or a representative of the agency, and that the child had not been in court during any of the proceedings. *Id.* The court found that there were problems which might have been alleviated, had independent counsel been appointed. *Id.* at 9-10, 210 Cal. Rptr. at 788.

court observed that independent counsel might not have made the same recommendation to the court that the agency's counsel did.<sup>267</sup>

The court's analysis is significant because: (1) the court stressed that where counsel represents dual interests an actual conflict exists,<sup>268</sup> and (2) the court acknowledged that the child's independent counsel may not have agreed with the agency's recommendation.<sup>269</sup>

### 3. The role of counsel for a child in juvenile dependency court proceedings

Determining the proper role of independent counsel is important to safeguard the child's best interests.<sup>270</sup> The analysis of independent counsel's function can be quite detailed.<sup>271</sup> Although an all-inclusive analysis goes beyond the scope of this Comment, it is clear that a statute that merely accords mandatory independent counsel without adequate role requirements would be meaningless.<sup>272</sup> A statute requiring mandatory independent counsel must set forth counsel duties that will assure the child an advocate who will limit the detriment to the child.<sup>273</sup>

#### a. *In re David C.: the proper role of counsel for a child*

In *In re David C.*,<sup>274</sup> the court addressed the issue of the proper role of a child's counsel.<sup>275</sup> The court stressed that the role of a child's counsel involved more than just acceding to the state's arguments.<sup>276</sup>

267. *Id.* at 7, 219 Cal. Rptr. at 786.

268. *See supra* notes 265-66 and accompanying text.

269. *See supra* note 267 and accompanying text.

270. *See, e.g., In re David C.*, 152 Cal. App. 3d 1189, 1206-08, 200 Cal. Rptr. 115, 125-27 (1984). *See also* Fraser, *supra* note 4, at 30 n.106.

271. *See generally* Guggenheim, *supra* note 122; Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287 (1983).

272. *See infra* notes 352-58 and accompanying text for the provisions of the author's proposed statute, which incorporates specific counsel duties. Current section 317(e) does delineate duties that a child's counsel should perform to fully protect the child's interests. CAL. WELF. & INST. CODE § 317(e) (West Supp. 1990). *Id.* Counsel's duties include investigating to ascertain the facts, interviewing witnesses, making recommendations regarding the child's welfare, and participating in proceedings in a manner necessary to adequately represent the child. *Id.* These are important and necessary duties. However, if the child is not accorded independent counsel, these duties derive from the agency rather than from an independent investigation by the child's sole representative.

273. Fraser, *supra* note 4, at 29.

274. 152 Cal. App. 3d 1189, 200 Cal. Rptr. 115 (1984) (holding that superior court proceeding was inadequate in protecting fundamental rights of parents and child).

275. *Id.* at 1207, 200 Cal. Rptr. at 126.

276. *Id.* at 1207-08, 200 Cal. Rptr. at 127.

## i. the facts

David had come under the jurisdiction of the juvenile court when he was fourteen months old.<sup>277</sup> David was removed from his parents' home primarily because he had been suffering from malnutrition.<sup>278</sup> When David was six years old, the county child welfare agency filed a petition to terminate parental rights.<sup>279</sup> In seeking to terminate, the agency alleged that returning David to his parents would be detrimental to him.<sup>280</sup> At the termination hearing, David had been represented by independent counsel.<sup>281</sup> However, on appeal, David's parents asserted that David had been denied *effective* assistance of counsel.<sup>282</sup>

## ii. the court's analysis

The court addressed the issue of the proper role of counsel for a child.<sup>283</sup> The court was appalled at the conduct of David's attorney, noting that he had not met with David or even questioned whether or not he *should* have met with David, the birth parents or the foster parents.<sup>284</sup>

The appellate court stressed that "[m]erely agreeing with the agency's assessments without conferring with the family and child involved does not guarantee [competency of] independent counsel for the minor, nor does it do anything to foster the minor's best interests. . . ."<sup>285</sup> The court stated that, *at a minimum*, independent counsel for a child should review the case, interview the child and, in general, make an informed judgment based on the client's interests.<sup>286</sup>

The court's analysis is important because: (1) the court stressed that David's counsel should have met with David as well as the birth parents and foster parents,<sup>287</sup> and (2) the court noted that the child's counsel is incompetent if he or she simply condones the agency's determination

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277. *Id.* at 1196, 200 Cal. Rptr. at 119.

278. *Id.*

279. *Id.* at 1197, 200 Cal. Rptr. at 120. Termination proceedings are held pursuant to section 232 of the California Civil Code. CAL. CIV. CODE § 232 (West 1982).

280. *David C.*, 152 Cal. App. 3d at 1195, 200 Cal. Rptr. at 118.

281. *Id.*

282. *Id.* at 1206, 200 Cal. Rptr. at 126. The court noted that parents in custody proceedings have standing to assert a child's right to effective counsel. *Id.*

283. *Id.* at 1207, 200 Cal. Rptr. at 126.

284. *Id.*, 200 Cal. Rptr. at 126-27. By the time of the termination hearing, David was old enough to voice his opinions, as he was six years old. *See id.* at 1195, 200 Cal. Rptr. at 118.

285. *Id.* at 1207, 200 Cal. Rptr. at 127.

286. *Id.* at 1208, 200 Cal. Rptr. at 127. The court noted that an informed judgment might require independent medical and psychological assessment. *Id.*

287. *See supra* notes 285-86 and accompanying text.

with no independent analysis.<sup>288</sup>

b. *In re Jessica B.: Agency denied counsel*

Recently, the Court of Appeal of the Fifth District in California held that the county child welfare agency was neither statutorily nor constitutionally guaranteed counsel in juvenile dependency proceedings.<sup>289</sup> If the holding in *In Re Jessica B.*<sup>290</sup> were followed, a child may not be accorded any legal representation.<sup>291</sup>

Section 317 gives the court discretion to appoint counsel for a child<sup>292</sup> and outlines specific counsel responsibilities.<sup>293</sup> However, as noted above,<sup>294</sup> a child under four years of age does not have to be interviewed and thus would have difficulty meeting the requirements of section 317 requirements.<sup>295</sup> The *Jessica B.* court saw an interplay between section 318.5<sup>296</sup> and section 317 when it held that even the agency is never *guaranteed* representation by counsel.<sup>297</sup> If the holding in *Jessica B.* were followed, it could completely destroy a child's chance of being even peripherally represented by counsel. Under the court of appeal's analysis, the only party statutorily required to have counsel appointed in

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288. See *supra* notes 285-86 and accompanying text.

289. *In re Jessica B.*, 207 Cal. App. 3d 504, 513, 254 Cal. Rptr. 883, 888 (1989). In this case, an eight-month-old child, Jessica, was severely injured while at home alone with her father. *Id.* at 508, 254 Cal. Rptr. at 885. She was comatose when her parents brought her to the hospital. *Id.* The father made varying reports as to how Jessica's injuries occurred. *Id.* at 508-09, 254 Cal. Rptr. at 885. Upon arrival at the hospital the father stated that Jessica had been strangled by a crib toy. *Id.* Later, the father told an investigating officer that he had slipped while holding Jessica, dropped her, then fell on top of her. *Id.* Abuse was suspected, and shortly thereafter dependency proceedings were initiated. *Id.*

At the detention hearing, the father entered a no-contest plea to an amended petition. *Id.* The child was subsequently released to the mother, with the stipulation that the father could only have visits with the child when a social worker was present. *Id.* at 509, 254 Cal. Rptr. at 886.

290. 207 Cal. App. 3d 504, 254 Cal. Rptr. 883 (1989).

291. The *Jessica B.* court cited current California Welfare and Institutions Code section 318.5. *Jessica B.*, 207 Cal. App. 3d at 513, 254 Cal. Rptr. at 888. The court said that the child welfare agency would only be accorded counsel if two requirements were met. *Id.* The first requirement, according to the court, was that the parent be represented by counsel; second, the court held, the trial court must specifically request the presence of counsel. *Id.*

292. CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

293. *Id.*

294. See *supra* notes 20-25 and accompanying text.

295. These requirements include either that counsel would benefit the child, or a showing that a conflict exists between the child and the agency. CAL. WELF. & INST. CODE § 317(c) (West Supp. 1990).

296. *Id.* § 318.5.

297. *Jessica B.*, 207 Cal. App. 3d at 513, 254 Cal. Rptr. at 888.

every juvenile court proceeding is the parent.<sup>298</sup> Thus, the child's "best interests" could be advocated solely by the county child welfare agency, itself potentially unrepresented by counsel.

c. *In re Laura F: independent counsel for children in parental termination proceedings*

In *In re Laura F.*,<sup>299</sup> the Supreme Court of California addressed whether independent counsel for children should be required in parental termination proceedings initiated under section 232 of the California Civil Code.<sup>300</sup> The high court could apply its *Laura F.* holding if an action were brought to the court alleging that mandatory independent counsel should be required for children in the juvenile dependency court system.

The purpose of Civil Code section 232 is to irrevocably free a child from parental care and custody.<sup>301</sup> Thus, *Laura F.* must be addressed because parental termination proceedings are generally considered more important than dependency proceedings due to the former's greater impact on parental rights.<sup>302</sup> In *Laura F.*, the court determined that when a county child welfare agency institutes termination proceedings, the agency's counsel could "adequately represent the child's interests."<sup>303</sup>

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298. *Id.*

299. 33 Cal. 3d 826, 662 P.2d 922, 191 Cal. Rptr. 473 (1983).

300. *Id.* at 830, 662 P.2d at 931, 191 Cal. Rptr. at 473; *see also* CAL. CIV. CODE § 232 (West 1982 & Supp. 1990).

301. CAL. CIV. CODE § 232 (West 1982). A child may be released from his parent's control, for example, if the child has been abandoned or abused by the parent, or the parent is disabled due to alcohol, drug abuse, or mental incapacity, and familial reunification efforts have failed. *Id.*

302. The theory is that parental rights are being conclusively ended in termination proceedings, rather than being merely temporarily obstructed. *See Note, supra* note 103, at 302-03. However, although dependency proceedings are geared toward temporarily detaining children in the state's custody rather than a permanent severance of parental rights, it has been termed a constructive termination. *Id.*

303. *Laura F.*, 33 Cal. 3d at 840, 662 P.2d at 931, 191 Cal. Rptr. at 473. Laura and her two siblings were removed from parental custody because of neglect. *Id.* at 829, 662 P.2d at 923-24, 191 Cal. Rptr. at 465. When the children had been with their parents, they had to sleep in cars and beg for food. *Id.* at 834, 662 P.2d at 927, 191 Cal. Rptr. at 469. In addition, the children had periodically been left with others: one child was given to a woman whose last name was unknown to the mother; another was left with a woman who had been accused of child neglect. *Id.* When taken into protective custody, Laura, three and one-half years old, could not talk and had rotten teeth; Laura's eight-year-old brother functioned at a mental age of less than four years of age; and Laura's younger sibling, a one-year-old girl, never cried nor appeared to want affection. *Id.* Three years after the children were taken into protective custody, the state initiated and prevailed in an action to terminate parental rights. *Id.* at 829-30, 662 P.2d at 924, 191 Cal. Rptr. at 465-66. The mother appealed. *Id.* at 829, 662 P.2d at 924, 191 Cal. Rptr. at 465. One of the mother's arguments on appeal was that the court had erred

One commentator has noted that the child may have a greater need for independent counsel in dependency proceedings as opposed to termination proceedings.<sup>304</sup> However, based on *Laura F.*, it is improbable that the Supreme Court of California would determine that children in dependency court should be granted independent counsel. Thus, without a favorable United States Supreme Court ruling, children residing in California need to look to the California Legislature to further the best interests standard and require independent counsel for every child.

*C. A Child's Right to Independent Counsel in the Juvenile  
Dependency Court System*

1. United States Supreme Court precedent and the right to  
independent counsel for children in the juvenile dependency  
court system

It is difficult to predict how the United States Supreme Court would react to a child's allegations that the lack of independent counsel in dependency proceedings amounted to a due process violation. However, if there were a constitutional challenge to section 317, the Court could analogize to prior Court holdings and grant children the right to independent counsel.

In *In re Gault*,<sup>305</sup> the Court said that without the right to counsel, juveniles in delinquency cases were deprived of fair proceedings and individual fundamental rights, including the right to liberty.<sup>306</sup> This was true, the Court said, even though the minor had a state probation officer looking after his interests.<sup>307</sup> The Court specifically found that the probation officer could not act as counsel for the minor, essentially because of the probation officer's conflict of interest.<sup>308</sup> Instead, the court held, a minor had to have his own counsel to make factual findings, to help in understanding the law, and to insist on regular proceedings.<sup>309</sup>

Like the minor in *Gault*, a child in the juvenile dependency court

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in failing to appoint independent counsel for the children. *Id.* at 830, 662 P.2d at 924, 191 Cal. Rptr. at 466.

304. Demchak, *supra* note 17, at 28.

305. 387 U.S. 1 (1967).

306. *Id.* at 27, 38-41. The minor in *Gault* did have his physical liberty restrained; he was committed to a state home. *Id.* at 27. However, the Court's analysis went beyond a requirement that physical liberty be affected before counsel had to be appointed. The Court stressed that the juvenile system had been designed to maximize the best interests of the child. *Id.* at 15.

307. *Id.* at 36.

308. *Id.* See *supra* notes 172-73 and accompanying text.

309. *Gault*, 387 U.S. at 36.

system also has state officers (i.e., county child welfare agency workers) with the duty to protect the child's interests.<sup>310</sup> However, as noted above, these social workers have concerns and obligations which prevent them from singularly focusing on the child's rights and interests.<sup>311</sup> Thus, like the probation officer in *Gault*, the agency's workers have a conflict with the child's interests.<sup>312</sup> In addition, without independent counsel, a child involved in the dependency court system may be deprived of fair, regularly scheduled proceedings.<sup>313</sup> The agency may also fail to instruct its attorney to pursue legal avenues that may be in the child's best interests.<sup>314</sup>

Using *Gault*, the Court could determine that the child in the juvenile dependency court system requires independent counsel to present facts and evidence to pursue the best interests of the child and fair proceedings. As the *Gault* Court stressed, inadequate procedures, such as a failure to require independent counsel for each child, could lead to inaccuracy.<sup>315</sup> Additionally, independent counsel would not be dictated by the needs of any party to the action other than the child. Independent counsel could thus serve as a "balancing force" between the agency investigations and the subjective analysis made by the parent.<sup>316</sup>

Detention by a juvenile dependency court system *does* deprive a child of his or her liberty interest.<sup>317</sup> Other than the physical liberty dep-

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310. See generally CAL. WELF. & INST. CODE §§ 305-06 (West Supp. 1990).

311. See *supra* notes 54-65 and accompanying text.

312. See *supra* notes 54-65 and accompanying text. See also *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990) (holding dependency court social workers have absolute immunity from liability, allowing workers to perform without fear of threat of 42 U.S.C. § 1983 litigation).

313. The state or the parent may move to continue the case, which might be against the child's best interests. Without independent counsel, the child cannot request that a continuance not be granted.

314. For example, the agency may fail to timely pursue termination so that a child may be adopted. Although California Welfare and Institutions Code gives the court leeway to order termination proceedings when the child has been detained for twelve months, see CAL. WELF. & INST. CODE §§ 361.5, 366.25 (West Supp. 1990), it often takes the state two years or more to initiate proceedings to terminate parental rights. See, e.g., *In re Laura F.*, 33 Cal. 3d 826, 662 P.2d 922, 191 Cal. Rptr. 464 (1983); *In re Terry E.*, 180 Cal. App. 3d 932, 225 Cal. Rptr. 803 (1986); *In re Raymond H.*, 175 Cal. App. 3d 556, 221 Cal. Rptr. 165 (1985); *In re David C.*, 152 Cal. App. 3d 1189, 200 Cal. Rptr. 115 (1984); *In re Susan M.*, 53 Cal. App. 3d 300, 125 Cal. Rptr. 707 (1975). The state's failure to pursue legal avenues means the state is ignoring the reality that children need stable environments. Even though the state is subjecting the child to uncertainty, the child without independent counsel is helpless to act against the state. See *Babcock* 884 F.2d at 498.

315. See *Gault*, 387 U.S. at 19-20.

316. See *Children of Divorce: Do They Have a Right to Counsel?*, 3 CHILDREN'S LEGAL RTS. J. Sept./Oct. 1981, at 29.

317. It cannot be forgotten that children detained by the juvenile dependency court system



privation, the child's liberty interest in familial autonomy is also affected by the state's action.<sup>318</sup> Additionally, it could be argued, based upon Supreme Court precedent, that children have an individual liberty interest in a secure, stable, long-term, continuous parental relationship.<sup>319</sup>

The Court has stated that although due process is required in juvenile proceedings,<sup>320</sup> the Constitution allows juveniles to be treated somewhat differently from adults.<sup>321</sup> In *Schall v. Martin*,<sup>322</sup> the Court noted that although juveniles have an interest in freedom, that interest is affected by the fact "that juveniles, unlike adults, are always in some form of custody."<sup>323</sup> In *Schall*, the Court rationalized that

[c]hildren, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the state must play its part as *parens patriae*. . . . In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the state's '*parens patriae*' interest in preserv-

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are usually detained in places other than the home of the parent. Such detention may be an unwarranted governmental interference with the child's due process liberty interest because the child's physical liberty is impinged.

318. The state has stepped in, after all, and temporarily severed the family unit. However, as a liberty interest, this might be deemed an interest shared and controlled by the parent. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Yet even if familial liberty is controlled by the parent, the Court has also stated that familial autonomy cannot usurp individual constitutional rights of children. See *Parham v. J.R.*, 422 U.S. 584, 600-03 (1979). Thus, the liberty interest in family autonomy, coupled with the child's individual rights, paves the way for the Court to grant substantial weight to the child's liberty interest.

319. See *supra* notes 68-71 and accompanying text. The importance of a stable parent-child relationship is due to what the relationship gives to the child: it promotes intimacy, a way of life, training, and love. *Smith v. Organization of Foster Families*, 431 U.S. 816, 844-45 (1977). The "emotional attachments" that develop between a child and the adult who cares for him or her connote a liberty interest. *Id.* at 854. It follows, thus, that the state unconstitutionally impacts the child's interest in emotional attachments and thus impinges upon liberty any time it removes the child from the parent or any other adult that cares for the child and to whom the child has become emotionally attached. The state must, therefore, enact statutes that will protect the child's liberty interests, further the child's best interests, and result in fair proceedings.

320. *Schall v. Martin*, 467 U.S. 253, 268 (1984); *In re Gault*, 387 U.S. 1, 18 (1967).

321. *Schall*, 467 U.S. at 268. In *Schall*, the Court held that in juvenile delinquency matters, the state has an interest in protecting society as well as the juvenile, and thus was justified in the pretrial detention of delinquent minors. *Id.* at 255-64. In this 1984 decision, a class action was instituted by juveniles who had been detained. *Id.* at 255-56. The class representatives asserted that their due process rights were violated because of New York's statutory construction. *Id.* at 255, 261.

322. 467 U.S. 253 (1984).

323. *Id.* at 262 (citing *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 510-11 (1982) and *In re Gault*, 387 U.S. 1, 17 (1967)).

ing and promoting the welfare of the child.<sup>324</sup>

The Court concluded that, in the pre-trial detention of delinquent juveniles, the state's statutory scheme was consistent with the due process requirement that proceedings be fair.<sup>325</sup> The Court did indicate that there were times when "detention of a juvenile would not pass constitutional muster."<sup>326</sup> In this case, however, the Court felt that juvenile delinquents needed to be detained prior to any adjudication because there was a risk to the community as well as to the juvenile.<sup>327</sup>

*Schall* does not stand for the proposition that a child is always in a form of custody and thus it follows that the state may ignore the child's constitutional right to liberty. The Court was very specific that, in detaining the minors here, the state did so not only to protect the child, but also to protect the state from future violence instigated by the child.<sup>328</sup> In *Schall*, it might have been appropriate for the state to subordinate the child's liberty interests. However, in juvenile dependency court, the young child is not a danger to the state. The child has been detained because of parental abuse or neglect, not because the child is violent. Further, the Court noted that a juvenile's liberty interest may be subordinated to the state's interest to further the child's welfare.<sup>329</sup> The child detained by the dependency court system is not in an "appropriate circumstance" to deny the right to counsel at the time the child is detained by the state because the child is not violent and the state's denial of counsel does *not* further the child's welfare. Thus, denying the right to counsel to a child in dependency court would violate the due process requirement of fair proceedings. In juvenile dependency cases, therefore, detention of a child without according the child independent counsel should not "pass constitutional muster."

Even if the Court determined that a dependent child's physical liberty was not affected by the state's detention, the Court could employ the *Lassiter* due process balancing test.

The result of the three-part *Lassiter* test could provide a constitutional basis for according the child independent counsel.<sup>330</sup> The first part

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324. *Id.* at 265 (citations omitted) (emphasis added).

325. *Id.* at 268.

326. *Id.* at 273.

327. *Id.* at 255-64.

328. *Id.*

329. *Id.* at 265.

330. If the Court followed *Lassiter* strictly, the constitutional requirement of independent counsel for a child would be on a case-by-case basis. Presumably this presently occurs in California through Welfare and Institutions Code section 317. However, a constitutional requirement would elevate the child's right to counsel in every case. Presently, the California

of the test examines the private interests at stake.<sup>331</sup> Under this prong of the test, the child's interests are much stronger than those of the indigent adult parent. Not only does the child share the parent's interest in familial ties, but he or she also has an interest in emotional attachments, a stable, loving home, and an interest in being free from emotional or physical abuse.<sup>332</sup>

The next consideration is the state's pecuniary interest.<sup>333</sup> Considering the state's overriding interest in its citizenry, the state's pecuniary interest is weak.<sup>334</sup> The *Lassiter* Court stated that the state's economic concerns could never override important private interests. As set forth above, the child has many important private interests that would have to be noted by the Court.<sup>335</sup>

The final prong focuses on the risks of erroneous decision if the child is not accorded counsel.<sup>336</sup> The risk to a child of erroneously detaining or allowing the child returned home is great. The child could suffer permanent disabilities or even death.<sup>337</sup> This third factor weighs heavily in the child's favor because the potential damage and danger to the child is substantially greater than the parent's potential loss of the care and control of his or her child. In addition, the risk of error is great because the child is compressed between the various state concerns, parental interests, and the state's conflicting obligations to both the parent and the child.

Denying independent counsel for every child in the juvenile depen-

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Legislature could determine that the child's procedural requirements in juvenile dependency court proceedings could be met solely by the agency itself without counsel. If the Supreme Court should hold that, at a minimum, the Constitution *requires* that appointment of independent counsel be considered on a case-by-case basis, California may be more willing to statutorily grant each child in the juvenile dependency court system the same mandatory right to counsel that the state now gives to the parent.

331. *Lassiter*, 452 U.S. at 27. See also *supra* notes 200-01 and accompanying text.

332. See *supra* notes 68-71 and accompanying text.

333. *Lassiter*, 452 U.S. at 27. See also *supra* notes 202-03 and accompanying text.

334. The *Lassiter* majority noted that the state's interest in avoiding the costs of appointed counsel could not overcome important private interests. *Lassiter*, 452 U.S. at 28. The Court noted that, in the case of parental interests, the state's economic concerns were "*de minimis*." *Id.* As noted, a child has interests that go beyond a shared parent-child interest in the integrity of the family. See *supra* notes 314-19 and accompanying text. Thus, the child's interests might completely overshadow the state's lesser pecuniary concerns. As Justice Stevens stressed in his dissent in *Lassiter*, in view of the child's interests, the financial and administrative burden on the trial court to appoint counsel is a reasonable one for the courts to bear. *Lassiter*, 452 U.S. at 59-60 (Stevens, J., dissenting).

335. See *supra* notes 314-19, 335 and accompanying text.

336. *Lassiter*, 452 U.S. at 27. See also *supra* notes 204-09 and accompanying text.

337. See *Bouknight*, 58 U.S.L.W. at 4814; *DeShaney*, 109 S. Ct. at 1002; *In re Patricia E.*, 174 Cal. App. 3d 1, 4, 219 Cal. Rptr. 783, 784 (1985).

dency court system is justified, it has been argued, because children's needs are being met by the county child welfare agency.<sup>338</sup> Others argue that independent counsel should not be provided because children are incapable of involvement in the adversarial process.<sup>339</sup> There is a general distrust of persons who advocate for children because children are not viewed as capable of directing counsel and thus, the argument advances, their attorneys cannot adequately represent the child's legal interests.<sup>340</sup> However, one commentator has noted "[i]f there are reasons to distrust legal representation of children, there are reasons to distrust legal representation of adults, and confronting both kinds of distrust may demand more, not less, legal conversation. Courts could appoint multiple representatives [for children] to offer contrasting views of children's rights and interests."<sup>341</sup>

Further, the United States Supreme Court has stated that "[p]rocedure by presumption is always cheaper and easier . . . but when . . . the procedure forecloses the determinative issues of competence and care, when it explicitly disdains *present realities* in deference to [tradition], it needlessly risks running roughshod over . . . important interests . . . ."<sup>342</sup> California's current statutory scheme fails to provide mandatory independent counsel for every child entering the juvenile dependency court system and thus, this author contends, ignores "present realities."<sup>343</sup>

As the Supreme Court noted in *Gault*, "[d]epartures from established principles of due process have frequently resulted . . . in arbitrariness."<sup>344</sup> As California departs from the due process principle which requires fair proceedings by failing to accord children in the juvenile dependency court system independent counsel, the state has acted unconstitutionally.

Current California Welfare and Institutions Code section 317 could be constitutionally challenged by a child under United States Supreme Court precedent. The challenge would be buttressed by the inexplicable requirement that adult indigents—but not children (who are usually in-

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338. See, e.g., *Patricia E.*, 174 Cal. App. 3d at 7, 219 Cal. Rptr. at 787 (1985).

339. Minow, *supra* note 26, at 1882.

340. See generally Guggenheim, *supra* note 122, at 76.

341. Minow, *supra* note 26, at 1890.

342. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (holding that due process guaranteed unwed father hearing regarding parental fitness before children could be taken from him) (emphasis added).

343. See *supra* notes 56-65 and accompanying text.

344. *Gault*, 387 U.S. at 18-19.

igent<sup>345</sup>)—have the right to independent counsel.

## 2. California precedent and the right to independent counsel for children in the juvenile dependency court system

By failing to require effective independent counsel for every child, the California Legislature denies the right to an independent "voice"<sup>346</sup> and ignores "present realities."<sup>347</sup> California Welfare and Institutions Code section 317 has been written so that a child may only be given independent counsel if the court determines that there is a need for one.<sup>348</sup> However, the courts have noted that neglected or abused children need independent counsel.<sup>349</sup> The California Legislature has yet to pass a statute that addresses this need.

## V. AMENDING SECTION 317: RECOMMENDED STATUTORY LANGUAGE

The state has an economic interest in limiting expenditures of state funds. However, this economic interest should not supercede the state's interest in its citizenry. The state's pecuniary interest is not sufficient to override certain liberty interests of the child, such as the right to be free from abuse, the right to stability and the child's right to safety.<sup>350</sup> A state's economic interest also does not nullify the collective interests of the state, the parent and the child in a just judicial decision based on fair proceedings. Neither does the state's economic concerns supplant the state's utmost interest in protecting the health, safety and welfare of its citizenry.

California needs to require that each child entering the juvenile de-

345. The term "indigent" refers "to one's financial ability, and ordinarily indicates one who is destitute of means . . . so as to be in want." BLACK'S LAW DICTIONARY 395 (5th ed. abridged 1983).

346. See *In re Melissa S.*, 179 Cal. App. 3d 1046, 1056, 225 Cal. Rptr. 195, 201 (1986).

347. *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). See also *supra* notes 56-65 and accompanying text.

348. CAL. WELF. & INST. CODE § 317 (West Supp. 1990).

349. See, e.g., *In re Melissa S.*, 179 Cal. App. 3d 1046, 225 Cal. Rptr. 195 (1986); *In re Patricia E.*, 174 Cal. App. 3d 1, 219 Cal. Rptr. 783 (1985); *In re David C.*, 152 Cal. App. 3d 1189, 200 Cal. Rptr. 115 (1984). Independent counsel not only benefits the child by according an independent voice, but also benefits the court. The court is benefitted because it receives information from counsel who is ascertaining the facts, interviewing witnesses and making recommendations based solely upon the best interests of the child.

350. See *Baltimore City Dep't of Social Servs. v. Bouknight*, 58 U.S.L.W. 4184 (1990); *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502 (1982); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Parham v. J.R.*, 442 U.S. 584 (1979); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). See also *supra* notes 110-29 and accompanying text.

pendency court system be accorded independent counsel to assure fair proceedings and to further the child's best interests. Section 317 should be amended to require independent counsel and should also clearly state counsel duties.

*A. Proposal: Provisions for an Amended Version of California Welfare and Institutions Code*

The California Welfare and Institutions Code should be amended to require independent counsel for the allegedly abused and neglected child entering the juvenile dependency court system. Counsel duties would be clearly delineated<sup>351</sup> and require counsel's active participation in both the factfinding and court-related process. The amended California Welfare and Institutions Code section would be designated section 317.1 and would provide:

- (a) When a minor alleged to be a person described in Welfare and Institutions Code section 300 comes to the attention of any state agency which has the duty to report suspected abuse, the court shall appoint counsel for this minor prior to the first detention hearing.<sup>352</sup> The minor's counsel shall meet with and interview the minor, regardless of the minor's age, taking into account the minor's age and cognizance, to determine the minor's wishes and to assess the minor's well-being.<sup>353</sup> Such interviews shall take place in a

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351. A clearly written statute will minimize contrived arguments, such as the one made in *In re Melissa S.* See *In re Melissa S.*, 179 Cal. App. 3d 1046, 1055, 225 Cal. Rptr. 195, 200 (1986) (child welfare agency argued children had not "appeared" per literal language of former section 318); see also *supra* notes 236-40 and accompanying text.

352. As currently written, section 317 stresses that counsel will be appointed for the parent if the parent cannot afford to retain his or her own counsel. CAL. WELF. & INST. CODE § 317 (West Supp. 1990). Obviously, it would be unusual for a child to be able to afford his or her own counsel. Therefore, so as not to be ambiguous, the statute would clearly state that all children will have counsel appointed to represent them.

In addition, counsel would be appointed and would interview the child when there is a report of child abuse. This would further the best interests of the child by allowing the child to speak to his or her counsel prior to the detention hearing. If the child is pre-verbal, independent counsel could at least independently assess and investigate circumstances that led to the child being taken into protective custody. This would include the child's counsel interviewing the child's designated agency social worker. By requiring the interview at this time, the child's counsel would not be able to wait until the day of the detention hearing and then "look at the case and wing it." See Kline, *supra* note 17, at 70.

353. Current statutory language requires only that counsel interview the minor if the minor is four years of age or older. CAL. WELF. & INST. CODE § 317(e) (West Supp. 1990). If the statute is written to require visitation and assessment by counsel (even if the minor is too young to be "interviewed"), then counsel will be more likely to depend on his or her own assessment of the situation.

quiet, private area.<sup>354</sup> Prior to the interview, counsel shall be provided with any reports or information pertaining to the detention of the child.

- (b) Counsel for the minor may not represent another party to the action, including any state or county agency. Counsel for the minor shall have had training in child development, as required by California Business and Professions Code section 28 and Welfare and Institutions Code section 16206.<sup>355</sup>
- (c) Counsel shall represent the minor at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the minor unless relieved by the court for cause. If counsel is relieved by the court for cause, substituted counsel shall immediately be appointed for the child. The representation of the child shall include representing the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship.
- (d) The counsel for the minor shall be charged in general with the representation of the minor's interests. To that end, counsel shall make investigations<sup>356</sup> to ascertain the facts, including the interviewing of witnesses, and he or she shall examine and cross-examine witnesses in both the adjudicatory and dispositional hearings; he or she may also introduce and examine his or her own witnesses, make recommendations to the court concerning the minor's welfare, and participate further in the proceedings to represent the minor's best interests. Counsel shall visit with and interview the minor prior to every hearing. If necessary to further the minor's interests, including the interests in

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354. Requiring that the interview take place privately would stop the interviews that currently occur in "crowded, noisy hallways or busy entryways leading to the courtrooms." Kline, *supra* note 17, at 70.

355. See CAL. BUS. & PROF. CODE § 28 (West Supp. 1990); CAL. WELF. & INST. CODE § 16206 (West Supp. 1990). Both sections declare that the California Legislature intends to ensure that professionals who deal with child abuse victims have adequate and appropriate training. However, although section 16206 of the Welfare and Institutions Code mentions that such training *may* include training in child development, the author would amend section 16206 to *require* that training necessarily include classes in child development.

356. Independent counsel should make its own investigations. This minimizes the danger that minor's counsel will depend on the interviews and investigations conducted by the county child welfare agency, police officers, and others with close attachment to the state.

safety and stability, counsel shall initiate legal action against any other parties.

- (e) The court may fix the compensation to be paid by the county for services of appointed counsel.
- (f) Notwithstanding any other provision of law, counsel shall be given access to all records relevant to the case which are maintained by state or local public agencies. Counsel shall be given access to records maintained by hospitals or other medical or nonmedical practitioners or by child care custodians.

### *B. The administrative burden of providing independent counsel*

Recently, the Los Angeles County Board of Supervisors decided to incorporate a cost-saving change and replace private lawyers who had represented parents (and some children) in dependency court with a non-profit legal corporation.<sup>357</sup> This administrative change could minimize the burden of providing independent counsel for each child entering the juvenile dependency court system.

The proposed corporation would function in a manner similar to the corporation that currently represents the Los Angeles Department of Children's Services.<sup>358</sup> If formed, the new corporation will satisfy current section 317 requirements.<sup>359</sup> The Board of Supervisors intend to divide this corporation into three separate legal offices to protect against conflicts-of-interest, which could occur if one office represents more than one client in the same case.<sup>360</sup>

If the corporation is formed, one of the offices should be designated as the office of independent counsel to represent children. A change in the statute could thus be coupled with the office's designation for representation of children. This system could be used in every county in California.<sup>361</sup>

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357. Guccione, *County Trying to Form a New Legal Aid Group*, L.A. Daily J., Oct. 25, 1989, § I, at 1, col. 4.

358. *Id.* at 11, col. 2.

359. *Id.*

360. *Id.*

361. Further, if the state adamantly feels as though it cannot afford any additional attorneys in dependency court, perhaps counsel for the child welfare agency should be discontinued. Current section 318.5, read literally, does not guarantee the agency's right to counsel. See CAL. WELF. & INST. CODE § 318.5 (West 1984 & Supp. 1990). See also *In re Jessica B.*, 207 Cal. App. 3d 504, 254 Cal. Rptr. 883 (1989). The agency is statutorily guaranteed counsel only if two requirements are met: (1) the parent is represented by counsel; and (2) the court requests that counsel be appointed for the agency. CAL. WELF. & INST. CODE § 318.5 (West



## VI. CONCLUSION

The California Welfare and Institutions Code should be amended to require that all children be appointed independent counsel as soon as they are taken into protective custody by the juvenile dependency court system. Such an amendment is necessary in order to pursue the best interests of children in dependency proceedings. Independent counsel can actively pursue children's interests in stability and safety by advocating the children's interests in light of the parent or state's failings.

Section 317, as written, is vulnerable to constitutional attack on grounds that a child's due process right to counsel is denied. After all, the Due Process Clause was "designed to protect the fragile values of a vulnerable citizenry from . . . government . . . ." <sup>362</sup> Although the United States Supreme Court typically defers to the states' judgment in the area of child protection, it has also emphasized that society's perpetuation depends on the "well-being" of its children. <sup>363</sup> The Court has noted that the well-being of society's children depends undisputedly on meeting the needs of children. <sup>364</sup> The Court has also implied that states should establish law that will ensure the rights of children. <sup>365</sup> A guarantee of independent counsel for all children will ensure protection of children's rights more than the present practice, which involves the child sharing counsel with a party who has conflicts with the child's interests.

The state must adhere to California's best interest standard to further the state's interest in the health, safety and welfare of its children. As this Comment has demonstrated, this best interest standard can only be served if the state requires independent counsel for all children in the juvenile dependency system.

*Martha Helppie\**

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1984 & Supp. 1990). Certainly an educated social worker could be more capable of representing the agency's interest than a minor would be in representing him or herself.

362. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

363. *See supra* notes 81-86 and accompanying text.

364. *Lehman v. Lycoming County Children's Servs.*, 458 U.S. 502, 513 (1982).

365. *Id.*

\* The author wishes to thank Dean Jan Costello for reading a draft of this Comment, and Mark Mason for his patience, understanding, and encouragement.