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A FATHER'S RIGHT TO COUNSEL IN GEORGIA JUVENILE COURT LEGITIMATION PROCEEDINGS: CLOSING THE DUE PROCESS LOOPHOLE

Meg Buice*

INTRODUCTION

A parent's right to the care and custody of his or her child has been universally regarded as fundamental and deserving of protection.¹ Recognizing the significance of this "fiercely guarded" right,² when the State seeks to terminate parental rights in juvenile court, Georgia law accords parents an array of procedural safeguards designed to protect that interest³—among them, the right to an attorney in a termination proceeding.⁴ By the time a deprivation case reaches the

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1. *E.g.*, *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *see also* Elizabeth Mills Viney, Comment, *The Right to Counsel in Parental-Rights Termination Cases: How a Clear and Consistent Legal Standard Would Better Protect Indigent Families*, 63 SMU L. REV. 1403, 1403 (2010).

2. *In re J.M.B.*, 676 S.E.2d 9, 12 (Ga. Ct. App. 2009) ("[W]hen the State is terminating a parent's 'fundamental and fiercely guarded right' to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process." (quoting *Nix v. Dep't of Human Res.*, 225 S.E.2d 306, 307 (Ga. 1976))).

3. *See* O.C.G.A. § 9-11-4 (Supp. 2011), § 15-11-96 (2012) (requiring personal service of summons and petition to parties to a juvenile court termination of parental rights proceeding at least thirty days prior to the hearing date); *id.* § 15-11-39.1 (allowing parties to a juvenile court proceeding—including a proceeding to terminate parental rights—to be served by publication only if the court finds the complaining party was unable to ascertain the responding party's address or whereabouts after reasonable efforts); *id.* § 15-11-99 (requiring a juvenile court's finding that termination of parental rights is in a child's best interests to be supported by clear and convincing evidence); *In re C.S.*, 644 S.E.2d 812, 812–13 (Ga. 2007) (finding insufficient service of process where a parent residing out of state, who had not waived service, was not personally served but instead received summons via certified mail); *Taylor v. Padgett*, 684 S.E.2d 434, 436 (Ga. Ct. App. 2009) (finding service by publication was improper where the party alleging deprivation failed to utilize available channels of communication to serve a parent who was living in a truck); *In re C.I.W.*, 494 S.E.2d 291, 293–94 (Ga. Ct. App. 1997) (holding personal service of summons that did not include a copy of the petition to terminate parental rights was constitutionally inadequate and violated Georgia law).

4. O.C.G.A. § 15-11-98(b) (2012). In any proceeding terminating parental rights, "[i]f the parent or

termination phase, the juvenile court has already found that the parent in question has subjected his or her child to abuse or neglect so severe that the child could not have remained in the parent's home without seriously jeopardizing the child's welfare.⁵ Nonetheless, the parent retains his or her right to an attorney because severing an individual's relationship with his or her child is considered "a tearing of the flesh" only to be done by the courts "under the most carefully controlled and regulated circumstances."⁶

However, under current Georgia law, this right does not extend to biological fathers of children born out of wedlock who have not rendered their relationships with their children "legitimate" through applicable statutory procedures.⁷ Unlike biological mothers and fathers of children born in wedlock, biological fathers who have not

parents of the child desire to be represented by counsel but are indigent, the court shall appoint an attorney for such parent or parents, which shall be a charge upon the funds of the county upon certification thereof by the court . . ." *Id.*; see also *In re J.M.B.*, 676 S.E.2d at 12.

5. After an initial authorization for emergency removal, a juvenile court must hold a hearing finding a child to be deprived in order to remove the child from his or her parents' custody. See O.C.G.A. § 15-11-55 (a) (2012); DANETTE JOSLYN-GAUL, GEORGIA'S RESPONSIBILITIES TOWARD CHILDREN IN FOSTER CARE: A REFERENCE MANUAL 36 (Karen Worthington ed., 2004), available at <http://bartoncenter.net/uploads/fall2011updates/dependency/Ga-responsibility.pdf>.

Georgia law defines a "deprived child" as a child who is "without proper parental care or control, subsistence, [or] education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals." O.C.G.A. § 15-11-2(8) (2012). "A [juvenile] court's order removing a child from [the parents'] home [must] be based upon a finding . . . that continuation in the home would be contrary to the welfare of the child." *Id.* § 15-11-58(a). Absent a few statutorily enumerated exceptions, after a child is removed, the Department of Human Resources, Division of Family and Children Services (DFCS) is required to provide the parent(s) with reunification services to address the causes of deprivation. See O.C.G.A. § 15-11-58(h) (2012). In these cases, DFCS may only pursue termination of a parent's rights if he or she fails to correct the causes of deprivation through reunification services. However, even if reunification services are not required, DFCS would not file a motion requesting termination of a parent's rights until after a court had adjudicated the child deprived and removed the child from the parents' custody. Telephone Interview with the Honorable Timothy Pape, Ga. Juvenile Court Judge (July 8, 2011).

6. *In re J.M.B.*, 676 S.E.2d at 11; *In re P.D.W.*, 674 S.E.2d 338, 341 (Ga. Ct. App. 2009). In *In re P.D.W.*, the Georgia Court of Appeals acknowledged overwhelming evidence that a mother's chronic, un-rehabilitated drug use, unemployment, and unstable housing rendered her incapable of providing proper care for her children. *Id.* Despite this finding, the court vacated an order terminating the mother's parental rights because her limited intellectual capacity called into question whether her waiver of counsel was both intelligent and voluntary. *Id.*

7. O.C.G.A. § 19-7-22 (2012). A father of a child born out of wedlock may render the child legitimate through petitioning and obtaining an order of legitimation from the superior court in the county where the child's mother or legal guardian resides, the superior court in the county where an adoption of the child is pending, or the juvenile court where deprivation proceedings concerning the child are pending. *Id.*

legitimated their children have no right to court-appointed counsel in juvenile court termination proceedings.⁸ Moreover, these fathers are denied all rights to challenge these proceedings on any basis.⁹

To obtain standing to contest a termination petition, a father must legitimate his child.¹⁰ When a child is in DFCS custody, a father typically begins this process by filing a petition for legitimation in the juvenile court where the deprivation action is pending.¹¹ In the legitimation proceeding that follows, the father has the burden of proof to establish both biological paternity and that he has demonstrated the necessary level of commitment to the child.¹² Because a denial of the legitimation petition eliminates the father's right to contest a later termination of his parental rights,¹³ the significance of this decision is extraordinary. Yet, while a legal parent's right to counsel in termination of parental rights proceedings is undisputed,¹⁴ in Georgia, a biological father has no established

8. See, e.g., *In re J.S.*, 691 S.E.2d 250, 251 (Ga. Ct. App. 2010) (dismissing a biological father's argument that he was denied the right to counsel in termination proceedings as moot because—due to the juvenile court's denial of his petition to legitimate his child—he had no standing to contest a termination of his parental rights).

9. O.C.G.A. § 15-11-96(i) (2012). A biological father who is not the legal father of a child may not object to the termination of his parental rights if he does not file a petition to legitimate the child within specified time frame or if, after filing such a petition, the action is dismissed for failure to prosecute or is otherwise denied or concluded without a court order finding that he is the child's legal father. *Id.*

10. Georgia Juvenile Code section 15-11-96(i) provides:

A biological father who is not the legal father loses all rights to the child and the court shall enter an order terminating all such father's rights to the child and such father may not thereafter object to the termination of his rights to the child if within 30 days from his receipt of the notice provided for in subsection (e) of this Code section he: (1) Does not file a legitimation petition and give notice as required in subsection (h) of this Code section; (2) Files a legitimation petition which is subsequently dismissed for failure to prosecute; or (3) Files a legitimation petition and the action is subsequently concluded without a court order declaring a finding that he is the legal father of the child.

O.C.G.A. § 15-11-96(i) (2012).

11. See *supra* note 7 and accompanying text.

12. When deciding whether to grant a biological father's petition for legitimation, a court "must initially determine whether the father has abandoned his opportunity interest to develop a relationship with the child." *In re L.S.T.*, 649 S.E.2d 841, 842 (Ga. Ct. App. 2007) (citing *Smith v. Soligon*, 561 S.E.2d 850 (Ga. Ct. App. 2002)). "If the juvenile court concludes that the father has abandoned his opportunity interest, that finding is sufficient to end the court's inquiry and justifies the denial of the legitimation petition." *Id.*

13. O.C.G.A. § 15-11-96(i) (2012).

14. See *supra* note 4 and accompanying text; cf. COUNCIL OF JUVENILE COURT JUDGES OF GEORGIA, BENCHBOOK ch. IX (2013), available at <http://www.georgiacourts.org/councils/cjcj/PDF/Benchbook%20Chapters/ch09.PDF> ("Because of the significant issues in termination of parental rights cases, some

right to counsel in legitimation proceedings despite the gravity of the interest at stake.¹⁵ In essence, denying putative fathers the right to counsel in legitimation proceedings provides a mechanism by which juvenile courts may deprive them of their fundamental liberty interest in parenting their children without due process.

In re J.S. illustrates the issue.¹⁶ In *J.S.*, a child's biological father filed a petition to legitimate his son in the Juvenile Court of Spalding County, where a termination action was pending.¹⁷ The legitimation proceeding was scheduled to take place in conjunction with the termination hearing, and after informing the court that he was indigent, the father requested the court appoint counsel to represent him in both matters.¹⁸ Acknowledging concern over conducting the termination hearing without appointing counsel for the father, the court elected to postpone the termination and proceeded only on the legitimation hearing, denying the father's request for counsel in that hearing.¹⁹ Despite the mother's consent to the legitimation, the court denied the petition and entered an order terminating the father's parental rights without a hearing, finding that the denial of the legitimation petition deprived him of standing to contest the termination.²⁰ Thus, in denying the legitimation petition, the court was able to avoid even holding a termination proceeding as to the

judges appoint attorneys to represent the interests of parents who cannot be personally served, even absent a request.”)

15. See *Alexander v. Guthrie*, 454 S.E.2d 805, 806–07 (Ga. Ct. App. 1995) (finding an indigent father had no right to court-appointed counsel in a legitimation proceeding brought in superior court); *In re J.S.*, 691 S.E.2d 250, 252 (Ga. Ct. App. 2010) (citing *Alexander*, 454 S.E.2d at 805) (finding a father was not entitled to an attorney to represent him at public expense in a juvenile court legitimation proceeding). But cf. *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20 (Ga. 1985) (holding that a putative father was a party to deprivation proceedings within the meaning of the Georgia statute and, as such, was entitled to representation at all stages of the proceedings, including a hearing to establish paternity); *In re S.M.G.*, 643 S.E.2d 296 (Ga. Ct. App. 2007) (citing *Taylor Auto Grp. v. Jessie*, 527 S.E.2d 256 (Ga. Ct. App. 1999)) (declining to examine the merit of a biological father's contention that an order terminating his parental rights should be vacated because the juvenile court failed to appoint him counsel in a legitimation proceeding, given his failure to raise the issue at trial).

16. *In re J.S.*, 691 S.E.2d at 250.

17. *Id.* at 251.

18. *Id.*

19. *Id.* at 251–52 (“Despite his request, the father ‘was not entitled to have an attorney appointed to represent him at public expense in the legitimation proceedings.’” (quoting *Alexander*, 454 S.E.2d at 806)).

20. *Id.*

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father, where he would have been entitled to court-appointed counsel.²¹

This Note examines whether denying a putative father²² the right to counsel in the context of juvenile court legitimation proceedings amounts to a violation of his Fourteenth Amendment right to due process because of the state's direct role in depriving him of a fundamental liberty interest in the care and custody of his children. Part I examines the procedure by which a father of a child born out of wedlock may legitimate his child under Georgia law and describes parents' right to counsel in juvenile court termination proceedings.²³ Part II explores the current state of the law regarding a putative father's right to counsel in these proceedings.²⁴ Part II also considers the constitutionality of denying a biological father the right to counsel in contested legitimation proceedings in light of Georgia and United States Supreme Court precedent on the issues of standards of proof in legitimation actions and due process requirements accorded to parents in termination proceedings.²⁵ Part III proposes that the Georgia General Assembly amend the Georgia Juvenile Code to require appointment of counsel to putative fathers in contested legitimation proceedings.²⁶

I. LEGITIMATION AND TERMINATION OF PARENTAL RIGHTS IN GEORGIA

A. Legitimation Procedure In Juvenile Court Deprivation Cases

Under Georgia law, a child born out of wedlock is not the legal child of his or her biological father.²⁷ Unless the biological father

21. See *supra* notes 4, 8 and accompanying text.

22. A putative father is an unmarried father who has not legitimated the child or been declared the child's father in a paternity action. BLACK'S LAW DICTIONARY 611 (9th ed. 2009).

23. See discussion *infra* Part I.

24. See discussion *infra* Part II.

25. See discussion *infra* Part II.

26. See discussion *infra* Part III.

27. O.C.G.A. § 15-11-2(10.1) (2012). In the context of juvenile court deprivation proceedings, a "legal father" is defined as "a male who has . . . legally adopted a child; . . . [w]as married to the biological mother of that child at the time the child was conceived or was born . . . ;" married the child's biological mother after the child's birth and "recognized the child as his own;" or "has legitimated the

subsequently marries the child's mother, he must either administratively legitimate the child or petition a court of competent jurisdiction to become the child's legal father.²⁸ Although the administrative legitimation procedure provides putative fathers the opportunity to establish legal fatherhood by signing a voluntary acknowledgement of legitimation with the written consent of the child's mother, the acknowledgement has no legal consequence unless it is executed during the first year of a child's life.²⁹ Additionally, contrary to the belief of many Georgians (and unlike in many other states),³⁰ being listed as the father on the child's birth

child" pursuant to procedures set forth in Georgia Code section 19-7-22 or 19-7-21.1. *Id.* See generally DAN E. MCCONAUGHEY, GEORGIA DIVORCE, ALIMONY AND CHILD CUSTODY § 25:6 (2011–2012 ed.). The mother of a child born out of wedlock is the only legally recognized parent unless and until the child's biological father brings a legitimation action to render the child legitimate. *Id.*

28. Georgia provides two methods by which a putative father may legitimate his child: (1) by petitioning the superior court in the county where the child's legal parent or guardian resides or where an adoption action is pending; or by petitioning the juvenile court in the county where a deprivation action concerning the child is pending; and (2) through signing a voluntary acknowledgement of legitimation with the consent of the mother during the child's first year of life. O.C.G.A. §§ 19-7-22, 19-7-21.1 (2010); see also *In re T.W.*, 654 S.E.2d 218, 220 (Ga. Ct. App. 2007) (reversing a juvenile court's order requiring father to submit to genetic testing to establish his paternity because, in having signed a voluntary acknowledgement of legitimation pursuant to Georgia Code sections 19-7-21.1 and 19-7-46.1, he had already established his legal status with respect to the children).

29. Georgia Code section 19-7-21.1 provides:

Prior to the child's first birthday, a father of a child born out of wedlock may render his relationship with the child legitimate when both the mother and father have freely agreed, consented, and signed a voluntary acknowledgment of paternity and an acknowledgment of legitimation which have been made and have not been rescinded pursuant to Code Section 19-7-46.1. . . . [A] [v]oluntary acknowledgment of legitimation shall not be recognized if. . . [t]he child is one year of age or older.

O.C.G.A. § 19-7-21.1(b)–(c) (2010).

30. Several states require putative fathers of children born out of wedlock to execute acknowledgments of paternity as a prerequisite to being listed as the child's father on the birth certificate. See, e.g., ARK. CODE ANN. § 20-18-401(f)(2) (West, Westlaw through 2012 Fiscal Sess.) ("If the mother was not married at the time of either conception or birth[,] . . . the name of the father shall not be entered on the certificate of birth without an affidavit of paternity signed by the mother and the person to be named as the father. . . ."); S.C. CODE ANN. § 44-63-165 (West, Westlaw through 2012 Reg. Sess.). Because the acknowledgments establish legal fatherhood in those states, being listed as the father on the child's birth certificate is proof of legal fatherhood. See, e.g., ARK. CODE ANN. § 9-10-120(a) (West, Westlaw through 2012 Fiscal Sess.) ("A man is the father of a child for all intents and purposes if he and the mother execute an acknowledgment of paternity of the child"); S.C. CODE ANN. § 63-17-50 (West, Westlaw through 2012 Reg. Sess.). While this is not the case in Georgia, many fathers believe that being listed on their child's birth certificate establishes legal fatherhood. See, e.g., *In re E.D.T.*, 505 S.E.2d 516, 518 n.4 (Ga. Ct. App. 1998) (addressing a biological father's claim that he believed he was the child's legal father because he signed the child's birth certificate).

certificate or obtaining a court order establishing paternity does not establish legal fatherhood.³¹

The question of a putative father's legal standing typically arises either in the context of custody disputes between the biological father and the mother or other relative of the child, or in juvenile court deprivation proceedings.³² In deprivation proceedings,³³ juvenile courts generally require that putative fathers of children born out of wedlock establish paternity and legitimate the child as part of a court-ordered case plan for reunification.³⁴ This requirement is important

31. A mother who is seeking child support for a child whose paternity is contested must obtain a court order establishing the putative father's biological paternity and duty to support the child. *See* O.C.G.A. § 19-7-49(a) (2010). While this paternity order constitutes proof of biological fatherhood, it does not provide a father with any legal rights as to the child, and its "sole effect" is to establish a father's duty to support the child. *Id.*; *see also* *Rodriguez v. Nunez*, 555 S.E.2d 514, 518 (Ga. Ct. App. 2001) (finding, in the context of a probate matter, that a child's mother could not seek a determination of paternity in order to establish her son's right to inherit from his deceased father because the sole purpose of a paternity action under Georgia Code section 19-7-49 is to establish a father's duty to support a child).

32. *See* MCCONAUGHEY, *supra* note 27, § 11:65 (noting custody challenges, juvenile court deprivation proceedings, and contested adoptions among the contexts in which petitions for legitimation are brought).

33. To initiate a deprivation action, the complainant must file a petition alleging that the children named in the petition are deprived, after which the court will schedule and hold an adjudication hearing. O.C.G.A. § 15-11-35 (2012). This hearing must take place within ten days if the child has already been placed in DFCS custody pursuant to an emergency removal and subsequent probable cause determination. *Id.* § 15-11-55(a)(2)(D). If the court adjudicates the child deprived, it may order that the child remain in DFCS custody (or be placed in DFCS custody if the child was not previously removed), be placed in the custody of a third party, or issue a protective order allowing the child to remain in the home under specific guidelines. *Id.* § 15-11-55(a). If the child remains in DFCS custody or under court-ordered supervision, the juvenile court will continue to oversee the case to ensure that the causes of deprivation are remedied or, in the alternative, that another permanent living arrangement for the child is secured. *See generally id.* § 15-11-58.

34. *See, e.g., In re M.D.N.*, 657 S.E.2d 594, 596 (Ga. Ct. App. 2008); *In re S.M.G.*, 643 S.E.2d 296, 297 (Ga. Ct. App. 2007); *In re A.J.*, 654 S.E.2d 465, 466-67 (Ga. Ct. App. 2007); *In re E.D.T.*, 505 S.E.2d at 517. In *In re of S.M.G.*, in an order terminating a biological father's parental rights, the juvenile court found that ever since the children had been initially adjudicated deprived, the court had "repeatedly" informed the biological father of his responsibility to legitimate, yet he had failed to do so. *In re S.M.G.*, 643 S.E.2d at 297. In *In re E.D.T.*, the court found that a biological father's responsibility to legitimate his child was included as a goal in his DFCS case plan for reunification and that the father acknowledged that his DFCS caseworker had instructed him to file a legitimation petition on several occasions. *In re E.D.T.*, 505 S.E.2d at 517. Similarly, in *In re A.J.*, a biological father's case plan required him to legitimate his child, among other goals. *In re A.J.*, 654 S.E.2d at 466-67. In *In re M.D.N.*, the father's case plan, filed with the juvenile court and bearing his signature, required that he legitimate his child. Both the seventy-two-hour hearing order and order of adjudication included findings that the father would have "no rights" until he legitimated his child. *In re M.D.N.*, 657 S.E.2d at 596.

for two reasons. First, in the context of reunification proceedings³⁵—without serious legal acrobatics—a juvenile court cannot give legal custody of a child to a biological father who has not legitimated.³⁶ Second, as previously stated, a putative father who has not legitimated his child has no standing to object to a termination of his parental rights.³⁷

B. Evaluating Legitimation Claims Based On Fathers' Asserted Relationship Interest

While a child's biological mother is automatically his or her legal mother unless her rights are terminated or surrendered, a biological father must prove more than genetic paternity to establish legal fatherhood.³⁸ As a threshold question, a court must determine whether the biological father has abandoned his opportunity interest

35. When a deprived child is removed from his or her home and placed in DFCS custody, the Department is required to make reasonable efforts to reunify the child with his or her parents unless the court finds that reunification efforts would be detrimental to the child. *See generally* O.C.G.A. § 15-11-58 (2012). These efforts center around a case plan for reunification—developed by the Department and approved by the court—that addresses the causes of deprivation through specific behavioral goals and required participation in appropriate community-based services. *Id.* § 15-11-58(c). The juvenile court conducts periodic review hearings to oversee compliance with the court-ordered plan and determine whether reunification remains in the child's best interest. *Id.* § 15-11-58. When a parent has successfully addressed all the issues that led to the child's removal, the juvenile court may terminate the Department's legal custody of the child and return the child to the legal custody of his or her parent(s). *See id.* § 15-11-58.1(b); JOSLYN-GAUL, *supra* note 5, at 43–47.

36. *In re A.D.*, 648 S.E.2d 786, 786 (Ga. Ct. App. 2007) (finding a biological father had no standing to request custody in juvenile court absent proof that he had legitimated his child); JOHN C. MAYOUE, 8 GEORGIA JURISPRUDENCE: FAMILY LAW § 9:10 (2006) (“The father of a child born out-of-wedlock has no right to custody of that child . . . unless the father legitimizes the child as provided for by statute.” (footnote omitted)).

37. O.C.G.A. § 15-11-96(i) (2012); *see also In re C.G.*, 658 S.E.2d 448, 456 (Ga. Ct. App. 2008); *In re S.M.G.*, 643 S.E.2d at 297. A father whose legitimation action was concluded without a determination that he was the legal father of the child had no standing to object to termination of his parental rights. *In re C.G.*, 658 S.E.2d at 456. A putative father's failure to file a legitimation petition warranted termination of his parental rights. *In re S.M.G.*, 643 S.E.2d at 297.

38. *See In re Baby Girl Eason*, 358 S.E.2d 459 (Ga. 1987). In evaluating a father's petition to legitimate his child, a court must initially determine whether he has abandoned his opportunity interest in developing a relationship with the child. *Id.* at 462. If the court finds that he has abandoned his opportunity interest, the court may deny his petition without a finding of parental unfitness, so long as the denial is in the child's best interests. *Id.* If a father has not abandoned his opportunity interest in developing a relationship with his child, a court is only justified in denying his petition to legitimate if it finds he is an unfit parent. *Id.*; *see also Bowers v. Pearson*, 609 S.E.2d 174 (Ga. Ct. App. 2005) (reiterating the standard established in *Eason*).

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in developing a relationship with the child.³⁹ If it determines that he has, the court may end the inquiry and deny the petition.⁴⁰ If the court finds the father has not abandoned his opportunity interest, in actions where the state has interfered with the parent-child relationship, the court applies the parental fitness standard to determine whether the father should be permitted to legitimate the child.⁴¹

The parental fitness standard considers whether the putative father is fit to have custody of his child, regardless of whether available alternatives—such as allowing the child to be adopted by another party—would better serve the child's interest.⁴² If the court determines the father is fit, it is required to grant the legitimation.⁴³ If the state is not involved, the court considers the totality of the circumstances to determine whether to apply a parental fitness or best interests of the child standard.⁴⁴ Under the best interests standard, the court has discretionary authority to decide whether granting the petition would be in the child's best interests, regardless of whether the putative father is fit to have custody.⁴⁵ Although many have

39. The Georgia Supreme Court explained:

[U]nwed fathers gain from their biological connection with a child an opportunity interest to develop a relationship with their children which is constitutionally protected. This opportunity interest begins at conception and endures probably throughout the minority of the child. But it is not indestructible. It may be lost . . . if not timely pursued. On the other hand it is an interest which an unwed father has a right to pursue through his commitment to becoming a father in a true relational sense as well as in a biological sense. Absent abandonment of his interest, a state may not deny a biological father a reasonable opportunity to establish a relationship with his child.

Eason, 358 S.E.2d at 462.

40. *In re L.S.T.*, 649 S.E.2d 841 (Ga. Ct. App. 2007); MARK H. MURPHY, GEORGIA JUVENILE PRACTICE AND PROCEDURE WITH FORMS § 8:16 (5th ed. 2012).

41. *Eason*, 358 S.E.2d at 459.

42. *Id.* at 463.

43. *Id.*

44. *Davis v. LaBrec*, 549 S.E.2d 76, 77 (Ga. 2001) (“[A]bsent the State’s involvement and under other circumstances, the best interests of the child standard would be adequate.”). For instance, the court may apply a best interests standard in a situation where the state is not involved and a putative father seeks to establish his paternity of a child who already has a legal father (because the child was born to a woman who was married to a man who was not the child’s biological father) with an established relationship to that child. *Id.* Additionally, a best interests test is adequate where an unwed father seeks to challenge the adoption of his child by the child’s stepfather. *Eason*, 358 S.E.2d at 463.

45. Like many other states, Georgia does not provide a statutory definition for the “best interests of the child” standard. In determining whether granting a legitimation petition is in the child’s best interests, the court has broad discretion to consider whatever factors it deems appropriate and relevant. See Susan Nauss Exon, *The Best Interest of the Child: Going Beyond Legalese to Empathize with a*

questioned the fundamental fairness of imposing heightened proof requirements on fathers,⁴⁶ the practice has stood up to constitutional challenges in both the United States and Georgia Supreme Courts.⁴⁷

C. Right To Counsel In Termination Of Parental Rights Proceedings

While the United States Supreme Court has recognized that termination of parental rights proceedings implicate a fundamental liberty interest that requires protection by clear procedural safeguards,⁴⁸ it has not found that due process requires the appointment of counsel to indigent parents in every termination case.⁴⁹ Nonetheless, given the fundamental nature of parents' right to the care and custody of their children, the Supreme Court has expressed doubts as to whether terminating a parent's rights without a showing of parental unfitness would be constitutional.⁵⁰

Client's Leap of Faith, 24 J. JUV. L. 1, 3 (2004).

46. Laura Oren, *Unmarried Fathers and Adoption: "Perfecting" or "Abandoning" an Opportunity Interest*, 36 CAP. U. L. REV. 253 (2007) (examining Supreme Court precedent regarding the so-called "biology plus" standard as articulated in a series of cases where the constitutionality of the standard was challenged on various grounds); see also discussion *infra* Part II.B.

47. See, e.g., *Eason*, 358 S.E.2d 459. The constitutionality of Georgia's legitimation statute has been upheld by the U.S. Supreme Court. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

48. In *Santosky v. Kramer*, the Court explained:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Santosky v. Kramer, 455 U.S. 745, 753–54 (1982).

49. The Court has not considered an indigent parent's right to counsel in termination of parental rights (TPR) proceedings since *Lassiter v. Department of Social Services of Durham County*, more than three decades ago. 452 U.S. 18 (1981). In *Lassiter*, while the Court recognized that a parent's right to the "companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection," it found that denying a parent's right to counsel in termination proceedings would not constitute a due process violation in every circumstance. *Id.* at 27 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). Instead, the Court explained that whether a denial of counsel in termination proceedings violates due process must be examined in light of the specific facts and circumstances in each case. *Id.* at 30. The *Lassiter* Court held that in the case before it, where the child's mother had not even demonstrated an interest in appearing at the custody hearing, the lower court did not err in failing to appoint counsel. *Id.* at 33.

50. See *Santosky*, 455 U.S. at 760 n.10 ("Nor is it clear that the State constitutionally could terminate a parent's rights without showing parental unfitness."); *Quilloin*, 434 U.S. at 255 ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a

Recognizing the gravity of an order of termination, almost every state accords indigent parents a statutory right to court-appointed counsel in these proceedings.⁵¹ Georgia is no exception.⁵² Moreover, Georgia courts have consistently held that failure to provide counsel for an indigent parent in a termination proceeding mandates reversal of an order of termination, regardless of the weight of the State's evidence of abuse or neglect.⁵³ In so doing, these courts have recognized the principle articulated by the United States Supreme Court in *Santosky v. Kramer* that “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”⁵⁴

It follows then that this fundamental interest deserves no less recognition when asserted by fathers of children born out of wedlock, simply because their failure to legitimate their children prior to the commencement of deprivation proceedings renders them something less than “model parents.” Nonetheless, because putative fathers are required to legitimate their children to have standing to contest a

natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.” (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring)).

51. See Susan Calkins, *Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts*, 6 J. APP. PRAC. & PROCESS 179, 184 (2004) (“Almost every state provides counsel to indigent parents either through public defender offices, a system of appointed counsel, or contracts with groups of attorneys.”); see also 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 13:6 (3d ed. 2009). While most states provide a statutory right to counsel for indigent parents in termination of parental rights proceedings, some states accord this right through common law. *Id.* Only five states—Delaware, Hawaii, Tennessee, Wyoming, and South Carolina—do not provide indigent parents with a mandatory statutory right to counsel in TPR proceedings. Iokona Baker & Faye Kimura, *Access to Justice: Parents' Right to Counsel in Termination of Parental Rights Cases*, HAW. BUS. J., Dec. 2008, at 11, 12.

52. See O.C.G.A. § 15-11-98(b) (2012).

53. See, e.g., *In re J.M.B.*, 676 S.E.2d 9, 12–13 (Ga. Ct. App. 2009); *In re P.D.W.*, 674 S.E.2d 338, 340 (Ga. Ct. App. 2009). In *In re P.D.W.*, the Georgia Court of Appeals determined that DFCS had presented sufficient evidence to support the lower court's determination that termination was in the children's best interests. *Id.* Nonetheless, because the juvenile court failed to appoint counsel to the purportedly indigent mother because she had not requested it prior to the hearing, the Court of Appeals vacated the termination order. *Id.* at 348.

54. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see also, e.g., *In re A.M.A.*, 607 S.E.2d 916, 922–23 (Ga. Ct. App. 2004) (comparing an indigent parent's right to counsel in TPR proceedings to that of a criminal defendant and characterizing the right as constitutional in nature).

termination⁵⁵ and since a juvenile court's denial of a father's legitimation petition establishes an absolute *requirement* that the court grant a pending petition to terminate his parental rights,⁵⁶ denying counsel to a putative father in a juvenile court legitimation proceeding has the same effect as denying him counsel in a termination proceeding.

II. DUE PROCESS CONSIDERATIONS IN CONTEXT

A. Procedural Due Process Requirements In Parental Rights Cases Where The State Is An Actor

In *Santosky v. Kramer*, the United States Supreme Court recognized that parents have a constitutionally protected liberty interest in the custody of their children that is “far more precious than any property right.”⁵⁷ In determining that the need to terminate parental rights must be established by “clear and convincing evidence,” the Court observed that parents’ right to custody is not diminished because the children were deprived in their care.⁵⁸ To the contrary, where parents face a termination of their parental rights, they have an even greater need for procedural protections.⁵⁹

55. O.C.G.A. § 15-11-96(h) (2012).

56. *Id.* § 15-11-96(i). If a father fails to successfully legitimate his child within the required time frame, “the court *shall* enter an order terminating all such father’s rights to the child” *Id.* (emphasis added); see also *In re D.W.*, 592 S.E.2d 679, 681 (Ga. Ct. App. 2003) (“In the absence of standing to object to the termination of parental rights for an untimely filed legitimation petition, entry of an order terminating parental rights [is] mandatory.”); MURPHY, *supra* note 40, § 6.8. Murphy clarifies:

When a putative father fails to timely file and pursue his legitimation petition in keeping with the requirements of O.C.G.A. section 15-11-96, the juvenile court is *required* to terminate his parental rights. The trial court has no discretion to grant a putative father more time to file for legitimation than the 30 days allowed by statute. Moreover, after the expiration of 30 days, the father loses standing to make any arguments in connection with the termination of his parental rights.

Id. (emphasis added) (footnotes omitted).

57. *Santosky*, 455 U.S. at 758–59.

58. *Id.* at 753 (explaining that even if the State has taken custody of their children, parents retain a “vital interest in preventing the irretrievable destruction of their family life”).

59. *Id.* (“If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.”).

In *Lassiter v. Department of Social Services of Durham County*, the Supreme Court declined to hold that the Due Process Clause of the Fourteenth Amendment requires that states appoint counsel to indigent parents in every termination case, yet the Court explicitly acknowledged that in many circumstances, a parent's asserted liberty interest in the parent-child relationship is significant enough to require appointment of counsel.⁶⁰ Acknowledging that termination of parental rights must be "accomplished by procedures meeting the requisites of the Due Process Clause,"⁶¹ the Court held that because the mother in *Lassiter* failed to demonstrate any interest in contesting the termination, due process was not offended by the juvenile court's failure to appoint counsel.⁶² Nonetheless, the Court specifically praised the wisdom of statutes requiring appointment of counsel in all termination proceedings, although such requirements impose higher standards than "those minimally tolerable under the Constitution."⁶³

Recognizing the importance of the liberty interest at stake in termination proceedings, Georgia has enacted such a statute.⁶⁴ Georgia courts have consistently protected parents' due process rights in this context, requiring strict construction of the statute

60. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 31 (1981) ("If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest . . . it could not be said that . . . due process did not therefore require the appointment of counsel.")

61. *Id.* at 37.

62. *Id.* at 33. The Court noted that the unrepresented mother had not even bothered to appear at a prior custody hearing and had failed, without cause, to attempt to contest the termination of her parental rights. *Id.*

63. *Id.* at 33. The Court explained:

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.

Id. at 33-34 (citations omitted).

64. O.C.G.A. § 15-11-98 (2012). Before this code section was enacted, courts construed Georgia Code section 15-11-6(b) (formerly section 15-11-30(b))—which extends the right to counsel to parties in deprivation proceedings—to provide for parents' right to counsel in termination of parental rights proceedings. O.C.G.A. § 15-11-6 (2012), construed in *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 24 (Ga. 1985).

conferring the right to counsel.⁶⁵ Furthermore, Georgia courts have gone so far as to apply additional procedural safeguards to termination proceedings, even when not explicitly provided by statute.⁶⁶ For example, in *Nix v. Georgia Department of Human Resources*, the Georgia Supreme Court held that a mother who appealed a termination of her parental rights was entitled to receive a transcript of the proceeding at the state's expense.⁶⁷ Although the Georgia Code did not explicitly so require, the court found that denying the mother a pauperized transcript would directly contradict the legislature's intent to protect a parent's "fundamental and fiercely guarded" rights to his or her child by securing effective representation at "all stages of any proceeding involving the termination of that parent's right to his or her child."⁶⁸

B. Due Process Requirements In Putative Fathers' Parentage Claims

Both the United States and Georgia Supreme Courts have recognized that a biological father's parental rights accord diminished protection if he makes no attempt to develop a relationship with his child.⁶⁹ Nonetheless, absent a showing that a

65. See, e.g., *In re J.M.B.*, 676 S.E.2d 9, 12 (Ga. Ct. App. 2009) (overruling precedent requiring that a parent erroneously denied counsel in a termination proceeding establish harm in order to prevail on an appeal because such a requirement "does not comport with the [Georgia] Supreme Court's directive that we guarantee 'the most stringent procedural safeguards' in termination cases" (quoting *Sanchez v. Walker Cnty. Dep't of Family & Children Servs.*, 229 S.E.2d 66, 70 (Ga. 1976))).

66. E.g., *Nix v. Dep't of Human Res.*, 225 S.E.2d 306, 308 (Ga. 1976). Similarly, in *Thorne v. Padgett*, the Georgia Supreme Court considered the constitutionality of a statute preventing a parent who had failed to provide financial support for his child from challenging adoption proceedings where the state was not involved. *Thorne v. Padgett*, 386 S.E.2d 155, 155 (Ga. 1989) (construing O.C.G.A. § 19-8-6(b) (1986)). In *Thorne*, the court found that preventing a challenge to adoption proceedings was, in essence, a termination of parental rights. *Id.* at 156. As such, the Court declared the statute unconstitutional because it "circumvents the constitutional requirement that a natural parent's rights in his child may not be terminated absent a showing, by clear and convincing evidence, of his unfitness." *Id.* at 156.

67. *Nix*, 225 S.E.2d at 307.

68. *Id.* at 307-08.

69. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983); *In re Baby Girl Eason*, 358 S.E.2d 459 (Ga. 1987). While a putative father who has demonstrated his commitment to his child through assuming some parental responsibilities may rightly claim an interest in the parent-child relationship warranting protection under the due process clause, "the mere existence of a biological link does not merit equivalent constitutional protection." *Lehr*, 463 U.S. at 261. A putative father's right to develop a relationship with his child exists through biology but may be abandoned if not asserted timely. *Eason*, 358 S.E.2d at 462; see also *Caban v. Mohammed*, 441 U.S. 380, 392 (1979). Although a statute denying

father has abandoned his interest in developing a relationship with his child, both courts have affirmed that this interest requires due process protections in proceedings where it may be challenged.⁷⁰ In *Stanley v. Illinois*, an Illinois statute authorized the Department of Human Resources to remove children from their putative father's custody following their mother's death without a hearing to determine his unfitness.⁷¹ Rejecting the State's argument that the father lacked a constitutionally protected interest in his children given the absence of a legal relationship,⁷² the Court held the statute violated the Due Process Clause because it deprived the father of custody without an opportunity to demonstrate his fitness as a parent.⁷³

In *Quilloin v. Walcott*, the United States Supreme Court considered a putative father's challenge to Georgia courts' application of a best interests standard to determine whether he should be permitted to legitimate his child.⁷⁴ In that case, a putative father who had never had custody of his son filed a petition to legitimate after receiving notice that the child's stepfather had filed a petition to adopt the child.⁷⁵ The trial court applied a best interests

any father of a child born out of wedlock the right to withhold consent to the child's adoption violates the Equal Protection Clause, in cases where a father has abandoned his child, the Equal Protection Clause would not preclude the state from withholding this privilege. *Id.*

70. See *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Clark v. Wade*, 544 S.E.2d 99, 108 (Ga. 2001) (requiring a clear and convincing standard of proof in a custody dispute between the biological father of child born out of wedlock and the child's grandparents); *Eason*, 358 S.E.2d at 463.

71. *Stanley*, 405 U.S. at 646 ("Under Illinois law, the children of unwed fathers become wards of the State upon the death of the mother. Accordingly, upon [their mother's] death, in a dependency proceeding instituted by the State of Illinois, Stanley's children were declared wards of the State and placed with court-appointed guardians." (footnote omitted)).

72. *Id.* at 652 ("To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." (quoting *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968))).

73. *Id.* at 658. The Court found the State's argument that its interest in judicial efficiency warranted a presumption of unfitness for all unwed fathers to be a wholly inadequate justification for denying the putative father due process in light of his substantial interest in keeping his family intact. *Id.* Moreover, the Court found that the statute also violated the Equal Protection Clause because it applied unilaterally to unwed fathers. *Id.* at 652.

74. *Quilloin*, 434 U.S. at 247.

75. *Id.* Under Georgia law, an un-legitimated father has no power to contest an adoption of his child but may acquire the authority to veto the adoption if he legitimates his child within the statutory time frame. *Id.* Notably, the father in *Quilloin* had never lived with his child and was not seeking custody but instead only sought an order of legitimation to prevent the child from being adopted by his stepfather.

standard to deny the legitimation petition and grant the stepfather's adoption.⁷⁶ The Court found that applying a best interests standard under the facts presented did not violate due process.⁷⁷ The Court began by reaffirming *Stanley*'s holding that a parent's relationship with his or her child is constitutionally protected,⁷⁸ but nonetheless found that where the effect of a legitimation petition would be to give legal recognition to a "family unit already in existence," a best interests standard was adequate.⁷⁹ Nonetheless, the Court cautioned that due process would be offended if the "State were to attempt to force the breakup of a natural family" simply because it was thought to be in the child's best interests.⁸⁰

Similarly, in *In re Baby Girl Eason*, the Georgia Supreme Court held that where the state plays a role in limiting a father's opportunity to develop a relationship with his child, absent a showing that he has abandoned his opportunity to do so, a best interests standard may not constitutionally be applied to deny his petition for legitimation.⁸¹ Although in *Eason* the child's mother had placed the child for adoption through a private agency, the court found that because the adoption was being pursued through state courts pursuant to state adoption laws, state participation was significant enough to require the court to examine the legitimation petition under a parental fitness, rather than best interests, standard.⁸²

Id. at 255. By contrast, the child's stepfather had lived with the child for nine years before initiating the adoption petition, and the child himself indicated a desire to be adopted by his stepfather. *Id.* at 247, 251. Although the mother acknowledged that the putative father had visited the child from time to time and had brought him presents, she testified that the visits tended to have a disruptive effect on the child. *Id.* at 251.

76. *Id.* at 247.

77. *Id.* at 256.

78. *Id.* at 255 ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected." (citing *Stanley v. Illinois*, 405 U.S. 645 (1972))).

79. *Id.* at 255.

80. *Quilloin*, 434 U.S. at 255 (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977)). The Court also stressed that the putative father in this case had never had or sought legal custody of his child and that this was not a case where the proposed adoption would place the child with an adoptive family with whom he had never lived. *Id.*

81. *In re Baby Girl Eason*, 358 S.E.2d 459, 463 (Ga. 1987).

82. *Id.* Additionally, the court noted that even though the adoptive parents had developed a relationship with the child and the father had not, given the child's age (nine months) and the delay created by the adoption proceedings, the court could not determine on the record whether the father had abandoned his interest in developing a relationship with his daughter. *Id.*

C. Right To Counsel In Legitimation Proceedings In Georgia Juvenile Courts

While the Georgia and United States Supreme Courts have delineated specific procedural safeguards applicable in different types of parental rights cases,⁸³ neither court has articulated a clear standard regarding a putative father's right to counsel in legitimation proceedings. The Supreme Court has not considered the issue, and the few Georgia cases that examine whether such a right exists reflect contrasting positions.⁸⁴ In *Wilkins v. Department of Human Resources*, the Georgia Supreme Court considered a putative father's claim that he was entitled to representation in a juvenile court hearing to establish his paternity and terminate his parental rights.⁸⁵ The putative father appeared at a hearing on DFCS's petition to terminate his parental rights on grounds that he had abandoned the child.⁸⁶ As permitted under then-existing law, Wilkins sought to establish his paternity so that he could be afforded a right to be heard in the termination proceeding.⁸⁷ Although he appeared without counsel, the juvenile court failed to inquire, as required by statute, whether Wilkins was aware of his right to counsel.⁸⁸ Finding that Wilkins

83. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979); *Quilloin*, 434 U.S. at 246; *Stanley v. Illinois*, 405 U.S. 645 (1972); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001); *Eason*, 358 S.E.2d at 463.

84. See *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20 (Ga. 1985); *In re S.M.G.*, 643 S.E.2d 296 (Ga. Ct. App. 2007); *Alexander v. Guthrie*, 454 S.E.2d 805, 806 (Ga. Ct. App. 1995); discussion *infra* Part II.C.

85. *Wilkins*, 337 S.E.2d at 20.

86. *Id.* at 20–21.

87. O.C.G.A. § 15-11-52(b), repealed in 1986, provided:

[i]f the paternity of a child born out of wedlock has been established in a judicial proceeding to which the father was a party prior to the filing of the petition [to terminate parental rights], the father shall be served with summons as provided by this chapter. Such father has the right to be heard unless he has relinquished all paternal rights with reference to the child. *The putative father of the child whose paternity has not been so established, upon proof of his paternity of the child, may appear in the proceedings and be heard.*

O.C.G.A. § 15-11-52(b) (1981) (emphasis added), repealed by 1986 Ga. Laws 1017, § 3, construed in *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 21–22 (Ga. 1985).

88. *Wilkins*, 337 S.E.2d at 21. The requirement that the court undertake such an inquiry was established under Georgia Code section 15-11-30(b), which provided that “[i]f a party appears [in a deprivation proceeding] without counsel, the court shall ascertain whether he knows of his right to counsel and to be provided with counsel by the court if he is an indigent person.” *Id.* (quoting O.C.G.A. § 15-11-30(b) (1981), repealed by 1986 Ga. Laws 1017, § 3).

failed to demonstrate paternity, the court proceeded to terminate his parental rights.⁸⁹ Wilkins appealed, arguing that the trial court's failure to inform him of his right to appointed counsel in the paternity proceeding required reversal of the termination.⁹⁰

Affirming the judgment and holding Wilkins was not entitled to representation, the Court of Appeals reasoned that an indigent putative father who has not demonstrated interest in parenting his child has a diminished right to representation in termination proceedings.⁹¹ Expressly rejecting this line of reasoning, the Georgia Supreme Court held that in determining whether a putative father is entitled to representation in termination proceedings, the critical inquiry is not whether he acted as a father to the child but rather whether he is a party to the proceedings within the meaning of the Georgia Juvenile Code.⁹²

The court found that Wilkins clearly qualified as an indigent "party" to the paternity proceeding as defined under Georgia law⁹³ and that as such, he was entitled to court-appointed counsel "at all stages of any proceedings alleging . . . [*inter alia*] deprivation."⁹⁴ Because the Code required that a putative father establish paternity as a prerequisite to challenging a termination action, the court found the hearing to establish paternity was "clearly . . . a stage of [the] termination proceeding," and that as a party the putative father was entitled to representation in the hearing to establish his paternity.⁹⁵

89. *Id.* at 20, 21.

90. *Id.*

91. *Id.*

92. Notably, the court also rejected the Department of Human Resources' contention that Wilkins was not entitled to present evidence to establish his paternity because he was not the putative father of a child born "out of wedlock." *Id.* at 21. Because the mother of Wilkins' child was married to another man when the child was born, the court acknowledged that Georgia Code section 19-7-20 created a presumption of legitimacy in the mother's husband. *Id.* at 23. However, the court found that in the context of termination of parental rights proceedings, the putative father was entitled to present evidence to rebut that presumption. *Id.*

93. *Wilkins*, 337 S.E.2d at 24. The court explained the term "party" is broadly defined in Georgia law as "one who is directly interested in the subject matter of the litigation," and is entitled to present evidence and "appeal from the judgment." *Id.* The court found that in the context of a paternity hearing brought in conjunction with a juvenile court TPR proceeding, a putative father "clearly falls within [this] . . . definition." *Id.*

94. *Id.* at 21 (quoting O.C.G.A. § 15-11-30(b) (1981), *repealed by* 1986 Ga. Laws 1017, § 3).

95. *Id.* at 24. Moreover, the court expressly noted that because Georgia Code section 15-11-52(b)

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Although the Georgia Juvenile Code has undergone several revisions since *Wilkins*,⁹⁶ the revisions have not resulted in such a substantive change that *Wilkins*' holding should cease to apply. Two primary differences distinguish the Code sections examined in *Wilkins* and the version currently in force.⁹⁷ First, under the statute examined in *Wilkins*, the parents' right to counsel in termination proceedings was implied under the general provision extending the right to parties at all stages of deprivation proceedings.⁹⁸ Although the current Code still contains a virtually identical provision,⁹⁹ an added provision explicitly extends the right to parents in termination of parental rights proceedings.¹⁰⁰

The other difference is that while former Georgia Code section 15-11-52(b) granted a putative father the right to "appear" and "be heard" in termination proceedings after presenting proof of paternity,¹⁰¹ the current Code imposes the more stringent requirement that a putative father succeed in a legitimation action to obtain standing to contest a termination.¹⁰² The current Juvenile Code also

imposed a burden on the putative father to establish his paternity as a prerequisite to challenging a termination of his parental rights, the paternity hearing is a "decisive" stage of a termination proceeding at which the putative father "has a critical need for legal representation." *Id.*

96. GA. APPLESEED CTR. FOR LAW & JUSTICE, COMMON WISDOM: MAKING THE CASE FOR A NEW GEORGIA JUVENILE CODE 19 (2008) [*hereinafter* COMMON WISDOM], available at <http://www.gaappleseed.org/children/reports/summary.pdf>.

97. Compare O.C.G.A. § 15-11-30(b) (1981), and *id.* § 15-11-52(b), repealed by 1986 Ga. Laws 1017, § 3, with O.C.G.A. §§ 15-11-96(i), 15-11-98 (2012).

98. O.C.G.A. § 15-11-30(b) (1981).

99. Former Georgia Code section 15-11-30(b) has been renumbered and appears in virtually identical form in current Georgia Code section 15-11-6(b), which reads as follows:

Except as otherwise provided under this article, a party is entitled to representation by legal counsel at all stages of any proceedings alleging delinquency, unruliness, incorrigibility, or deprivation and if, as an indigent person, a party is unable to employ counsel, he or she is entitled to have the court provide counsel for him or her. If a party appears without counsel, the court shall ascertain whether such party knows of his or her right to counsel and to be provided with counsel by the court if he or she is an indigent person.

O.C.G.A. § 15-11-6(b) (2012). Aside from minor semantic revisions, the only change is the addition of proceedings alleging "incorrigibility" to the list of those entitling a party to counsel. Compare *id.*, with O.C.G.A. § 15-11-30(b) (1981).

100. O.C.G.A. § 15-11-98(b) (2012).

101. O.C.G.A. § 15-11-52(b) (1981), repealed by 1986 Ga. Laws 1017, § 3. Presumably, as demonstrated in *Wilkins*, the putative father was entitled to make such a showing at any time prior to the termination action. *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 24 (Ga. 1985).

102. O.C.G.A. § 15-11-96(i) (2012). To demonstrate paternity under Georgia Code section 15-11-

imposes additional requirements that the father file both a petition for legitimation and notice of the petition with the juvenile court within thirty days of receiving a summons.¹⁰³ Given the legislature's intent to ensure parents' right to counsel in termination proceedings,¹⁰⁴ it is counterintuitive that a revision increasing a father's burden of proof could be read to diminish his right to counsel.

The Georgia Supreme Court has not considered a father's right to counsel in legitimation proceedings under the current Juvenile Code. Although *Wilkins* has not been overruled, the Georgia Court of Appeals decisions considering the issue of representation in legitimation proceedings have increasingly departed from its holding.¹⁰⁵

In *Alexander v. Guthrie*, the Court of Appeals considered whether a putative father is entitled to court-appointed representation in the context of legitimation proceedings brought in superior court.¹⁰⁶ In *Alexander*, an indigent putative father filed a pro se petition to legitimate his child after receiving notification that the child's mother had consented to an adoption by the child's stepfather.¹⁰⁷ On appeal

52(b), the putative father needed only provide proof that he was the child's biological father. O.C.G.A. § 15-11-52(b) (1981), *repealed by* 1986 Ga. Laws 1017, § 3. Because current law requires that a father legitimate his child to obtain standing to contest a termination, O.C.G.A. § 15-11-96(i) (2012), in addition to proving his biological paternity, the putative father must demonstrate that he has not abandoned his opportunity interest in developing a relationship with his child and that he is not an unfit parent. *See, e.g., In re Baby Girl Eason*, 358 S.E.2d 459 (Ga. 1987).

103. O.C.G.A. § 15-11-96(i) (2012).

104. *Nix v. Dep't of Human Res.*, 225 S.E.2d 306, 307-08 (Ga. 1976) ("It is thus quite evident that the entire legislative scheme written into the pertinent provisions of the Juvenile Code was intended to provide to an indigent parent effective representation at all stages of any proceeding involving the termination of that parent's right to his or her child.").

105. *See In re J.S.*, 691 S.E.2d 250 (Ga. Ct. App. 2010) (holding an indigent putative father was not entitled to court-appointed counsel to represent him in juvenile court legitimation proceedings); *In re S.M.G.*, 643 S.E.2d 296 (Ga. Ct. App. 2007) (declining to consider a father's contention that he was entitled to representation to enable him to initiate a legitimation action in juvenile court because he failed to raise the issue at the lower court level); *Alexander v. Guthrie*, 454 S.E.2d 805, 806 (Ga. Ct. App. 1995) (holding an indigent putative father had no right to court-appointed counsel in a legitimation proceeding brought in superior court).

106. *Alexander*, 454 S.E.2d at 805.

107. Absent a handful of statutory exceptions, prior to a child's adoption, a putative father's rights must be terminated either in juvenile court (typically the culmination of a deprivation action brought by the State) or in superior court (typically in private adoptions where deprivation is not an issue). O.C.G.A. § 19-8-10 (2010). While a father who has not legitimated has no standing to contest a termination regardless of whether a father's rights are terminated in superior court or juvenile court, the termination procedures are dealt with in separate portions of the code. O.C.G.A. § 15-11-2 (2012)

from the trial court's denial of his legitimation petition, the putative father contended that the trial court erred in failing to provide him with court-appointed counsel.¹⁰⁸ Despite its implicit admission that *Wilkins* might be read to suggest otherwise,¹⁰⁹ the court, without explaining its reasoning, held that the putative father "was not entitled to have an attorney appointed to represent him at public expense in the legitimation proceedings."¹¹⁰ Although the court failed to articulate a justification for distinguishing *Wilkins*, because the holding in *Wilkins* was based on the right to counsel afforded to parties in a deprivation proceeding as established by the Georgia Juvenile Code,¹¹¹ *Wilkins* arguably would not apply to a legitimation proceeding brought in superior court that was unconnected to a deprivation action.¹¹² In fact, just ten months later, in *Ghrist v. Fricks*, when considering a putative father's right to present evidence to establish his paternity in a superior court legitimation hearing, the Georgia Court of Appeals expressly distinguished *Wilkins* on the ground that it involved a termination case brought in juvenile court and was decided pursuant to the Juvenile Code.¹¹³

(governing termination of parental rights in juvenile court); *id.* § 15-11-98 (requiring putative father legitimate in order to have standing to contest termination proceedings in juvenile court); O.C.G.A. § 19-8-11 (2010) (specifying procedure for termination of parental rights in superior court); *id.* § 19-8-12 (requiring putative father to legitimate in order to have standing to contest termination proceedings in superior court).

108. *Alexander*, 454 S.E.2d at 806.

109. *Id.* at 806-07.

110. *Id.* at 806.

111. *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 21 (Ga. 1985) (construing O.C.G.A. § 15-11-30(b) (1981) and O.C.G.A. § 15-11-52(b) (1981), *repealed by* 1986 Ga. Laws 1017, § 3).

112. *Alexander*, 454 S.E.2d 805; *see also* *Quilloin v. Walcott*, 434 U.S. 246 (1978) (requiring heightened procedural safeguards where the State interfered with a putative father's relationship with his child).

113. *Ghrist v. Fricks*, 465 S.E.2d 501, 506 (Ga. Ct. App. 1995), *overruled in part by* *Brine v. Shipp*, 729 S.E.2d 393, 396-397 (Ga. 2012). In holding that collateral estoppel prevented a putative father from presenting evidence to establish his paternity and legitimate a child who already had another legal father in a superior court proceeding, the court distinguished *Wilkins* as follows:

[*Wilkins*] was a termination case brought in juvenile court and the Supreme Court's decision was based upon OCGA § 15-11-52(b) As discussed . . . below, the instant case was not, despite its denomination as such, a termination of parental rights case. Moreover, the circumstances presented and interests sought to be protected are clearly different in this case.

Id. at 506.

Since *Alexander*, the Court of Appeals has only considered an indigent putative father's right to court-appointed counsel in juvenile court legitimation proceedings on two occasions, but on neither occasion did the court find that the putative father was entitled to counsel.¹¹⁴ Perhaps surprisingly, the issue was not raised on appeal until 2007 in *In re S.M.G.*¹¹⁵ In that case, the Court of Appeals declined to examine the merit of a father's contention that a termination of his parental rights must be reversed because the juvenile court failed to provide him with counsel to legitimate his children.¹¹⁶ Although shortly after the termination petition was filed, the court appointed an attorney to represent the father in the termination proceeding, the record revealed no evidence that the father or his attorney made any attempt to file a legitimation petition before the deadline or that either requested funds for that purpose.¹¹⁷ Although the *S.M.G.* court reasoned that it could not examine the denial of counsel claim on appeal because it was not raised at the lower level, this reasoning seemingly contradicts *Wilkins*, where the court decided that the putative father was entitled to counsel *despite* his failure to request it.¹¹⁸ Nonetheless, *Wilkins* is likely distinguishable from *S.M.G.* because the statute requiring a father to file a petition to legitimate differs from the statute examined in *Wilkins*.¹¹⁹

In *In re J.S.*, the only Georgia appellate case to directly consider the issue of a putative father's right to counsel in juvenile court legitimation proceedings, the Court of Appeals cited *Alexander* for the proposition that an indigent father seeking to establish paternity

114. *In re J.S.*, 691 S.E.2d 250, 251 (Ga. Ct. App. 2010); *In re S.M.G.*, 643 S.E.2d 296 (Ga. Ct. App. 2007).

115. *In re S.M.G.*, 643 S.E.2d at 296.

116. *Id.* at 297.

117. *Id.*

118. *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 24 (Ga. 1985).

119. Unlike the paternity statute in *Wilkins*, which simply entitled a putative father to present evidence to establish his paternity in conjunction with a termination of his parental rights, Georgia Code section 15-11-98 requires that a putative father initiate the legitimation action by filing a notice and a petition. Compare O.C.G.A. § 15-11-98 (2012), with O.C.G.A. § 15-11-30(b) (1981). Under this scheme, it is logical that a court would not appoint counsel to represent a father in legitimation proceedings until he has taken some action to initiate those proceedings.

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and legitimate his child in conjunction with a juvenile court termination action has no right to court-appointed counsel.¹²⁰ However, the court failed to articulate why *Alexander*, rather than *Wilkins*, should apply.¹²¹ As in *J.S.*, *Wilkins* examined the right to counsel in the context of a juvenile court paternity proceeding governed by Article 15 of the Georgia Code, where the State sought to terminate a father's parental rights.¹²² *Alexander*, on the other hand, was decided in the context of a private adoption by the child's stepfather, governed by Article 19 of the Georgia Code, where the State was not involved.¹²³ Given this distinction, along with the amplified need for due process protections in cases where the State is an actor,¹²⁴ it seems that the court's reliance on *Alexander* in the context of juvenile court legitimation proceedings was misplaced. Applying procedural standards intended to govern litigation between private parties to cases where the State seeks to deprive individuals of their parental rights, as the court did in *J.S.*, appears to run afoul of Fourteenth Amendment principles.

III. ESTABLISHING FATHERS' RIGHT TO COUNSEL IN GEORGIA JUVENILE COURT LEGITIMATION PROCEEDINGS

To ensure putative fathers receive constitutionally adequate protection where the state seeks to sever relationships with their children, Georgia law should be amended to prevent juvenile courts from denying legitimation petitions brought by unrepresented, indigent fathers.

A. The Nature Of The Right To Counsel

Although legitimation proceedings brought in response to privately initiated adoption petitions and those brought to obtain standing to

120. *In re J.S.*, 691 S.E.2d 250, 252 (Ga. Ct. App. 2010).

121. *Id.*

122. *Wilkins*, 337 S.E.2d at 24.

123. *Alexander v. Guthrie*, 454 S.E.2d 805 (Ga. Ct. App. 1995).

124. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972); *In re Baby Girl Eason*, 358 S.E.2d 459, 463 (Ga. 1987).

challenge state-initiated terminations of parental rights are decided in different courts,¹²⁵ their potential impact on the putative father's relationship with his child is virtually identical. In both instances, a denial of the petition eliminates a father's right to assert any relationship interest in his child or to challenge an adoption.¹²⁶ Nonetheless, in juvenile court legitimation proceedings, this interest requires greater constitutional protection because of the state's direct role in extinguishing the relationship.¹²⁷

The Fourteenth Amendment provides that no state shall deprive a person of life, liberty, or property without due process of law.¹²⁸ Because parents' right to custody of their children is a liberty interest within the meaning of the Fourteenth Amendment,¹²⁹ the critical

125. Georgia Code section 19-7-22 provides:

A father of a child born out of wedlock may render his relationship with the child legitimate by petitioning the superior court of the county of the residence of the child's mother or other party having legal custody . . . of the child . . . [However, a] legitimation petition may be filed, pursuant to paragraph (2) of subsection (e) of Code Section 15-11-28, in the juvenile court of the county in which a deprivation proceeding regarding the child is pending.

O.C.G.A. §§ 19-7-22(a), (d) (2010); *see also* O.C.G.A. § 15-11-28 (e)(2) (2012) ("The juvenile court shall have jurisdiction to hear any legitimation petition filed pursuant to Code Section 19-7-22 as to a child with respect to whom a deprivation proceeding is pending in the juvenile court at the time the legitimation petition is filed.")

126. Georgia Code section 19-8-12(f)(3)—articulating consequences of a denied legitimation petition filed in response to a privately initiated adoption petition in superior court—is identical to Georgia Code section 15-11-96(i)(3)—articulating consequences of a denied legitimation petition filed in response to a state-initiated motion to terminate parental rights in juvenile court. *Compare* O.C.G.A. § 19-8-12(f)(3) (2010), *with id.* § 15-11-96(i)(3) (2012). Both Code sections provide that after receiving notice of the motion or petition:

A biological father who is not the legal father loses all rights to the child and . . . may not thereafter object to the [child's] adoption . . . if . . . he . . . [f]iles a legitimation petition and the action is subsequently concluded without a court order declaring a finding that he is the legal father of the child.

O.C.G.A. § 15-11-96(i) (2012); O.C.G.A. § 19-8-12(f) (2010).

127. *See Quilloin*, 434 U.S. at 255; discussion *infra* Part II.B.

128. U.S. CONST. amend. XIV, § 1. The Supreme Court has found that the Fourteenth Amendment imposes both procedural and substantive due process requirements in cases involving parents' right to custody of their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982) (imposing a procedural due process requirement that evidence supporting termination of parental rights be proved by clear and convincing evidence); *Stanley*, 405 U.S. 645 (articulating a substantive due process requirement that the State prove terminating a father's custody is necessary to achieving a compelling government purpose).

129. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18 (1981). A parent's right to raise his or her child free from state interference "has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment." *Id.* at 38 (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 845 (1977)).

distinction between the degree of due process required in cases such as *Alexander*, where a father seeks to challenge a privately initiated adoption,¹³⁰ and *Wilkins*, where a father seeks to challenge a termination initiated by the Department,¹³¹ is state action.

Traditionally, the Fourteenth Amendment has been interpreted as a limitation on government action as opposed to private conduct.¹³² Although much debate has ensued as to whether, and in what circumstances, the Fourteenth Amendment applies to private actors who challenge other individuals' liberty or property interests through state courts,¹³³ it is well-settled that due process is required when a government entity, such as DFCS, seeks to divest an individual of a protected liberty interest.¹³⁴ Hence, in legitimation and termination of parental rights cases where the state is a party, parental rights unquestionably require constitutional protection.¹³⁵

Although the Supreme Court has occasionally found that court enforcement of private claims constitutes state action requiring Fourteenth Amendment protection, the principle has not been consistently applied, possibly because of the potential for characterizing all private conduct as state action.¹³⁶ As to legitimation claims, on at least one occasion, the Georgia Supreme Court found that pursuing a privately initiated adoption through state courts

130. *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 21 (Ga. 1985).

131. *Alexander v. Guthrie*, 454 S.E.2d 805, 806 (Ga. Ct. App. 1995).

132. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 519–51 (4th ed. 2011).

133. *Id.* at 557–58. Under the “entanglement exception” to the state action doctrine, the Fourteenth Amendment applies where the state “affirmatively authorizes, encourages, or facilitates private conduct.” *Id.* at 539. In *Shelley v. Kraemer*, the Supreme Court held that “the ‘action of state courts . . . is . . . regarded as action of the State within the meaning of the Fourteenth Amendment.’” *Id.* at 540 (footnote omitted) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948)). *Shelley* has incited controversy as to the limits of the state action doctrine, and while the Court has rarely applied *Shelley* in subsequent cases, it has also failed to “articulate[] any clear limiting principles.” *Id.* at 540–41.

134. *See, e.g., In re H.L.T.*, 298 S.E.2d 33, 33 (Ga. Ct. App. 1982). Emphasizing the gravity of a juvenile court’s order granting DFCS’s motion to terminate a mother’s parental rights, the Georgia Court of Appeals observed that “[f]ew forms of state action are both so severe and so irreversible.” *Id.* at 33 (quoting *Santosky v. Kramer*, 455 U.S. 745 (1982)).

135. *See, e.g., In re B.N.A.*, 546 S.E.2d 819, 820 (Ga. Ct. App. 2001) (finding that the State’s failure to prove parental unfitness by clear and convincing evidence in a termination proceeding was a violation of the Due Process Clause of the Fourteenth Amendment requiring reversal); *In re H.L.T.*, 298 S.E.2d at 33.

136. CHEREMINSKY, *supra* note 132, at 523, 540.

pursuant to state law was significant enough to entitle the father to enhanced procedural safeguards.¹³⁷ However, the United States Supreme Court has recognized a clear distinction, finding that legitimation proceedings brought for the purpose of obtaining standing to challenge privately initiated adoptions require less stringent due process protections than those brought for the purpose of obtaining standing to challenge state-initiated terminations of parental rights.¹³⁸

While the Court has stopped short of finding that due process requires appointment of counsel to indigent parents in every termination case, in this context, it has encouraged states to impose more rigorous due process requirements than are minimally permissible under the Constitution.¹³⁹ Accordingly, the Georgia legislature has imposed a statutory right to counsel in juvenile court termination proceedings.¹⁴⁰ Deferring to the legislative judgment on the issue, reviewing courts have refused to condone some judicially imposed limitations on the right, even when not expressly prohibited by statute.¹⁴¹ Juvenile courts have accordingly been prevented from utilizing statutory loopholes to undermine the purpose of the requirement.¹⁴²

Unfortunately, reviewing courts have failed to apply the same logic to juvenile courts' denial of counsel in legitimation proceedings.¹⁴³ This practice is plainly incompatible with the

137. *In re Baby Girl Eason*, 358 S.E.2d 459, 463 (Ga. 1987); discussion *infra* Part II.B.

138. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); see also discussion *infra* Part II.B.

139. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 33–34 (1981).

140. O.C.G.A. § 15-11-98(b) (2012).

141. See, e.g., *Nix v. Dep't of Human Res.*, 225 S.E.2d 306, 308 (Ga. 1976); *In re J.M.B.*, 676 S.E.2d 9, 12 (Ga. Ct. App. 2009) (refusing to apply harmless error standard to court's failure to ensure mother's waiver of counsel was knowing, intelligent, and voluntary); *In re A.M.A.*, 607 S.E.2d 916, 923 (Ga. Ct. App. 2004) (establishing that when a non-indigent parent appears without counsel at a termination proceeding, the juvenile court has a duty to delay the proceedings long enough to ascertain whether she has acted with reasonable diligence in retaining an attorney and whether her failure to procure counsel is due to factors beyond her control).

142. See, e.g., *Nix*, 225 S.E.2d at 307–08. In requiring a juvenile court to provide a mother with a pauperized transcript for the purposes of appeal despite the absence of an explicit statutory requirement, the Georgia Supreme Court observed that it was the legislature's intent to effectuate due process in termination proceedings. *Id.*

143. See, e.g., *In re J.S.*, 691 S.E.2d 250, 252 (Ga. Ct. App. 2010); *In re S.M.G.*, 643 S.E.2d 296 (Ga. Ct. App. 2007). But see *In re B.N.A.*, 546 S.E.2d 819, 820 (Ga. Ct. App. 2001) (reversing termination of

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legislature's goal of protecting parents' right to due process in termination proceedings.¹⁴⁴ While in private proceedings, distinctions may allow courts to treat estranged putative fathers differently from mothers who have established relationships with their children,¹⁴⁵ such distinctions are far less justified when the mother's conduct has been so egregious that she has lost custody to the state.¹⁴⁶ Moreover, in legitimation proceedings, where the burden of proof is on the putative father to establish biological paternity and parental fitness, denying counsel may create an even greater disadvantage than in termination proceedings, where the state has the burden of proof.¹⁴⁷

B. Establishing A Father's Right To Counsel In Juvenile Court Legitimation Proceedings

To prohibit additional infringements on putative fathers' Fourteenth Amendment rights, Georgia courts need a clear standard requiring court-appointed counsel in juvenile court legitimation proceedings. Given Georgia courts' failure to develop and apply consistent standards,¹⁴⁸ the General Assembly should amend the Juvenile Code to provide a statutory basis for the right. However, in light of the substantial budgetary constraints plaguing Georgia

a putative father's parental rights despite his failure to legitimate, where the Department failed to prepare a case plan for reunification pursuant to court order).

144. See *Wilkins v. Ga. Dep't of Human Res.*, 337 S.E.2d 20, 24 (Ga. 1985).

145. *Lehr v. Robertson*, 463 U.S. 248, 262, 267-68 (1983) ("If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."); *Parham v. Hughes*, 441 U.S. 347, 355-56 (1979) (finding unwed fathers who may remain anonymous to the state until taking action to legitimate their children are not "similarly situated" to unwed mothers for purposes of pursuing a wrongful death suit).

146. *Lehr*, 463 U.S. at 267. Statutes that treat putative fathers and mothers differently with respect to rights to veto an adoption "may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child." *Id.* But see *In re V.M.T.*, 534 S.E.2d 452, 455 (Ga. Ct. App. 2000). In *In re V.M.T.*, the Georgia Court of Appeals consolidated appeals from juvenile court orders terminating the parental rights of both parents. *Id.* at 454. After rejecting the putative father's contention that requiring him to legitimate his child in order to obtain standing to contest a termination violates Fourteenth Amendment principles, the court affirmed termination of his parental rights and proceeded to consider the merits of the mother's appeal. *Id.*

147. *In re A.B.*, 579 S.E.2d 779, 780 (Ga. Ct. App. 2003). In proceedings to terminate parental rights, the State has the burden to prove parental misconduct or inability by clear and convincing evidence. *Id.*

148. See *In re J.S.*, 691 S.E.2d 250; discussion *infra* Part II.C.

juvenile courts,¹⁴⁹ to the extent feasible, the statute should be tailored to remedy the specific issue of denying counsel in legitimation proceedings that could actually result in a de facto termination of parental rights.

1. Budgetary Constraints and Denial of Counsel

While inadequate funding of juvenile courts is hardly a new problem, decreased tax revenue resulting from the current recession has exacerbated the issue.¹⁵⁰ Georgia juvenile courts are funded solely by county governments and in proceedings not involving delinquency, must pay for counsel for children and all indigent parties from the budget allocated to them by the county commissioner.¹⁵¹ This funding structure has the unfortunate consequence of intensifying the disparity of resources between poor and wealthy counties, so the counties that are most in need receive the smallest allocation of financial resources.¹⁵² Even in circumstances where an indigent party's right to counsel is statutorily established, inadequate funding has forced many juvenile courts to cut corners that undermine the quality of the representation provided.¹⁵³

149. See generally Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 97, 115 (2011) (discussing the current recession's impact on allocation of resources to juvenile courts).

150. See, e.g., Preston Sparks, *Juvenile Court Cases on Rise County Adds Funding for Judge's Position*, AUGUSTA CHRON., June 1, 2006, at B2, available at 2006 WLNR 9452121. Unable to procure funding from the county in time to prevent a backlog of juvenile court cases, a part-time Columbia County juvenile court judge worked additional days without pay. *Id.*; see also Mike Buffington, *Juvenile Court Gets a Little More Funding*, BARROW J. (Sept. 15, 2011), <http://www.barrowjournal.com/archives/5764-Juvenile-Court-get-a-little-more-funding.html>. When Barrow County's Board of Commissioners cut funding for indigent defense in half, the juvenile court was forced to request additional funding to cover the cost of providing counsel for indigent parents. *Id.*

151. Sarah Gerwig-Moore & Leigh S. Schrope, *Hush, Little Baby, Don't Say a Word: How Seeking the "Best Interests of the Child" Fostered a Lack of Accountability in Georgia's Juvenile Courts*, 58 MERCER L. REV. 531, 536 (2007) ("Counties bear financial responsibility for funding counsel in juvenile deprivation matters . . ."); *Georgia's County Governments*, NEW GA. ENCYCLOPEDIA (Dec. 20, 2011), <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-589>.

152. See COMMON WISDOM, *supra* note 96, at 13.

153. MELINDA MOORE & ALLISON MCWILLIAMS, UNIV. OF GA., A STATEWIDE ASSESSMENT OF GEORGIA PARENT REPRESENTATION IN CHILD WELFARE PROCEEDINGS 4 (2010), available at <http://w2.georgiacourts.org/cj4c/files/Final%20PA%20Merged%20Report.pdf>. A statewide examination of available data on parent representation revealed that attorneys are frequently given little time to

Unsurprisingly, facing these practical challenges and in the absence of a statute creating a clear mandate, juvenile courts often decline to provide counsel to indigent fathers in legitimation proceedings.¹⁵⁴ Moreover, *denying* legitimations produces an even greater cost benefit because it renders fathers unable to contest terminations of their parental rights.¹⁵⁵ When a court denies a legitimation, it avoids the cost of providing counsel to an indigent father in subsequent termination proceedings, which are typically far lengthier and more complex than legitimation proceedings,¹⁵⁶ and also decreases the length of termination proceedings—thereby decreasing the number of hours in court for all attorneys and court staff who must be present.¹⁵⁷ With the odds already stacked against the indigent father who must, with no legal training, present a pro se case for legitimation, these circumstances incentivize juvenile courts to deny the legitimation.

2. A Proposed Remedy

To remedy this issue, the proposed statute must prevent courts from unfairly denying counsel in legitimation proceedings for the purpose of denying fathers the right to challenge terminations. However, because in reality only a small percentage of legitimation petitions are actually denied, it may be unrealistic to burden courts

prepare cases and often meet with clients for the first time in the courtroom. *Id.* at 3. Additionally, researchers found that low attorney pay and overall lack of funding for juvenile courts impacted the quality of representation parents received. *Id.*; *see also*

Gerwig-Moore & Schrope, *supra* note 151, at 536 (explaining that in some circumstances, lack of adequate funding for Georgia juvenile courts has resulted in courts' failing to appoint counsel for children in delinquency proceedings).

154. *See, e.g., In re J.S.*, 691 S.E.2d 250, 251 (Ga. Ct. App. 2010); *In re S.M.G.*, 643 S.E.2d 296, 296 (Ga. Ct. App. 2007).

155. O.C.G.A. § 15-11-96(i)(2) (2012).

156. Motion for Leave to File Brief Amicus Curiae and Brief for Amicus Curiae National Legal Aid and Defender Association, *Lassiter v. Dep't of Social Servs. of Durham Cnty.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340038, at *15 (“Proceedings to terminate parental rights are extremely complex. The statutory standards for the termination of parental rights . . . require the court to make its determination on the basis of complicated factual issues that require close analysis of human behavior.” (footnote omitted)).

157. Courts typically conduct a single hearing regarding termination of parental rights of both parents. *See, e.g., In re M.J.L.*, 643 S.E.2d 395 (Ga. Ct. App. 2007); *In re T.W.O.*, 643 S.E.2d 255 (Ga. Ct. App. 2007); *In re C.P.*, 630 S.E.2d 165 (Ga. Ct. App. 2006).

with the additional cost of providing counsel for *all* indigent fathers in legitimation proceedings. To prevent obligating courts with an unwarranted burden, the statute should be narrowly tailored to address the specific harm in question. To accomplish this, the amended statute should prevent juvenile courts from *denying* legitimation petitions where the father is unrepresented. Although this approach would require juvenile courts to make a pretrial prediction as to whether they might deny the petition and appoint counsel even if denial is inevitable, it would require a lesser expenditure than an absolute requirement that courts appoint counsel in all legitimation cases.

This proposed solution is similar to the “actual imprisonment” standard the United States Supreme Court has established in the criminal context.¹⁵⁸ Recognizing that extending a constitutional right to counsel to all indigent criminal defendants would impose an undue financial burden on states, in *Argersinger v. Hamlin*, the Court held that states are only required to provide counsel if the defendant is sentenced to actual imprisonment.¹⁵⁹ In response to subsequent criticism that the standard required judges to make predictive evaluations concerning whether imprisonment might be imposed, the Court defended the actual imprisonment standard as a “reasonably workable” solution in light of the “substantial[] costs” that a more inclusive standard would generate.¹⁶⁰

If courts are capable of making such pretrial determinations based largely on the character of the charged offense in criminal proceedings, juvenile courts should be competent to make similar pretrial determinations concerning legitimation petitions, as they have access to substantially more information than is available in the criminal context.¹⁶¹ Unlike in criminal proceedings, juvenile courts

158. *See* *Argersinger v. Hamlin*, 407 U.S. 25, 39–40 (1972).

159. *Id.* at 37 n.7 (noting that the actual imprisonment standard would not impose too great a burden on the “Nation’s legal resources”).

160. *Scott v. Illinois*, 440 U.S. 367, 373 (1979).

161. Case plans for reunification, which must be submitted to the court within thirty days of a child’s removal from the family home, provide substantial information about the family, including a statement of the reasons why the child cannot return safely to the home of either parent. *See generally* O.C.G.A. § 15-11-58(b) (2012). At each subsequent permanency hearing, the Department must submit an

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have access to social and psychological histories, as well as the child's guardian ad litem's recommendation regarding the petition.¹⁶² Additionally, by the time a legitimation petition is filed, in most cases, juvenile courts will have received substantial information about the father's relationship with his child through other hearings.¹⁶³ Although this "actual denial" standard would prevent courts from denying legitimation petitions if they fail to provide counsel, courts could minimize this risk by appointing counsel whenever there is any doubt as to the whether the petition should be granted.¹⁶⁴ Moreover, because the standard would not prevent a court from granting a subsequent termination of the father's rights, even if a court was forced to grant a petition because of an inaccurate pretrial assessment, the error would not produce a substantive difference in the case's ultimate outcome.

CONCLUSION

The United States Supreme Court has recognized that parents have a constitutionally protected liberty interest in the care and custody of their children.¹⁶⁵ Where the State seeks to terminate parental rights, Georgia law requires that juvenile courts appoint counsel to indigent parents to protect their right to due process.¹⁶⁶ Although denying a putative father's petition to legitimate his child amounts to a de facto termination of his parental rights, current precedent suggests juvenile courts have no obligation to provide counsel for indigent fathers in legitimation proceedings.¹⁶⁷ Given the Georgia legislature's determination that due process requires court-appointed counsel

additional report identifying an updated permanency recommendation for the child and explaining the reasoning behind this recommendation. *Id.* § 15-11-58(o)(2).

162. JOSLYN-GAUL, *supra* note 5, at 62.

163. *See generally* O.C.G.A. § 15-11-58 (2012) (identifying proceedings required to take place at each stage of a deprivation case).

164. *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.2(a) (4th ed. 2004) (suggesting the same for criminal proceedings).

165. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

166. O.C.G.A. § 15-11-98(b) (2012).

167. *In re J.S.*, 691 S.E.2d 250, 250 (Ga. Ct. App. 2010).

when the State seeks to terminate the parent–child relationship,¹⁶⁸ depriving indigent fathers of counsel in juvenile court legitimation proceedings amounts to a constitutionally impermissible denial of due process.

The Georgia Juvenile Code should be amended to create a clear standard preventing juvenile courts from denying indigent fathers' legitimation petitions without providing counsel for the legitimation proceeding. To avoid creating an unnecessary financial burden on the courts, the legislature should consider a scheme that allows juvenile courts to grant, but not deny, legitimation petitions without appointing counsel for the father.

168. *Nix v. Dep't of Human Res.*, 225 S.E.2d 306, 307–08 (Ga. 1976).