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*Susan M. Finegan & Laura W. Gal**

INTRODUCTION

"You have the right to remain silent . . . . You have the right to an attorney . . . . If you cannot afford an attorney, one will be provided for you."[1] Whether from television or from law school, most Americans, even children, have heard or read some version of a Miranda Warning. We are familiar with the idea that a person is entitled to legal representation when charged with a criminal offense punishable with jail time and that, if the accused cannot afford an attorney, one will be appointed at the government's expense.[2] What if a person's physical liberty is not at stake, but the loss of housing or custody of a child is at risk? Are there other rights so fundamental to our society's sense of liberty that a right to counsel is, or should be, recognized?

This question has gained increasing attention in recent years, as civil courts have grappled with an unprecedented increase in unrepresented litigants.[3] The American justice system is predicated on having a judge preside over a lawsuit involving two opposing parties—both represented by counsel. As a result, the

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1. *What Are Your Miranda Rights?*, MIRANDAWARNING.ORG, http://www.mirandawarning.org/whatareyourmirandarights.html [https://perma.cc/5XGY-QFJR].

2. *Id.*; *see* Miranda v. Arizona, 384 U.S. 436 (1966).

3. *See* CHARLES P. KINDREGAN & PATRICIA A. KINDREGAN, COMMONWEALTH OF MASS. THE TRIAL COURT PROB. & FAMILY COURT DEP'T, PRO SE LITIGANTS: THE CHALLENGE OF THE FUTURE (1995), http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/prosefinalreport.pdf [https://perma.cc/3A6X-TGMR].

system of rules that developed over time is often difficult to understand by those who must represent themselves. A single party unfamiliar with the rules of litigation can make the process more difficult and more resource-consuming for all parties and for the courts. In addition, lack of understanding can lead to lack of faith in our system of laws. To address this phenomenon, court systems throughout the country have implemented innovative approaches to assist unrepresented litigants, including the simplification of court forms, the development of online resources in plain language, and the opening of court-service centers with court staff available to provide information. While such efforts are laudable, and indeed necessary, it is important that access to justice advocates not lose sight of the important roles lawyers play, and the impact on outcomes lawyers could have in the cases in which litigants must forge ahead without such assistance. While perhaps appointment of counsel for all low-income litigants, in all case types, is not realistic from a fiscal standpoint, or necessary from a due process perspective, providing lawyers for low-income litigants in certain types of cases is not only helpful, it is constitutionally required.

This Article explores an important avenue for the access to justice movement: appellate lawyers using the due process clause of both the state and federal constitutions to advocate for a constitutionally based right to counsel. Through examination and discussion of the Supreme Judicial Court's (SJC) April 2016 decision in *L.B. v. Chief Justice of the Probate & Family Court Department*,[4] this Article details this approach in the context of private child custody actions.

L.B. is the most recent Massachusetts case to address the question: when does a parent have a right to counsel in a custody case concerning the parent's child? The answer to this question has been developing over the past several decades, and the SJC's decision in *L.B.* marked a significant expansion of this right in cases involving a parent versus a non-parent. It also marked a new approach to balancing the rights of parents with the fiscal constraints of the state. In *L.B.,* the court held that an indigent parent whose child is under guardianship has a right to counsel if the parent presents a "meritorious" claim for: (1) removal of the guardianship; or (2) a substantial expansion of parental visitation

4. *L.B.*, 49 N.E.3d at 232.

under the guardianship.[5] The decision is interesting both for its expansion of the class of proceedings in which a right to counsel may exist and for the initial burden the court imposes on *pro se* litigants as a prerequisite to triggering their right to counsel. The creation of the "meritorious" threshold allowed the court to extend a right to counsel into a new class of proceedings without guaranteeing counsel in all proceedings of the given class. Future appellate advocacy will likely be necessary to determine what evidence or assertion is sufficient to trigger the right.

I. CIVIL RIGHT TO COUNSEL: AN OVERVIEW

A. *National Movement*

A right to counsel in criminal matters was first recognized more than fifty years ago in the 1963 landmark Supreme Court decision, *Gideon v. Wainwright*.[6] In *Gideon*, the Court found a criminal defendant's Fourteenth Amendment right to due process could not be protected without access to counsel.[7] Since that time, courts and legislatures have wrestled with the question of when indigent litigants have the right to counsel in civil proceedings. As articulated in the Supreme Court's 1981 decision in *Lassiter v. Department of Social Services of Durham County*, the analysis for determining due process rights is complicated, and the answer far from straightforward: "[f]or all its consequence, 'due process' has never been, and perhaps can never be, precisely defined . . . . Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty."[8]

In *Lassiter*, the state terminated Abby Lassiter's (petitioner) parental rights to her infant son. She appealed the termination, asserting her due process rights had been violated by the state's failure to provide her with a court-appointed lawyer.[9] She could not afford a lawyer to represent her at the trial court proceeding

5. *See id.* at 241–42.

6. Gideon v. Wainwright, 372 U.S. 335 (1963).

7. *See id.* at 341–45.

8. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 24 (1981).

9. It is noteworthy that *Lassiter* was decided on federal constitutional grounds. The decisions in *L.B.*, and cases leading up to that decision, suggest that state constitutions may provide broader protections. *Lassiter* did not foreclose recognition of a right to counsel in custody or other civil proceedings, but it indicated a restrictive view that providing counsel is a necessity to preserving due process. *See id.* at 33–34.

and argued she could not effectively defend her parental rights without one.[10] Applying the three-prong balancing test ("*Mathews* Test") articulated in *Mathews v. Eldridge*,[11] the Court held that protection of due process rights of the particular litigant at hand did not require appointment of counsel, both because of alternative measures taken to protect the litigant's rights and the litigant's failure to avail herself of other opportunities to protect and promote her relationship with her child.[12] Nonetheless, the Court's focus on the facts of the individual case left room for future litigation of the issue; a different set of circumstances might tip the *Mathews* analysis in the parent's favor. Moreover, the court made a point of acknowledging that access to counsel may be appropriate, even if not constitutionally required:

> In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well . . . . Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.[13]

In the decades since *Lassiter*, a national movement to recognize a right to counsel in civil cases has gained significant momentum. Proponents of a civil right to counsel advocate that self-represented litigants should have counsel in any case affecting "basic human needs" such as housing, health, safety, sustenance and child custody matters.[14]

10. *See id.* at 24.

11. Mathews v. Eldridge, 424 U.S. 319 (1976). The three-prong balancing test is: "(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail." *Id.* at 321.

12. *See Lassiter*, 452 U.S. at 32–33.

13. *Id.* at 33–34 (citations omitted).

14. *See* Jillian Jorgenson, *Civil Discourses: Lawmakers and Legal Experts Want*

B. *State Initiatives*

Advocates at both state and local levels have pursued a variety of approaches to obtain a civil right to counsel.[15] This year alone, over two dozen bills in multiple state legislatures have been filed that would establish or expand a civil right to counsel in varying circumstances.[16] One of the more promising recent bills hails from New York City and guarantees low-income residents an attorney in eviction proceedings.[17] This bill has garnered substantial political support and inspired similar efforts in other states.[18] A similar bill is now pending in the Massachusetts House of Representatives.[19] In addition to legislative fixes, advocates have tried local pilot projects to demonstrate that providing counsel in certain circumstances could make a significant difference in case outcomes. One such example was a two-court pilot program, which provided an attorney in certain categories of eviction cases in Quincy, Massachusetts District Court and the Northeast Housing Court. These pilot programs were developed through the collaboration of the Boston Bar Association, two legal-services organizations (Greater Boston Legal Services and Northeast Legal Aid), academics from Harvard University, and many others.[20] The pilot

to Expand Your Right to a Lawyer, OBSERVER (Aug. 20, 2015, 10:30 PM), http://observer.com/2015/08/civil-discourse-lawmakers-and-legal-experts-want-to-expand-your-right-to-a-lawyer/ [https://perma.cc/XW8G-ML8Z].

15. *See* BOS. BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHTS TO COUNSEL, GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS apps. 3 & 4 (Sept. 2008), https://www.bostonbar.org/prs/reports/GideonsNewTrumpet.pdf [https://perma.cc/FK5M-VJV5] (detailing types of Massachusetts cases in which a right to counsel has been found through statute or case law). The National Coalition for a Civil Right to Counsel, a national advocacy organization based in Maryland, has a comprehensive list of state-by-state approaches, including litigation, legislation, and pilot projects. *See* NCCRC, http://www.civilrighttocounsel.org [https://perma.cc/96MF-VXMZ].

16. *See 2016 Civil Right to Counsel Bills*, NCCRC, http://civilrighttocounsel.org/highlighted_work/legislative_developments/2016_civil_right_to_counsel_bills [https://perma.cc/7W9C-YC9B].

17. *See* N.Y. State Assemb. S02061B, 2015–2016 Reg. Sess. (N.Y. 2015), http://assembly.state.ny.us/leg/?default_fld=&bn=S02061&term=2015&Summary=Y&Actions=Y&Text=Y&Votes=Y [https://perma.cc/9BV9-U7RV].

18. *See* Jessica Silver-Greenberg, *For Tenants Facing Eviction, New York May Guarantee a Lawyer*, N.Y. TIMES (Sept. 26, 2016), http://www.nytimes.com/2016/09/27/nyregion/legal-aid-tenants-in-new-york-housing-court.html?mwrsm=Email&_r=0 [https://perma.cc/5348-M5KH].

19. *See* H.B. 1560, 189th Gen. Ct., Reg. Sess. (Mass. 2015).

20. *See* BOS. BAR ASS'N TASK FORCE ON EXPANDING THE CIVIL RIGHTS TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND

programs in both communities had a variety of favorable outcomes—including preventing evictions and protecting tenants' rights—confirming the essential role that attorneys play in such cases.

In the Quincy pilot, "full representation [] allowed more than two-thirds of the tenants in this pilot to avoid the destabilizing consequences of eviction, including potential homelessness" and these tenants, with the help of an attorney, "also received almost five times the financial benefit (*e.g.*, damages, cancellation of past due rent) as those without full representation."[21] Last, courts in Massachusetts and elsewhere have found a constitutionally based civil right to counsel in a number of areas.[22]

II. RIGHT TO COUNSEL IN CHILD CUSTODY PROCEEDINGS

As illustrated by the long list of supporting studies referenced in *Lassiter*, expansion of a civil right to counsel has been particularly successful in child custody cases.[23] The need for counsel in custody proceedings is compelling because the cases are complex and the stakes are high. Presentation of evidence often involves expert testimony, decisions are based largely on case-specific facts, and trial court judges have tremendous discretion to assess factors such as the credibility of witnesses.[24] Failure to effectively present one's case could result in interference with a fundamental right of (wo)man: the right to parent one's child.[25]

HOMELESSNESS PREVENTION (Mar. 2012), http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf [https://perma.cc/L8BV-GCDM].

21. *See id.* at 2. While the Northeast Housing Court pilot provided less dramatic results for those obtaining full representation, that was likely due to the fact that tenants there, whether in the control group or in the full representation group, could get access to a lawyer in a lawyer for a day program sponsored by legal aid. *See id.* at 18–24.

22. *See generally* Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406 (Mass. 1979) (recognizing parents' right to counsel in termination of parental rights cases).

23. *See* Lassiter v. Dep't of Soc. Serv. of Durnham Cty., 452 U.S. 18, 39 n.6, 46–47 n.15–16 (1981).

24. *See* In re Adoption of Meaghan, 961 N.E.2d 110, 111 (Mass. 2012) (noting the complexity in *J.K.B.* is "no less present" in cases between private parties); Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980); *J.K.B.*, 393 N.E.2d at 408–09 (noting cases "may well involve complex questions of fact and law, and require the marshalling and rebutting of sophisticated expert testimony . . . [and] the balance [of rights] to be struck is more complex"); Guardianship of Estelle, 875 N.E.2d 515 (Mass. App. Ct. 2007).

25. Care and Protection of Jamison, 4 N.E.3d 889, 900–01 (Mass. 2014) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (noting parental rights "among the 'essential' and 'basic civil rights of man'").

Parenthood and the autonomy and sanctity of the family unit are so fundamental to our society, they are constitutionally protected.[26] As a result, most states have adopted statutory schemes under which indigent parents are entitled to legal counsel whenever the state seeks to take or maintain custody of the parents' child(ren).[27] However, prior to enactment of statutory protection, case law first established this right in Massachusetts, and litigation continues to be an effective tool to ensure that parents' constitutionally-protected liberty interests in their relationships with their children are protected.

A. *Developing a Right to Counsel One Case at a Time*

Child custody cases present in three categories: (1) those pitting one or both parents against the state (*e.g.*, care and protection cases and petitions to terminate parental rights filed by the Department of Children and Families), (2) those in which a private third-party seeks to take custody away from a parent (*e.g.*, private adoptions and guardianship of minor petitions), and (3) those involving one parent against the other (*e.g.*, divorce actions, separate support actions, and paternity actions). Recognition of a right to counsel was established earliest in the first of these categories and more recently in the second. Although statute provides discretionary access to counsel in the third category, a right to counsel has yet to be identified.

In Massachusetts, statutory law now guarantees an indigent parent court-appointed counsel in child custody cases in which the Commonwealth is a party.[28] Prior to statutory law, the right to counsel in custody cases was first recognized through case law. In 1979, in *J.K.B.*, the SJC was presented with the question of whether an indigent parent is entitled to appointed counsel in a proceeding to terminate the parent's parental rights.[29] The court held that indigent parents do have a right to a court-appointed lawyer in such circumstances because:

> [a]n indigent parent facing the possible loss of a child cannot be

26. Courts accord "substantial respect" towards "family autonomy . . . a 'private realm of family life which the state cannot enter.'" *Bezio*, 410 N.E.2d at 1212 n.6 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

27. *Lassiter*, 452 U.S. at 34 ("Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases.").

28. *See* MASS. GEN. LAWS ch. 119, § 29 (2016).

29. Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 406 (Mass. 1979).

> said to have a meaningful right to be heard in a contested proceeding without the assistance of counsel . . . . Provision of appointed counsel not only safeguards the rights of the parents, but it assists the court in reaching its decision with the 'utmost care' and 'an extra measure of evidentiary protection,' required by law.[30]

J.K.B. was among the cases the United States Supreme Court cited in *Lassiter*.[31] Shortly after the *Lassiter* decision, the Massachusetts legislature created a statutory right to counsel for all custody proceedings in which the Department of Children and Families is a party.[32] This law is still in effect today.

After the surge of right-to-counsel litigation and legislation in the late 1970s and early 1980s, it took more than twenty-five years to make the leap from parent versus state custody cases to parent versus private third-party custody cases. In 2012, further litigation led to recognition of a right to counsel in privately filed adoption petitions.[33] In *J.K.B.*, the court highlighted the "vastly superior resources for investigation" of the state in comparison to the parent.[34] In *Meaghan*, the court shifted focus from the power of the state to the importance of the rights at stake, finding that "[w]here the petitioner is a private party, the same fundamental, constitutionally protected interests are at stake [for the defendant parent], and the cost of erroneously terminating the parent's rights remains too high to require an indigent parent to risk it without counsel."[35]

The decision in *Meaghan* opened the door to the consideration of other private-custody actions, and legal services agencies quickly identified another area of need. Increasingly, parents were losing custody of their children to guardianship of minor petitions filed by private parties, often a grandparent or other relative. The guardianship statute is an important means by which extended family and friends can step in to help parents and children in need—many guardianships are done by consent of all parties. However, when parties do not agree, problems may arise. While a decree of guardianship does not terminate parental rights, it is "permanent" in the sense that the law presumes the child will

30. *Id.* at 408.
31. *See Lassiter*, 452 U.S. at 30.
32. *See* MASS. GEN. LAWS ch. 119, § 29 (2011).
33. *See* In re Adoption of Meaghan, 961 N.E.2d 110, 111 (Mass. 2012).
34. *See J.K.B.*, 393 N.E.2d at 408.
35. *In re Adoption of Meaghan*, 961 N.E.2d at 113.

remain in the guardian's care and custody until the child reaches majority, and there is no statutory obligation for either the court or guardian to work toward reunification of parent and child.[36] In contrast to care and protection law, the guardianship statute does not require annual review hearings and does not require any show of efforts toward reunification.[37] Additionally problematic, it is unclear what standard of proof should apply when a parent seeks to regain custody.[38] Despite these shortcomings in statutory guidance, the guardianship statute—unlike the care and protection statute—has no provision for the appointment of counsel for parents. This disparity of available protections led advocates to question whether a parent's due process rights in a guardianship proceeding were adequately protected without legal representation.

In 2015, lawyers from Northeast Justice Center filed an appeal on behalf of a mother whose child was under guardianship, arguing her lack of legal counsel at the initial guardianship proceeding had left her without due process.[39] The SJC took the case on its own initiative and held that indigent parents have a right to counsel when a third party seeks to take custody from a parent through a private-guardianship proceeding.[40] Using the same basis found in both the *J.K.B.* and *Meaghan* decisions, the court reasoned:

> [T]here is every reason, given the fundamental rights that are at stake, why an indigent parent is entitled to the benefit of counsel when someone other than the parent, whether it be the State or a private entity or individual, seeks to displace the parent and assume the primary rights and responsibilities for the child, whether it be in a care and protection proceeding, a termination proceeding, an adoption case, or a guardianship proceeding.[41]

In contrast to the expansive language in the court's reasoning, the holding in *V.V.* specifically referenced only chapter 190B, section 5-206 of the Massachusetts General Laws, which defines the procedure by which a permanent guardian may be appointed for a

36. *See* MASS. GEN. LAWS ch. 190B, § 5-202 (2009).

37. MASS. GEN. LAWS ch. 119 §§ 29B(a), 29(C).

38. *See generally* Guardianship of Verity, No. 15-P-778, 2016 WL 2941076 (Mass. App. Ct. May 19, 2016) (demonstrating the ongoing lack of clarity about standard and burden of proof).

39. *See* Guardianship of V.V., 24 N.E.3d 1022, 1024 (Mass. 2015).

40. *Id.* at 1025.

41. *Id.*

child.[42] The holding contained no mention of section 5-212, which defines the procedure by which a decree of guardianship can be modified or terminated.[43] Although the court made clear that parents had the right to counsel at the initial-decree stage of a guardianship proceeding, it left open the issue of whether the right to counsel extended to post-decree actions to terminate or modify a decree of guardianship.

B. *The Decision in* L.B. v. Chief Justice of the Probate & Family Court Department*: New Rights, New Limitations*

Advocates for parents found language in the *V.V.* decision suggestive of a broad right to counsel. In a footnote, the court stated, "[O]ur concern regarding whether a parent is entitled to counsel applies to *all* proceedings related to guardianship."[44] The court also observed that a parent's parental rights are "severely circumscribed . . . for as long as the guardianship remains in effect."[45] Last, the court also noted that because of the impact a guardianship has on a parent-child relationship and

> the particular nature of the fundamental rights at stake, an indigent parent whose child is the subject of a guardianship proceeding is entitled to, and must be furnished with, counsel in the same manner as an indigent parent whose parental rights are at stake in a termination proceeding or, similarly, in a care and protection proceeding.[46]

Given that counsel is statutorily available in all phases in a care and protection action, one could conclude from the court's language that the court meant for the right to be expansively adopted in guardianship proceedings.

Advocates interpreted this language as clearly endorsing a right to counsel throughout the life of a guardianship. However, Chief Justice Ordoñez of the Massachusetts Probate and Family Court, who was responsible for the implementation of the *V.V.* decision, took a more measured approach. Relying on the specific language of the holding in *V.V.*, Chief Justice Ordoñez released a guidance memorandum to the Probate and Family Court judges defining the right to counsel as limited to the initial-petition, pre-

42. *Id.*
43. *See generally id.*
44. *Id.* at 1023–24 n.2 (emphasis added).
45. *Id.* at 1024.
46. *Id.*

decree, stage: "[T]he right to counsel for indigent parents *only* applies in a Petition to Appoint a Guardian of a Minor."[47]

The contrast between the court's far-reaching discussion and its restrictive holding confounded both lawyers and judges, leading almost immediately to further litigation. On May 6, 2015, Community Legal Aid (CLA) utilized a statute that allows for Direct Appellate Review by a single justice of the SJC to challenge the policy Chief Justice Ordoñez set in her February 20, 2015 Memorandum.[48] CLA filed suit on behalf of two mothers —L.B. and C.L.—whose children were under guardianship, challenging Chief Justice Ordoñez's guidance memorandum. The single justice reported the matter to the full SJC panel. Also on May 4, 2015, a trial court judge from Hampden County Probate and Family Court reported the same issue to the Appeals Court in *Guardianship of J.T.*, and the SJC transferred the case on its own motion.[49] Oral arguments for the two cases were scheduled together for a single presentation of the issue of whether indigent parents of children under decrees of guardianship have a right to counsel when seeking to regain custody of, or expand visitation with, their children.[50] Members of the private bar agreed to provide pro bono representation to the mother of J.T. These advocates worked with CLA to craft a coordinated argument in favor of further expanding parents' right to counsel. Amicus counsel from Massachusetts Law Reform, the Boston Bar Association, Committee for Public Counsel Services, and members of the private bar also collaborated with lead counsel in developing these arguments.

Using the *Mathews* Test—to balance the interests of parents, the likelihood that parents might be erroneously deprived of those interests, and any conflicting state interests—the court found that indigent parents have a limited right to an attorney when trying to regain custody or increase visitation of a child under guardianship.[51]

In brief summary, the court reasoned that regardless of what stage the guardianship proceeding was in, the parents' liberty interests at stake were the same:

> It would be incongruous to recognize the significance of the

47. L.B. v. Chief Justice of the Prob. & Family Ct. Dep't, 49 N.E.3d 230, 232 (Mass. 2016) (emphasis added).

48. *See* MASS. GEN. LAWS ch. 211, § 3 (2012).

49. *See* Guardianship of J.T., 49 N.E.3d 242 (Mass. 2016).

50. *L.B.*, 49 N.E.3d at 231.

51. *See id.*

> parent's rights for due process purposes at the time those rights are first displaced, as we did in *Guardianship of V.V.*, but not to do so at the time the parent seeks to regain them. The deprivation at the former stage and the continued deprivation at the latter stage are equally real and significant.[52]

The court also stressed that "[v]isitation, like custody, is at the core of a parent's relationship with a child[.]"[53] Visitation was considered especially critical for parents who "aspire[] to regain custody at some point" because visitation "provides an opportunity to maintain a physical, emotional, and psychological bond" with the child and to "demonstrate the ability to properly care for the child."[54] Next, the court found the risk of erroneous deprivation of these rights was equally significant and substantial: "The risk of erroneously adjudicating these fundamental rights and interests of parents is no less real at the guardian removal stage than at the appointment stage."[55] As the court pointed out, a judge has to make "complex determinations" during these stages, "consider[ing] numerous factors regarding the child's best interest and the parent's fitness."[56] The judge not only has to weigh the competency of the parent, but also must consider the potential effect the change in guardianship will have on the child, including consideration of whether or not a substantial guardian-child bond has developed and, if so, whether or not the strength and nature of that bond renders an otherwise fit parent unfit to care for the bonded child.[57] These complex decisions are not easily made. Accordingly, the court found "[t]he presence of counsel for a parent will both help to protect the parent's rights and interests in this regard and assist a judge to ensure accuracy and fairness in his or her adjudications."[58]

Finally, the court considered the state's interest in "efficient

52. *Id.* at 236.
53. *Id.* at 239.
54. *See id.*
55. *Id.* at 236.
56. *Id.*
57. A decision to terminate a guardianship is not based on parental fitness alone; chapter 190B, section 5-212 of Massachusetts General Laws requires a showing that removal is "in the best interest[s]" of the child. MASS. GEN. LAWS ch. 190B, § 5-212 (2009).
58. *L.B.*, 49 N.E.3d at 237. The SJC's language in *L.B.* seems to confine the right to counsel to petitions to remove guardians that would restore a parent's custody. *See id.* at 236 n.12. The extent of a parent's right to counsel where the child's other parent is the moving party is yet undefined. *See id.*

and economic administration of its affairs."[59] Similar to the United States Supreme Court's decision in *Lassiter*, the court in *L.B.* noted that not all cases would require appointment of counsel in order to protect due process, for example, in cases where the parents have "no hope of prevailing."[60] The court suggested that, although the fundamental rights at stake are no different for a parent seeking to *regain* custody than for a parent seeking to *retain* custody, the risk of erroneous deprivation may be lower.[61] This may be because in post-decree proceedings a parent is typically the moving party and could, in some cases, abuse the system with frivolous pleadings, whereas, in pre-decree proceedings the parent is defending against an action brought by another. As a result, the court held that, whereas due process requires an indigent parent be provided the appointment of counsel upon request in pre-decree guardianship proceedings, due process requires access to counsel in post-decree petitions to remove a guardian or to expand parental visitation only where the parent has presented a "meritorious" claim for relief.[62]

III. FUTURE LITIGATION

The decision in *L.B.* leaves the door open to future appellate advocacy on the contours of the right to counsel in this area of practice. Most likely, advocates will push for a clear understanding of what is needed to meet the "meritorious claim" standard in *L.B.* Advocates may also continue to seek expansion of a civil right to counsel by applying parent versus third-party arguments to parent versus parent cases, pushing for automatic appointment of counsel for children who are the subjects of guardianship petitions and decrees, or promoting the rights and interests of long-term guardians faced with petitions for removal.

A. *Meritorious Claim*

Both in the parties' arguments and in the court's decision, significant attention was paid to what an unrepresented litigant could reasonably be expected to present in order to trigger a right to counsel. The issue was addressed in the parties' briefs, at oral

59. *Id.* at 235.

60. *Id.* at 237 (citing Roe v. Att'y Gen., 750 N.E.2d 897, 904 (Mass. 2001), quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). The court noted that having counsel in such instances would "add little value." *Id.*

61. *See id.*

62. *See id.* at 242–43.

argument, and in the court's decision. Petitioners argued that, to the extent a limit on the right to counsel were warranted, restrictions on the frequency of court reviews, analogous to those found in the care and protection statute, would be sufficient.[63] Unlike the decision in *V.V.*, the court in *L.B.* did not draw parallels between guardianship and care and protection proceedings.[64] As respondent in *L.B.*, Chief Justice Ordoñez asserted the bar should be high: an indigent parent petitioning to remove a guardian and regain custody of his or her child "should be required to make an initial showing that there have been 'substantial and relevant changed circumstances' since the guardian was appointed."[65] The court rejected this approach, stating this proposed burden would require a parent to show changed circumstances "in a legally significant manner and to a legally cognizable degree" before the right to counsel arises.[66] Instead, the court settled on a "lighter, less technical burden" that would instead require the parent to demonstrate "that he or she has a colorable or 'meritorious' claim."[67]

In settling on the standard of "meritorious," the SJC was careful to define the term as not requiring a showing that is "legally significant" or "legally cognizable."[68] The court found, "[i]t would be unusual and potentially unfair to require a litigant unaided by counsel to make that kind of a legal demonstration before the right to counsel arises."[69] The court also provided a number of references to the "meritorious" standard in a variety of legal contexts to emphasize its ubiquity in Massachusetts case law.[70]

63. *Impounded Case: SJC-11882*, SUFFOLK U. L. SCH., http://www.suffolk.edu/sjc/archive/2015/SJC_11892.html [https://perma.cc/5QKB-7MJT] (webcast of case hearing from Oct. 5, 2015).

64. L.B. v. Chief Justice of the Probate and Family Court Dep't, 49 N.E.3d 230 (Mass. 2016).

65. *Id.* at 238.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* (citing In re Gen. Motors Corp., 182 N.E.2d 815 (Mass. 1962) ("A meritorious case means one that is worthy of presentation to a court, not one which is sure of success")); *see also id.* at 239 n.17 (citing Commonwealth v. Gunter, 945 N.E.2d 386 (Mass. 2011)); Lovell v. Lovell, 176 N.E. 210, 211 (Mass. 1931) (stating that a petition to remove default decree requires a meritorious claim or defense to assert "one which is worthy of judicial inquiry"); Jones v. Manns, 602 N.E.2d 217, 222 n.9 (Mass. App. Ct. 1992) (involving "meritorious issues, in the usual sense of that phrase in appellate practice" i.e., "worthy of presentation to a court"); Commonwealth v.

Despite the terms' broad and varied application, its meaning in the context of a custody case is unclear. Indeed, while "meritorious" may be a familiar standard to the court, it may not be self-evident to unrepresented litigants. What does meritorious mean in the context of a parent seeking to regain custody or increase visitation? If a parent consented to the guardianship at its inception, is withdrawal of consent sufficient to establish a meritorious claim for removal of the guardianship? Is completion of a drug rehabilitation program sufficient? Is it sufficient if a previous attempt at sobriety was not successful? Is a claim that a guardian refuses to allow visitation, or enough visitation, sufficient to merit a right to counsel? Where the court will draw the line between claims that are meritorious and claims that are not remains to be seen, and the ability of parents to challenge adverse rulings *pro se* is questionable. Interpretation of the meaning of meritorious in a custody case may still approach the boundary of requiring self-represented parents to interpret questions of law without counsel.

B. *Further Expansion of a Parent's Right to Counsel*

It is noteworthy that many of the factors justifying a right to counsel in parent versus third-party custody cases are also present in parent versus parent custody cases. In *J.K.B.*, the court observed parental termination cases often involve "complex questions of fact and law" and the "marshalling and rebutting of sophisticated expert testimony" and found "appointed counsel not only safeguards the rights of the parents, but it assists the court . . . ."[71] The same can be said of many custody battles, which pit one parent's fundamental rights against those of the other, while the child(ren)'s rights and best interests hang in the balance. In *Meaghan*, the court held that the same issues and same complexities identified in *J.K.B.* warranted access to counsel even in cases between private parties, so the absence of the state in parent versus parent cases does not lessen the risk to parents' fundamental rights.[72] The court in *V.V.* found access to counsel

Levin, 388 N.E.2d 1207, 1210 (Mass. App. Ct. 1979) (meritorious standard "connotes opposite of frivolous" in context of stay of execution); Tisei v. Bldg. Inspector of Marlborough, 330 N.E.2d 488, 489 (Mass. App. Ct. 1975) (on motion for leave to docket appeal, moving party must show "a case meritorious or substantial in the sense of presenting a question of law deserving judicial investigation and discussion").

71. Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 408 (Mass. 1979).

72. *See* In re Adoption of Meaghan, 961 N.E.2d 110, 112 (Mass. 2012).

necessary even in cases in which parental rights were merely at risk of suspension, not termination.[73] And, finally, in *L.B.*, the court recognized the importance of visitation alone in protecting and maintaining a parent's right to a relationship with one's child.[74] Are these arguments applicable to parent versus parent custody cases?

The legislature has recognized that access to counsel may be critical in some cases between parents, and has provided courts discretionary power to allocate marital funds to pay for a party's representation or, in the case of never-married parents, to appoint counsel for either party.[75] A 1989 SJC study found that lack of access to attorneys had created a justice gap for women, in particular, and encouraged invocation of chapter 208, section 17 of Massachusetts General Laws as a means of relief.[76] "[T]here is too little legal help available to moderate-income women, in part because judges fail to award adequate counsel fees, especially during the pendency of litigation. . . . Judges must award adequate attorney fees during the pendency of litigation."[77] To what extent this gap remains today is unknown, however, the number of unrepresented litigants in the Probate and Family Courts has increased and now sits at above fifty percent, suggesting the discretionary authority to appoint counsel is insufficient to meet the needs of today's litigants.[78] While a right to counsel in a parent versus parent custody case has yet to be recognized by either the legislature or the courts, perhaps the case for appointed counsel could be made in the future.

C. *Right to Counsel for Children*

If, as the court held in *V.V.* and *L.B.*, there is a constitutionally

73. *See id.*

74. *See L.B.*, 49 N.E.3d at 239–242.

75. *See* MASS. GEN. LAWS ch. 208, § 17 (2015); MASS. GEN. LAWS ch. 209C, § 7 (2015).

76. *See* RUTH I. ABRAMS & JOHN M. GREANEY, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 20 (1989).

77. *Gender Bias Study of the Supreme Judicial Court*, 24 NEW ENG. L. REV. 745, 764–67 (1990).

78. *See* MASS. ACCESS TO JUSTICE COMM'N, FINAL REPORT OF THE SECOND MASSACHUSETTS ACCESS TO JUSTICE COMMISSION 7 (April 2015), http://www.mass.gov/courts/docs/sjc/docs/massachusetts-access-to-justice-commission-final-report-april-2015.pdf [https://perma.cc/Z3X2-YFX9] (stating that, "[i]n the Probate and Family Court, . . . an estimated 50 to 75% of all litigants statewide are unrepresented").

based right to counsel for parents in guardianship proceedings, would the court also find that children have a similar right? In *L.B.*, the court declined to address whether children have their own right to counsel in guardianship removal proceedings.[79] This may be because, by statute, a child is entitled to appointed counsel in some circumstances. Specifically, chapter 190B of the Massachusetts General Laws requires for the appointment of counsel to children in any of three instances: (1) the child asks the court for counsel, although it is unclear how a child would know to ask for counsel; (2) a parent or guardian asks the court to appoint counsel on behalf of the child, which assumes an adult knows to ask and chooses to do so; or (3) the trial judge *sua sponte* orders the appointment of counsel for the child, which relies on the trial judge's discretion.[80] Until the court reviews this issue, it will remain unsettled whether the statute sufficiently protects a child's fundamental liberty interests, and yet it is hard to imagine circumstances in which the matter would properly be brought to the court's attention. A child would need legal counsel to make such an argument, and the argument would be moot if the child had counsel. Given that advocates for a child's right to counsel have this especially challenging hurdle to clear, the legislature may be a more effective venue to amend the current statute to allow for an absolute right to counsel. Protection of children is a politically safe and noble ground to walk; perhaps advocates should shift attention away from the courts and seek a statutory fix instead.

D. *Right to Counsel for Guardians*

What about the rights of non-parents who have, nonetheless, created family bonds with a child? The questions of who is a parent and what constitutes family have been garnering attention and challenges to traditional definitions have been getting positive results. This past fall, the SJC found that a person who has acted as a parent to the child of another may have standing to establish his or her parenthood under chapter 209C of the Massachusetts General Laws, regardless of biology and in spite of the parties not being married.[81] Does this open the door to recognizing a right to

79. *See L.B.*, 49 N.E.3d at 237.

80. *See* MASS. GEN. LAWS ch. 190B, § 5-202 (2009).

81. *See* Partanen v. Gallagher, 59 N.E.3d 1133 (Mass. 2016). "[I]t is apparent that a biological connection is not a *sine qua non* to the establishment of parentage under G.L. c. 209C." *Id.* at 4.

counsel for non-parents in custody cases?

In the context of guardianship, a limited statutory right to counsel already exists, and advocates are pushing for broader access to court-appointed attorneys for long-time parental figures.[82] A case recently decided in the Massachusetts Supreme Judicial Court asks for recognition of a guardian's right to counsel in private guardianship cases.[83] It is noteworthy that, as recently as 2014, the SJC contrasted the fundamental rights of parents with the limited rights of guardians, noting that guardians are "solely creatures of statute."[84] This characterization undermines the guardians' argument. Without a fundamental right to anchor guardians' due process rights, it is difficult to see a path to a constitutionally based right to counsel for guardians.

CONCLUSION

Efforts to expand a civil right to counsel continue, and there is plenty of interesting work to be done, both in the context of child custody and beyond. Whether watching the implementation of the *L.B.* decision with an eye toward protecting and expanding this newly identified right to counsel, looking for opportunities to apply the right-to-counsel analysis to other custody proceedings, or lobbying the legislature for a child's right to counsel in custody proceedings or a tenant's right to counsel in eviction proceedings, opportunities await and advocates are needed.

82. *See* MASS. GEN. LAWS ch. 119, § 29 (2011) (providing that guardians of children who subsequently become subjects of care and protection proceedings, if indigent, are entitled to court-appointed counsel).

83. *See* Guardianship of K.N., 476 Mass. 762 (2017).

84. *See* Care & Prot. of Jamison, 4 N.E.3d 889 (Mass. 2014).