

## COMMENT

### JUDGE OR JURY? HOW BEST TO PRESERVE DUE PROCESS IN WISCONSIN TERMINATION OF PARENTAL RIGHTS CASES

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The right to parent one's own child is a fundamental right that requires due process protection from government interference. Since 1979, the Wisconsin Children's Code has provided parents involved in termination of parental rights cases with the right to a jury trial as a way to safeguard their due process rights. In the 2013–14 Session, the Wisconsin Legislature will consider a bill that seeks to eliminate a parent's right to a jury trial in termination of parental rights cases. Proponents of this change argue that jury trials are not in the best interest of the child because they delay permanency for children and that jury trials are more expensive.

This Comment argues that the right to a jury trial in termination of parental rights cases should be preserved in Wisconsin because it provides parents with an important due process safeguard. It analyzes the importance of jury trials in the termination of parental rights context using the three-factor test established in *Mathews v. Eldridge*, concluding that these factors weigh in favor of preserving a parent's right to a jury trial. In doing so, it addresses the claims that jury trials delay permanency and are more expensive. Finally, it suggests alternative solutions that achieve timely permanency for children and reduce administrative costs without eliminating an important procedural protection.

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#### INTRODUCTION

“All parents damage their children. It cannot be helped. Youth, like pristine glass, absorbs the prints of its handlers. Some parents smudge, others crack, a few shatter childhoods completely into jagged little pieces, beyond repair.”<sup>1</sup> This sad reality has long been the focus of state human service organizations, legislatures, and courts in Wisconsin and across the nation.<sup>2</sup> State intervention can take many forms, but the most extreme form of state intervention is termination of parental rights.<sup>3</sup> When the state terminates a parent’s rights, it means that “all rights, powers, privileges, immunities, duties and obligations existing between parent and child are permanently severed.”<sup>4</sup>

A termination of parental rights case can be either voluntary or involuntary.<sup>5</sup> When a parent voluntarily consents to a termination of his or her parental rights, the court may accept the consent only after it has engaged in a colloquy with the parent and is satisfied that the consent is

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1. MITCH ALBOM, *THE FIVE PEOPLE YOU MEET IN HEAVEN* 104 (2003).

2. See, e.g., WIS. STAT. § 48.01(1)(a) (2011–12) (“[T]he paramount goal of this chapter is to protect children and unborn children.”); *Mission and Goals*, WIS. DEP’T CHILD. & FAMS., [http://dcf.wi.gov/mission\\_and\\_goals.htm](http://dcf.wi.gov/mission_and_goals.htm) (last visited Sept. 21, 2013) (“The Department is committed to protecting children and youth, strengthening families, and supporting communities.”).

3. See § 48.40(2).

4. *Id.* Parent is defined as “a biological parent, a husband who has consented to the artificial insemination of his wife . . . , or a parent by adoption.” § 48.02(13). This includes a person acknowledged or adjudicated to be the biological father under state law. *Id.*

5. Compare § 48.41 (allowing the court to proceed immediately to disposition when a parent consents to a termination of parental rights), with § 48.415 (requiring a fact-finding hearing when the parent has not consented to a termination of parental rights).

informed and voluntary.<sup>6</sup> There is no trial in a voluntary termination proceeding.<sup>7</sup> However, if a parent does not voluntarily consent to having his or her parental rights terminated, he or she is entitled to a fact-finding hearing.<sup>8</sup>

Because a termination of parental rights is civil, parents are not entitled to the same due process protections that are afforded to criminal defendants.<sup>9</sup> However, the United States Supreme Court has recognized that the individual interests at stake in termination proceedings are considerably more significant than most civil cases.<sup>10</sup> The Wisconsin Supreme Court has agreed, stating that a termination of parental rights is “among the most severe forms of state action” because it “involve[s] the awesome authority of the State to destroy permanently all legal recognition of the parental relationship.”<sup>11</sup> Because of the serious consequences, states are required to provide some additional due process safeguards in involuntary termination of parental rights cases.<sup>12</sup>

Jury trials are not constitutionally required in termination of parental rights cases. However, five states guarantee the right to a jury trial in involuntary termination proceedings.<sup>13</sup> In addition, Arizona allowed jury trials for a three-year experimentation period, although it does not currently allow jury trials in termination of parental rights proceedings.<sup>14</sup> Every other state specifically prohibits jury trials in termination of parental rights cases.<sup>15</sup>

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6. § 48.41(1)–(2)(a).

7. § 48.41(1) (“When such voluntary consent is given . . . the judge may proceed immediately to a disposition of the matter . . .”).

8. § 48.422(2). The fact-finding hearing must take place within forty-five days of the initial petition hearing. *Id.*

9. *Walworth Cnty. Dep’t of Health & Human Servs. v. Andrea L.O. (In re Termination of Parental Rights to Lyle D.E.)*, 2008 WI 46, ¶ 47, 309 Wis. 2d 161, 749 N.W.2d 168.

10. *Santosky v. Kramer*, 455 U.S. 745, 755–58 (1982).

11. *Evelyn C.R. v. Tykila S. (In re Jayton S.)*, 2001 WI 110, ¶ 20, 246 Wis. 2d 1, 629 N.W.2d 768 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 127–28 (1996)).

12. *Santosky*, 455 U.S. at 753–54. For example, due process requires a clear and convincing standard of proof in termination of parental rights proceedings. *Id.* at 747.

13. Linda A. Szymanski, *Is a Jury Trial Ever Available in a Termination of Parental Rights Case?*, 16 NAT’L CENTER FOR JUV. JUST. SNAPSHOT, no. 3, Mar. 2011, [http://www.ncjj.org/pdf/Snapshots/2011/vol16\\_no3\\_Jury%20Trial%20In%20Termination%20of%20Parental%20Rights%20Case.pdf](http://www.ncjj.org/pdf/Snapshots/2011/vol16_no3_Jury%20Trial%20In%20Termination%20of%20Parental%20Rights%20Case.pdf). These states are Wyoming, Oklahoma, Wisconsin, Virginia, and Texas. *Id.* Virginia uses an “advisory” jury in termination cases. *Id.*

14. *Id.* Arizona repealed the statute at the end of the three-year period. *Id.*

15. *Id.*

In Wisconsin, the right to a jury trial in termination cases is statutory, not constitutional.<sup>16</sup> In the 2012 interim session, the Wisconsin Legislative Council's Special Committee on Permanency for Young Children in the Child Welfare System recommended that this statutory right be eliminated.<sup>17</sup> Of the many changes the Special Committee recommended, the committee members were "most divided on this issue."<sup>18</sup> This Comment argues that Wisconsin's statutory guarantee of a jury trial in involuntary termination of parental rights cases should be preserved because it provides important due process safeguards for parents and does not interfere with permanency goals for children. Part I discusses relevant Supreme Court case law and Wisconsin procedures in involuntary termination of parental rights proceedings. Part II analyzes the importance of jury trials in termination of parental rights cases and examines how jury trials affect permanency goals. Finally, this Comment concludes that the right to a jury trial should be preserved in Wisconsin and suggests alternatives to eliminating jury trials that promote timely permanency while preserving parents' due process rights.

#### I. ANALYZING DUE PROCESS IN TERMINATION OF PARENTAL RIGHTS CASES

At the federal level, both the United States Congress and the United States Supreme Court have addressed the procedural issues relating to termination of parental rights proceedings.<sup>19</sup> These federal policies

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16. WIS. STAT. § 48.422 (2011–12). *See also Walworth Cnty. Dep't of Health & Human Servs. v. Andrea L.O. (In re Termination of Parental Rights to Lyle D.E.)*, 2008 WI 46, ¶ 29, 309 Wis. 2d 161, 749 N.W.2d 168.

17. *See* MELISSA SCHMIDT & MARGIT KELLEY, SPECIAL COMM. ON PERMANENCY FOR YOUNG CHILDREN IN THE CHILD WELFARE SYS., REPORT TO THE JOINT LEGISLATIVE COUNCIL 4, 21 (2013), *available at* [http://legis.wisconsin.gov/lc/publications/lcr/LCR\\_13\\_06.pdf](http://legis.wisconsin.gov/lc/publications/lcr/LCR_13_06.pdf) [hereinafter JOINT LEGISLATIVE COUNCIL REPORT]; Memorandum No. 3 from Melissa Schmidt and Margit Kelley, Staff Attorneys, Wis. Legislative Council, to Members of the Special Comm. on Permanency for Young Children in the Child Welfare Sys. (Sept. 5, 2012), *available at* [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/memo3\\_welfr.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/memo3_welfr.pdf) [hereinafter WLC Memo No. 3]. For the text of the proposed statutory amendment, see ASSEMB. B. 151, 2013–2014 Leg., 100th Reg. Sess. (Wis. 2013), *available at* <https://docs.legis.wisconsin.gov/2013/related/proposals/ab151.pdf>.

18. Katie Holtz & Devon Lee, *High Stakes in TPR Proceedings Require the Balance that Juries Provide*, WIS. LAW., June 2013, at 4 *available at* <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=86&Issue=5&ArticleID=10829>.

19. *See, e.g.*, 42 U.S.C. § 675(5)(E) (2006) (requiring states to petition for termination of parental rights under certain circumstances); *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (considering the proper standard of proof in termination of parental rights cases); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981) (considering whether parents have a constitutional right to counsel in termination proceedings).

influence the practices and procedures of termination of parental rights cases in Wisconsin.<sup>20</sup> Most recently, federal policies like the Adoption and Safe Families Act (ASFA) have motivated Wisconsin to revisit its statutory and administrative procedures in child welfare and termination of parental rights proceedings.<sup>21</sup> Federal case law and policy serve as an important backdrop to the issue of due process in Wisconsin termination proceedings.

#### A. The Supreme Court Analysis

The United States Supreme Court has not specifically addressed the issue of whether the Due Process Clause guarantees the right to a jury trial in termination of parental rights cases. The Court has, however, addressed whether the Due Process Clause guarantees the right to a jury trial in juvenile delinquency proceedings—which, like termination of parental rights cases, are civil in nature and involve the potential deprivation of a fundamental right.<sup>22</sup> In *McKeiver v. Pennsylvania*,<sup>23</sup> the Supreme Court held that juveniles are not entitled to a jury trial in delinquency proceedings as long as other aspects of the trial adequately protect the interests that a jury trial is intended to serve.<sup>24</sup>

The Court distinguished juvenile proceedings from criminal proceedings, noting two main differences. First, there are fewer risks in denying a jury trial in delinquency proceedings than a criminal proceeding because of the additional policies and procedures in the juvenile court system.<sup>25</sup> Second, the consequences of adjudication in

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20. § 48.01(1)(ad) (One purpose of The Children’s Code is “[t]o provide judicial and other procedures through which children and all other interested parties are assured fair hearings and their constitutional and other legal rights are recognized and enforced . . .”).

21. CHILDREN’S COURT IMPROVEMENT PROGRAM, WISCONSIN CHILDREN’S COURT INITIATIVE (CCI) SUMMARY REPORT (January 2012), available at <http://www.wicourts.gov/courts/programs/docs/ccipsummaryreport.pdf>. Specifically, the Children’s Court Initiative lists safety, permanency, due process, and timeliness as desired performance measures, based on ASFA as well as other state and federal law. *Id.*

22. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 531 (1971). The *McKeiver* Court recognized that the possible consequences of being adjudicated delinquent include detention, and that juvenile cases therefore concern a fundamental interest protected under the Due Process Clause. *Id.* (citing *In re Gault*, 387 U.S. 1 (1967)).

23. 403 U.S. 528 (1971).

24. *Id.* at 554. The Court stated that the purpose of the jury is to allow “an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience.” *Id.* Other ways of obtaining similar protection, in lieu of a jury trial, may include “focusing public attention upon the facts of [the] trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation.” *Id.* at 555.

25. *Id.* at 552–53.

juvenile proceedings are less severe than in criminal proceedings.<sup>26</sup> In addition, the Court was reluctant to impose a jury trial requirement for fear that it would turn juvenile delinquency proceedings into “a full adversary process” rather than an “informal, protective proceeding.”<sup>27</sup> Although the Court refused to hold that the Due Process Clause requires a jury trial, the Court did recognize that although not criminal proceedings, the nature of juvenile proceedings require some additional due process safeguards.<sup>28</sup>

Although the Supreme Court has not addressed the right to a jury trial, it has addressed the issue of due process required during termination proceedings. The Court has recognized that parents have a “fundamental liberty interest . . . in the care, custody, and management of their child”; that this fundamental interest<sup>29</sup> extends equally to all parents, not just model ones; and that it is protected by the Fourteenth Amendment.<sup>30</sup> “A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.”<sup>31</sup> It is true that this fundamental interest is not absolute.<sup>32</sup> States can intervene with termination proceedings, but only if they have “a powerful countervailing interest.”<sup>33</sup> Further, when states do intervene,

26. *Id.* at 553.

27. *Id.* at 545. Unlike juvenile proceedings, termination of parental rights trials are fully adversarial.

28. *Id.* at 533. These safeguards include the right to appropriate notice, the right to counsel, the rights to confrontation and cross-examination, the privilege against self-incrimination, and the standard of proof beyond a reasonable doubt. *Id.*

29. The Supreme Court has defined a fundamental interest as one which “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men,” and has stated that these fundamental rights are protected by the Due Process Clause. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). *Loving v. Virginia* held that marriage is one of these fundamental rights. *Id.*

30. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (A parent’s interest in his child “undeniably warrants deference and . . . protection.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (Custody, care, and nurture of a child is the parents’ primary function and freedom, which “the state can neither supply nor hinder.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (Marriage and procreation are “basic civil rights of man.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (The right to raise one’s children is “essential.”).

31. *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 27 (1981).

32. *Prince*, 321 U.S. at 166. In *Prince*, the Court noted that a court may limit a parent’s control over their child “to guard the general interest in [the] youth’s well being.” *Id.*

33. *Stanley*, 405 U.S., at 651. In *Stanley*, the Court found that the state’s legitimate interest in protecting the welfare of minors and the best interests of the community did not overcome Stanley’s essential right to raise his children. *Id.* at 651–53.

termination of parental rights procedures must conform to the Due Process Clause because of this fundamental liberty interest.<sup>34</sup>

Based on the fundamental nature of parents' interest in their children, the Court has held that the Due Process Clause of the Fourteenth Amendment requires states to provide more due process safeguards in termination proceedings than it would for an ordinary civil action.<sup>35</sup> The Court in *Santosky v. Kramer*<sup>36</sup> stated that "parents retain a vital interest in preventing the irretrievable destruction of their family life," and therefore states "must provide parents with fundamentally fair procedures."<sup>37</sup> The *Santosky* Court applied a three-factor balancing test, first developed in *Mathews v. Eldridge*,<sup>38</sup> to determine whether New York's termination of parental rights procedure<sup>39</sup> violated a parent's due process rights.<sup>40</sup> The *Eldridge* factors are (1) the private interest affected by the proceeding, (2) the risk of error inherent in the state's procedure, and (3) the countervailing government interest.<sup>41</sup> In finding the New York statute unconstitutional, the Court noted that the private interest affected was strong,<sup>42</sup> the specific procedure used created a high risk of

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34. *Lassiter*, 452 U.S. at 37 (Blackmun, J., dissenting). See also *Santosky*, 455 U.S. at 753–54 ("When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.")

35. *Santosky*, 455 U.S. at 747. For example, in *Santosky*, the Court held that the Due Process Clause requires the government to prove "allegations by at least clear and convincing evidence" in termination of parental rights cases, a higher standard of proof than most civil cases. *Id.* at 747–48.

36. 455 U.S. 745 (1982).

37. *Id.* at 753–54. In fact, the Court noted that "[i]f 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." *Id.* at 753.

38. 424 U.S. 319 (1976).

39. In *Santosky v. Kramer*, the Court addressed a two-stage proceeding. *Santosky*, 455 U.S. at 748. New York's termination proceedings at the time consisted of a fact-finding hearing, in which the State must prove permanent neglect, and a dispositional hearing, in which the court must determine whether termination is in the child's best interests. *Id.*

40. *Id.* at 758. The Supreme Court also applied the *Eldridge* test in holding that the Due Process Clause does not guarantee parents a right to assistance of appointed counsel in termination of parental rights cases. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 31 (1981).

41. *Santosky*, 455 U.S. at 754.

42. *Id.* at 759. The strong private right at stake in *Santosky* was the irreversible severance of a constitutionally protected right to parent one's own child. *Id.* The Court observed that in a termination of parental rights case, not only is the government seeking to infringe a fundamental liberty interest, it is seeking to end it. *Id.*

error,<sup>43</sup> and the state interests at stake were consistent with a higher standard of proof.<sup>44</sup>

*B. Involuntary Termination of Parental Rights in Wisconsin*

Like the United States Supreme Court, the Wisconsin Supreme Court has held that termination of parental rights proceedings require increased due process protection. The court has recognized “that the private interest affected by a [termination of parental rights] proceeding is unquestionably very strong.”<sup>45</sup> The court agrees with the United States Supreme Court that parental rights are fundamental, and that termination of parental rights procedures must comply with the Due Process Clause.<sup>46</sup> The court has cited with approval numerous statutory provisions that are intended to safeguard a parent’s interests, including the right to receive written notice of the grounds for termination, the right to be personally served with the petition, the right to a hearing within thirty days, the right to an attorney, and the right to a jury trial.<sup>47</sup>

In Wisconsin, an involuntary termination of parental rights trial occurs in two stages.<sup>48</sup> The first stage is the fitness stage, in which the moving party must prove by clear and convincing evidence that specific grounds for the termination exist.<sup>49</sup> These statutory grounds include: abandonment, continuing need of protection or services, continuing parental disability, continuing denial of periods of physical placement or visitation, child abuse, failure to assume parental responsibility, incestuous parenthood, homicide of a parent, parenthood as a result of a sexual assault, commission of a felony against a child, and a prior involuntary termination of parental rights to another child.<sup>50</sup> At this

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43. *Id.* at 762. Specifically, the Court found that the imprecise and subjective standards, the court’s wide discretion, the disparity of resources between the parties, and the unavailability of criminal due process safeguards combined created a high risk of error. *Id.* at 762–64.

44. *Id.* at 766. The state interests at issue in *Santosky* included promoting the welfare of the child and reducing the costs of termination proceedings. *Id.* at 766–67.

45. *Steven V. v. Kelley H. (In re Termination of Parental Rights to Alexander V.)*, 2004 WI 47, ¶ 41, 271 Wis. 2d 1, 678 N.W.2d 856.

46. *Walworth Cnty. Dep’t of Human Servs. v. Elizabeth W. (In re Interest of Philip W.)*, 189 Wis. 2d 432, 436–37, 525 N.W.2d 384 (1994).

47. *Sheboygan Cnty. Dep’t of Health & Human Servs. v. Julie A.B. (In re Termination of Parental Rights to Prestin T.B.)*, 2002 WI 95, ¶ 23, 255 Wis. 2d 170, 648 N.W.2d 402.

48. *In re Termination of Parental Rights to Alexander V.*, 2004 WI 47, ¶ 24.

49. *Id.*

50. WIS. STAT. § 48.415(1)–(10) (2011–12). The 2013–14 Session of the Wisconsin Legislature will consider Assembly Bill 152, which seeks to add and revise

stage, the court recognizes the fundamental interest parents have in their children.<sup>51</sup>

If the fact-finder finds the parent to be unfit in the first stage, then the trial moves into the second stage, or the dispositional stage, of the proceeding.<sup>52</sup> A finding of unfitness does not require that a parent's rights be terminated.<sup>53</sup> The "prevailing factor" at the dispositional stage is not the parent's interests, but "the best interests of the child."<sup>54</sup> In determining whether a termination of parental rights is in the best interests of the child, the court must consider several statutorily prescribed factors,<sup>55</sup> as well as any "evidence relevant to the issue of disposition."<sup>56</sup>

The Wisconsin right to a jury trial in termination of parental rights cases is statutory, not constitutional.<sup>57</sup> Under the Wisconsin Children's Code, any party "whose rights may be affected" by the termination action "shall be granted a jury trial upon request."<sup>58</sup> An interested party may request a jury trial at any time "before the end of the initial hearing on the petition."<sup>59</sup> A jury trial, however, is only available during the first stage of the trial, also known as the fitness stage.<sup>60</sup> At the second, dispositional stage, the court alone determines what is in the child's best

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several statutory grounds for termination of parental rights. See JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 19–25.

51. *In re Termination of Parental Rights to Prestin T.B.*, 2002 WI 95, ¶ 22. In other words, the parent's rights at this first stage are of paramount concern. *Id.* ¶ 24.

52. *Id.* ¶ 28. Note that if the fact-finder does not find grounds to terminate the parent's rights, the petition is dismissed. *Id.* ¶ 26.

53. *Id.* (stating that "the outcome of [the dispositional] hearing is not predetermined").

54. § 48.426(2).

55. § 48.426(3). These factors include: the likelihood of adoption, the age and health of the child, whether the child has substantial relationships with the parent or family members, the wishes of the child; the duration of separation, and whether the termination will result in a more stable and permanent family environment for the child.

§ 48.426(3)(a)–(f).

56. § 48.427(1). This can include expert testimony. *Id.*

57. *Walworth Cnty. Dep't of Health & Human Servs. v. Andrea L.O. (In re Termination of Parental Rights to Lyle D.E.)*, 2008 WI 46, ¶ 29, 309 Wis. 2d 161, 749 N.W.2d 168.

58. § 48.422(4). A jury in a termination of parental rights case typically consists of twelve people, unless the parties agree to fewer. § 48.31(2).

59. § 48.422(4).

60. Wis. Legislative Council Staff Memorandum No. 2 from Margit Kelley and Melissa Schmidt, Staff Attorneys, Wisconsin Legislative Council, to Members of the Special Comm. on Permanency for Young Children in the Child Welfare Sys. 5 (July 17, 2012), available at [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/memo2\\_welfr.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/memo2_welfr.pdf) [hereinafter WLC Memo No. 2].

interests.<sup>61</sup> If a jury finds a parent to be fit at the first stage, or if the court does not terminate a parent's rights at the second stage, any underlying child welfare case remains open and the parent must continue to comply with previous orders.<sup>62</sup>

*C. Adoption and Safe Families Act of 1997*

In 1997, President Clinton signed into law the Adoption and Safe Families Act (ASFA).<sup>63</sup> The legislation was widely hailed as making "the most sweeping changes" to the foster-care system and as a "fundamental shift" away from an emphasis on reunification and parents' rights towards an emphasis on faster permanency and the needs of children.<sup>64</sup> One significant change was that ASFA attempted to shorten the period of time in which children are in the foster-care system.<sup>65</sup> To achieve this, ASFA requires states to hold a permanency hearing within twelve months after a child enters foster care instead of eighteen months.<sup>66</sup> Additionally, ASFA requires states to file a petition to terminate a parent's rights under certain circumstances.<sup>67</sup> ASFA also provides states with adoption incentive payments, which award states money based on the number of foster child adoptions, special needs adoptions, and older child adoptions that occur in the state during the fiscal year.<sup>68</sup> ASFA's

61. *Id.* See also § 48.426(1) (stating that *the court* shall make "a decision about the appropriate disposition"). The court may either dismiss the petition or may enter an order terminating parental rights. § 48.427(2)–(3).

62. See § 48.43. Therefore if a child was placed out of his or her home before a termination of parental rights trial, and the parent's rights were not terminated, the child would remain in out-of-home placement.

63. Teresa Moore, *High Hopes for Foster Care Reform in Berkeley, First Lady Says California Will Lead the Way*, S.F. CHRON., Nov. 25, 1997, at A3.

64. Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES, Nov. 17, 1997, at A20. Rather than focusing on a presumption that reunification is best for the child, ASFA "give[s] more weight to the child's health and safety." *Id.*

65. Moore, *supra* note 63.

66. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 302, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 675(5)).

67. *Id.* at § 103(a)(3) (codified as amended at 42 U.S.C. § 675(5)). Circumstances under which a state is required to petition to terminate a parent's rights include: if a child has been in foster care for fifteen of the last twenty-two months, if an infant has been abandoned, or if the parent has murdered or committed felony assault against the child's other parent. *Id.* Exceptions to the requirement include: if the child is in the care of a relative, if the state has a compelling reason why termination of a parent's rights would not be in the best interests of the child, or if the state has failed to provide the family with necessary services. *Id.*

68. 42 U.S.C. § 673b(d)(1) (2006). Specifically, states receive \$4,000 for each foster child adoption, \$2,000 for each special needs adoption, and \$4,000 per year for each older child adoption in the state. *Id.*

emphasis on faster permanency has influenced recent legislative changes to the Wisconsin Children's Code.<sup>69</sup>

#### *D. Proposed Legislation in Wisconsin*

In Wisconsin, the Special Committee on Permanency for Young Children in the Child Welfare System has proposed several changes to the Wisconsin Children's Code.<sup>70</sup> These changes include amendments to statutory provisions relating to child welfare proceedings, termination of parental rights proceedings, and adoption procedures.<sup>71</sup> The main reason stated for many of these changes is to bring Wisconsin's statutes into better compliance with ASFA.<sup>72</sup>

One major change the Committee is discussing is eliminating the statutory right to a jury trial in termination of parental rights cases.<sup>73</sup> Proponents argue that jury trials impose delays and are therefore "a significant impediment to achieving timely permanence for children," a key goal of ASFA.<sup>74</sup> Proponents also argue that juries do not prevent inappropriate termination, arguing that juries overwhelmingly find parental unfitness in termination cases.<sup>75</sup> Finally, some proponents

69. See *supra* note 21 and accompanying text.

70. See JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17.

71. WLC Memo No. 3, *supra* note 17, at 1–8. Specific changes recommended to the Joint Legislative Council include allowing post-termination contact agreements between a relative and a proposed adoptive parent, providing the statutory right to counsel in child in need of protection or services (CHIPS) proceedings, and various revisions to specific grounds to petition for termination of parental rights and open a CHIPS case. JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 3–6.

72. See WLC Memo No. 2, *supra* note 60, at 4 (noting that Wisconsin termination of parental rights law is based on ASFA). See also Mary M. Sowinski & Thomas D. Wiensch, *Contrary to the Child's Best Interest: Jury Trials in Children's Court Proceedings*, WIS. LAW., Apr. 2013, at 28, 31 (arguing that ASFA's filing requirements are meaningless if jury trials delay the outcome).

73. WLC Memo No. 3, *supra* note 17, at 6. See also Sowinski & Wiensch, *supra* note 72, at 29. The Committee is also recommending eliminating the right to a jury trial in CHIPS cases. WLC Memo No. 3, *supra* note 17, at 1. This Comment focuses solely on the elimination of jury trials in termination of parental rights cases.

74. Memorandum from Judge Chris Foley, Milwaukee Cnty. Circuit Court Judge, to Legislative Study Comm. on Permanency for Young Children in the Child Welfare Sys. 7 (June 26, 2012), available at [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/june27\\_foley\\_handout.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/june27_foley_handout.pdf) [hereinafter Foley Memo]. See also Sowinski & Wiensch, *supra* note 72 ("Every jury trial that is held at the request of a parent . . . slows the process of permanency for all children in that jurisdiction . . .").

75. Foley Memo, *supra* note 74, at 7. Judge Christopher Foley estimates that juries find grounds for termination far in excess of 90 percent of cases, probably in excess of 95 percent of cases. *Id.* See also Sowinski & Wiensch, *supra* note 72, at 31 (arguing

reason that jury trials cost a disproportionate amount of time and money for attorneys and negatively affect the court's calendar and docket.<sup>76</sup>

## II. ACHIEVING DUE PROCESS IN TERMINATION OF PARENTAL RIGHTS CASES

Wisconsin's statutory right to a jury trial in termination of parental rights cases is an important procedural safeguard that should not be eliminated. This Part evaluates the pros and cons of the jury trial requirement in termination of parental rights cases. First, it analyzes whether a jury trial provides necessary due process in termination trials in Wisconsin by using the three-factor test established in *Eldridge*. Second, it examines statistics from both Wisconsin and Arizona to determine the effects of jury trials on termination of parental rights trials. Specifically, it looks at whether jury trials in fact serve as an effective impediment to unwarranted termination and whether they are an obstacle to timely permanency for children. Finally, this Part suggests ways to achieve faster permanency and reduce costs that will not negatively impact the due process rights of parents.

### *A. The Jury Trial Is an Important Procedural Safeguard in Termination of Parental Rights Proceedings*

Based on the Supreme Court's opinion in *McKeiver* that jury trials are not constitutionally required in juvenile delinquency proceedings, it is unlikely that the Supreme Court would require every state to provide the right to a jury trial in termination of parental rights proceedings because termination cases are civil in nature. However, termination of parental rights cases require more procedural protections than other civil cases because of the nature of the rights that are at risk.<sup>77</sup> Parents have a

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that "the quality of decisions in child abuse and neglect cases is better when a single judge hears all stages of the same case").

76. See Sowinski & Wiensch, *supra* note 72, at 31 ("Because they take longer, jury trials are more expensive than trials to the court . . ."). See generally Megan L. DeVore, Deputy Corporation Counsel, La Crosse County, Presentation on Involuntary Termination of Parental Rights Trials at the Meeting of the Special Committee on Permanency for Young Children in the Child Welfare System (Sept. 11, 2012), [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/sept11\\_mins.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/sept11_mins.pdf); Eve M. Dorman, Assistant Corporation Counsel, Dane County, Presentation on Involuntary Termination of Parental Rights Trials at the Meeting of the Special Committee on Permanency for Young Children in the Child Welfare System (Sept. 11, 2012), [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/sept11\\_mins.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/sept11_mins.pdf).

77. Michael D. Bustamante, *Incorporating the Law of Criminal Procedure in Termination of Parental Rights Cases: Giving Children a Voice through Mathews v. Eldridge*, 32 N.M. L. REV. 143, 158–59 (2002). See also *Santosky v. Kramer*, 455 U.S.

“fundamental liberty interest . . . in the care, custody, and management of their child.”<sup>78</sup> Because of this fundamental liberty interest, due process in termination of parental rights cases should be maximized.<sup>79</sup>

#### 1. THE THREE-FACTOR TEST OF *ELDRIDGE* FAVORS THE RIGHT TO A JURY TRIAL IN WISCONSIN

The Supreme Court has applied *Eldridge*'s three-factor test in determining whether a specific state procedure provides adequate due process in termination of parental rights cases.<sup>80</sup> The three *Eldridge* factors are (1) the private interest that is affected; (2) the government's interests, including additional burdens the additional safeguard would impose; and (3) the risk of an erroneous decision and whether the additional safeguard will decrease that risk.<sup>81</sup> When applied to a parent's right to a jury trial in termination proceedings in Wisconsin, these factors weigh in favor of preserving the right to a jury trial.<sup>82</sup>

##### *a. The Private Interest Affected Favors the Right to a Jury Trial*

The first *Eldridge* factor, the private interest at stake in the particular proceeding,<sup>83</sup> weighs in favor of maintaining the right to a jury trial in termination of parental rights cases. How much procedural due process is required in a specific legal proceeding depends on the extent to which the parties may be “condemned to suffer grievous loss.”<sup>84</sup> In

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745, 753 (1982) (“[P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections.”).

78. *Santosky*, 455 U.S. at 753.

79. Bustamante, *supra* note 77, at 158. A parent's right to a jury trial is “an important check” on the state's power to terminate this fundamental liberty interest. Holtz & Lee, *supra* note 18, at 4.

80. See *Santosky*, 455 U.S. at 758 (applying the *Eldridge* test to determine whether a “fair preponderance of the evidence” standard is consistent with due process in termination cases); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (applying the *Eldridge* test to determine whether a right to counsel is constitutionally required in termination cases).

81. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

82. Others have concluded that whether the right to a jury trial in termination of parental rights cases provides necessary due process is not amenable to the *Eldridge* test. See Bustamante, *supra* note 77, at 173–74. Judge Michael Bustamante concluded that the *Eldridge* factors were not helpful with regard to jury trials because “there is no way to gauge” whether jury trials reduce or enhance the risk of error. *Id.* at 174. This Part argues that there are risks associated with a bench trial in termination of parental rights cases in Wisconsin, and that a jury trial does reduce those risks.

83. *Eldridge*, 424 U.S. at 335.

84. *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). In

considering this factor, the nature of the private interest at stake and the permanency of the potential loss are key components.<sup>85</sup>

In termination of parental rights cases, this factor weighs heavily in favor of preserving the right to a jury trial. First, the nature of a parent's interest in an involuntary termination case is fundamental, and it is considered "far more precious than any property right."<sup>86</sup> This interest is so strong that it "undeniably warrants deference and, absent a *powerful* countervailing interest, protection."<sup>87</sup> Second, termination of parental rights proceedings result in the permanent, irreversible loss of a parent's rights to his or her child.<sup>88</sup> The permanency of the potential loss, as well as the fundamental nature of a parent's rights, leads to the conclusion that a parent's interest in accurate and just proceedings is strong.<sup>89</sup> This strong private interest weighs in favor of providing parents maximum due process rights.<sup>90</sup>

*b. The Countervailing Government Interests Favor the Right to a Jury Trial*

The second *Eldridge* factor, the State's interests,<sup>91</sup> also weighs in favor of preserving the right to a jury trial. There are two major state interests at stake in termination of parental rights proceedings.<sup>92</sup> First, the State has an "interest in preserving and promoting the welfare of the child."<sup>93</sup> Second, the State has an "interest in reducing the cost and burden of such proceedings."<sup>94</sup> While it is accurate that jury trials do

*Goldberg v. Kelly*, all parties agreed that procedural due process was applicable when the "grievous loss" was the termination of welfare benefits. *Id.* at 261, 263.

85. *Santosky*, 455 U.S. at 758.

86. *Id.* at 758–59. *See also* Sowinski & Wiensch, *supra* note 72, at 29 ("[T]he right to raise one's own child is a fundamental constitutional right which the state cannot abrogate without appropriate due process protections.").

87. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (emphasis added).

88. *Santosky*, 455 U.S. at 759 ("When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it."); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) ("If the State prevails, it will have worked a unique kind of deprivation."). This type of loss is surely more grievous than the termination of welfare benefits.

89. *Lassiter*, 452 U.S. at 27.

90. *Santosky*, 455 U.S. at 758–59.

91. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

92. *Santosky*, 455 U.S. at 766.

93. *Id.* This has also been expressed by those who wish to eliminate the right to a jury trial in termination of parental rights cases in Wisconsin in order to achieve faster permanency. Foley Memo, *supra* note 74, at 7.

94. *Santosky*, 455 U.S. at 766. Proponents of elimination of the right to a jury trial in termination cases in Wisconsin have also cited cost and burden reduction as a reason for elimination. *See supra* note 76 and accompanying text.

increase the cost and burden of termination proceedings, the State's interest in the welfare of the child is wholly consistent with maintaining the right to a jury trial.

The State has an interest in promoting child welfare,<sup>95</sup> and this interest is consistent with maintaining the right to a jury trial. The State's interest in the welfare of a child means that, like a parent, it has an "interest in an accurate and just decision."<sup>96</sup> In an involuntary termination of parental rights, a jury trial is available at the first stage of the proceeding, in which the fact-finder must determine whether the parent is unfit.<sup>97</sup> At the fitness stage of the proceedings, the State's interest still favors preservation of the family, not termination, because the parent has not yet been adjudicated an unfit parent.<sup>98</sup> The "best interests of the child" standard does not dominate every step of the proceeding; it is only considered *after* a parent has been found to be unfit.<sup>99</sup> In other words, the State's interests are aligned with the parent's at the first stage of a termination of parental rights case.

The State's interest in a child's welfare also coincides with its interest in complying with ASFA by creating faster permanency for children.<sup>100</sup> ASFA requires states to achieve timely permanency for children, directing states to terminate parental rights under certain circumstances in order to achieve permanency in a timely fashion.<sup>101</sup> Many proponents of the effort to eliminate the right to a jury trial believe that jury trials are an impediment to achieving timely permanency because they take longer than bench trials.<sup>102</sup> However, jury trials do not interfere with the State interest in complying with ASFA.

95. *Santosky*, 455 U.S. at 766.

96. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981).

97. *See supra* notes 48–51 and accompanying text.

98. *Santosky*, 455 U.S. at 766–67. *See also* WIS. STAT. § 48.01(1)(a) (2011) (“[T]he paramount goal of this chapter is to . . . preserve the unity of the family . . . by strengthening family life through assisting parents . . . .”); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (“[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.”). The focus at the fact-finding stage of a termination of parental rights case is on the parent's rights, not the child's best interests. *See supra* note 51 and accompanying text.

99. *Sheboygan Cnty. Dep't Health & Human Servs. v. Julie A.B. (In re Termination of Parental Rights to Prestin T.B.)*, 2002 WI 95, ¶ 22, 255 Wis. 2d 170, 648 N.W.2d 402.

100. *See, e.g.*, 42 U.S.C. § 671(a)(15)(C), (E) (2006).

101. *See* 42 U.S.C. § 675(5)(E) (2006). For example, ASFA requires states to initiate termination of parental rights proceedings when a child has been placed out of the home for fifteen of the most recent twenty-two months, unless the child is being cared for by a relative, the State has a “compelling reason” not to file, or the State has failed to provide the family with adequate services. *Id.*

102. *See, e.g.*, Sowinski & Wiensch, *supra* note 72, at 31; Foley Memo, *supra* note 74, at 7.

The State's interests in promoting timely permanence for children is consistent with maintaining a right to jury trials because jury trials do not significantly increase the amount of time it takes to complete a termination of parental rights case.<sup>103</sup> For example, statewide data from Wisconsin suggests that the jury trial does not delay permanency for children.<sup>104</sup> In Wisconsin, 75 percent of termination of parental rights petitions are resolved without a trial.<sup>105</sup> Of the 25 percent of termination cases that go to trial, 11 percent (323 cases over five years) statewide are decided by a jury, while 14 percent (385 cases over five years) are decided by a judge.<sup>106</sup> Between July 1, 2007 and June 30, 2012, bench trials in termination proceedings took, on average, slightly longer to reach resolution than jury trials, bench trial cases averaging 310 days to resolution and jury trial cases averaging 279 days.<sup>107</sup>

This data suggests that eliminating the right to a jury trial in Wisconsin will not have a significant effect on the amount of time it takes to achieve resolution in termination of parental rights cases.<sup>108</sup> If

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103. See generally Letter from Adam Plotkin, Wis. State Pub. Defender Legislative Liaison, to Representative Samantha Kerkman, Chair of the Special Comm. on the Permanency for Young Children in the Child Welfare Sys. (Sept. 27, 2012) [hereinafter Letter from Adam Plotkin], available at [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/oct9\\_spd\\_letter2.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/oct9_spd_letter2.pdf); CHILDREN'S ACTION ALLIANCE, TERMINATING PARENTAL RIGHTS BY JURY TRIAL IN ARIZONA: A FIRST YEAR LOOK 16–17 (May 2005) [hereinafter A FIRST YEAR LOOK], available at [http://azchildren.org/wp-content/uploads/2013/02/tpr\\_jury\\_trial.pdf](http://azchildren.org/wp-content/uploads/2013/02/tpr_jury_trial.pdf); GENE C. SIEGEL & MICHELE ROBBINS, TERMINATING PARENTAL RIGHTS BY JURY TRIAL IN ARIZONA: A SECOND YEAR ANALYSIS 24 (Dec. 2005) [hereinafter A SECOND YEAR ANALYSIS], available at <http://www.azcourts.gov/LinkClick.aspx?fileticket=O18ZEF-JWOI%3d&tabid=2023>. See also Holtz & Lee, *supra* note 18.

104. Letter from Adam Plotkin, *supra* note 103, at 2.

105. *Id.*

106. *Id.*; see Holtz & Lee, *supra* note 18.

107. Letter from Adam Plotkin, *supra* note 103, at 1. Days to resolution refers to the time between the filing date of the petition and a final disposition. See *id.* This data also indicates that Milwaukee County takes significantly more time to process both jury and bench trial cases, averaging 407 days for jury trial cases to reach resolution and 372 days for bench trial cases to reach resolution. *Id.*

108. Other statewide data from the Wisconsin State Public Defender's office indicates that while jury trials take slightly longer than bench trials, they do not significantly increase time to resolution. Katie Holtz and Devon Lee estimate that in termination cases over the past five years, a jury trial takes only twenty-one days longer than a bench trial from filing to adjudication. Holtz & Lee, *supra* note 18. Although this data indicates a slightly longer time to achieve resolution in jury trials, Holtz and Lee do not consider this to be a "significant delay." *Id.* Additionally, Adam Plotkin, the Wisconsin State Public Defender's Legislative Liaison, estimates that in seventy-one of seventy-two Wisconsin counties, the average length of time to reach resolution in jury trial cases is only eight days longer than in bench trial cases. Letter from Adam Plotkin, Wis. State Pub. Defender Legislative Liaison, to Members of the Special Comm. on Permanency for Young Children in the Child Welfare Sys. 3 (Jan. 16, 2012), available at

the right to a jury trial were removed, most termination cases which would have been resolved by a jury trial would likely be resolved by a bench trial instead.<sup>109</sup> The fact that there is no significant difference in the amount of time needed to resolve a jury trial versus a bench trial, and the fact that the number of trials is not likely to decrease, indicate that removing the jury trial right would not create faster permanency for children.

Statistical data from a three-year experiment in Arizona also indicates that termination of parental rights cases with jury trials do not take longer than cases with bench trials.<sup>110</sup> In the first year of the experiment, cases with jury trials took an average of 121 days from the point of a child's permanency hearing, versus 137 days in cases with bench trials in Pima County, Arizona's second-most populous county.<sup>111</sup> Although it took longer for the cases with jury trials to begin, the trials themselves took fewer days.<sup>112</sup> Two reasons were cited for the difference. First, bench trials were spread out over days or weeks, while jury trials were heard within a finite number of days.<sup>113</sup> Second, judges often did not issue a decision until days or weeks after the conclusion of the bench trial.<sup>114</sup>

This trend continued into the second year of Arizona's experiment. In the second year in Pima County, jury trial cases took an average of 113 days from permanency hearing to completion, whereas bench trial cases took an average of 148 days.<sup>115</sup> Data from Maricopa County, Arizona's most populous county, would most likely have shown similar results.<sup>116</sup> The study not only indicates that jury trials do not take longer than bench trials in termination of parental rights cases, but also that the jury trials may be slightly more efficient than bench trials, especially in more populous, urban counties.<sup>117</sup>

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[http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/jan24\\_letter\\_spd.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/jan24_letter_spd.pdf). Milwaukee County, however, has a much larger gap—about thirty-five days—thus skewing statewide data. *Id.*

109. Letter from Adam Plotkin, *supra* note 103, at 2.

110. See A FIRST YEAR LOOK, *supra* note 103, at 16–17; A SECOND YEAR ANALYSIS, *supra* note 103, at 24. Statistics from Arizona were chosen because Arizona conducted a three-year experiment with jury trials in termination of parental rights trials during which it gathered and analyzed extensive data. *Id.* at 5–6.

111. A FIRST YEAR LOOK, *supra* note 103, at 16.

112. *Id.*

113. *Id.* at 17.

114. *Id.* In the smaller Arizona counties, these delays were not present, and bench trials took slightly less time than jury trials. *Id.*

115. A SECOND YEAR ANALYSIS, *supra* note 103, at 24.

116. *Id.* at 24 n.32. Data for Maricopa County was not available at the time of publication. *Id.*

117. *Id.* at 24–25.

Finally, regardless of whether or not a state extends the right to a jury trial in termination of parental rights cases, almost every state in the nation has reported that the time it takes to conduct termination proceedings is a significant barrier to permanency and adoption.<sup>118</sup> The fact that almost every state reports significant delays during termination proceedings, regardless of whether they provide the right to a jury trial, suggests that eliminating the right to a jury trial will not shorten the process or significantly hasten the achievement of permanency for children.

The State also has an administrative interest in reducing the cost and burden of the termination of parental rights cases.<sup>119</sup> Those in favor of eliminating the right to a jury trial in termination proceedings in Wisconsin cite the added cost and burden on attorneys as a compelling reason for eliminating it.<sup>120</sup> The cost and burden of termination cases seem to increase because of the large amount of information and documentation involved; the amount of time required by the attorney and social service worker to prepare for trial; and the added formalities of a jury trial, such as taking depositions and preparing witnesses.<sup>121</sup>

Jury trials do add an increased burden, and therefore cost, on the State. In Arizona, for example, the direct costs for termination of parental rights cases with jury trials were “substantially higher” than for those with bench trials.<sup>122</sup> Additionally, the Arizona study found that jury trials impose a “substantially higher workload demand” on most of the parties involved in a termination of parental rights trial.<sup>123</sup> After the first year of the experiment, attorneys and case managers reported that jury trials

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118. URBAN INSTITUTE CHILD WELFARE RESEARCH PROGRAM, FOSTER CARE ADOPTION IN THE UNITED STATES: A STATE BY STATE ANALYSIS OF BARRIERS & PROMISING APPROACHES 7 (2004), available at [http://www.urban.org/UploadedPDF/411108\\_FosterCareAdoption.pdf](http://www.urban.org/UploadedPDF/411108_FosterCareAdoption.pdf). The report lists conducting termination of parental rights proceedings as the top barrier to permanency, with forty-eight states reporting “significant barriers.” *Id.* Iowa, Montana, and Ohio are the only states that do not report barriers at the termination of parental rights proceedings stage. *Id.* at 16.

119. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

120. See Minutes of the Special Committee of Permanency for Young Children in the Child Welfare System 2–3 (Sept. 11, 2012), available at [http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/sept11\\_mins.pdf](http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/sept11_mins.pdf) [hereinafter Minutes of the Special Comm.]; Sowinski & Wiensch, *supra* note 72.

121. Minutes of the Special Comm. *supra* note 120, at 2–3. A related criticism is that in termination of parental rights proceedings, jury trials result in more appealable errors, further increasing the amount of resources required. JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 19; Sowinski & Wiensch, *supra* note 72, at 31.

122. A SECOND YEAR ANALYSIS, *supra* note 103, at 25. These higher direct costs included both juror-related fees, such as jury pay and mileage costs, as well as increased fees going to court-appointed counsel. *Id.* at 25–26.

123. *Id.* at 29.

required up to ten times more work than a bench trial,<sup>124</sup> and this large increase in workload was affirmed after the second year.<sup>125</sup> The study also reported that jury trials require more work for the judges involved, because more time is spent resolving pretrial issues and dealing with jury instructions and voir dire.<sup>126</sup>

Although jury trials impose an additional financial and administrative burden on the State at both the trial and appellate stages of litigation, the second *Eldridge* factor still, on balance, weighs in favor of maintaining the right to a jury trial in Wisconsin. The State's primary stated goal is the welfare of the child.<sup>127</sup> This important interest is paramount and outweighs any possible financial interest the State may have.<sup>128</sup> Additionally, a State's legitimate, financial, and administrative interests alone are not enough to overcome private interests as important as those at stake in a termination of parental rights case.<sup>129</sup> It should be hard to terminate forever a parent's rights to his or her child. Procedural safeguards should not be eliminated simply because it requires less work for the State, especially when the private interest at stake is fundamental and when the State has an interest in preserving that right.<sup>130</sup>

*c. The Risk of Error Favors the Right to a Jury Trial*

The third *Eldridge* factor is whether the specific procedural safeguard at issue reduces a risk of error that exists.<sup>131</sup> The Supreme Court has stated that “[a] parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.”<sup>132</sup> Therefore, any risk of error regarding the accuracy or justness of termination of parental rights proceedings would weigh strongly in favor

124. *Id.* at 29; A FIRST YEAR LOOK, *supra* note 103, at 25–26.

125. A SECOND YEAR ANALYSIS, *supra* note 103, at 29. It is important to note, however, that at least some of this increased workload is due to the fact that many of the attorneys had no jury trial experience in the first years of Arizona’s experiment and that the work should decrease as attorneys gain experience in preparing for jury trials. *Id.*

126. *Id.* at 30.

127. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). *See also* WIS. STAT. § 48.01(1)(a) (“[T]he paramount goal of this chapter is to protect children and unborn children . . . .”); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (“[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.”).

128. *See* § 48.01. This statute does not list reduction of state costs and/or workload as a goal of The Children’s Code. *Id.*

129. *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 28 (1981) (“[T]hough the State’s pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here.”).

130. *Id.*

131. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

132. *Lassiter*, 452 U.S. at 27.

of maintaining the right to a jury trial if the right to a jury trial reduces that risk.<sup>133</sup>

The jury trial has long been an important element of due process in the American legal system.<sup>134</sup> Thomas Jefferson once said, “I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”<sup>135</sup> There are several reasons why juries are so highly valued in our legal system. First, many consider juries to be better at finding facts than a single fact-finder.<sup>136</sup> Second, a jury trial functions as a check on judicial abuse of power and a safeguard for individual liberty interests.<sup>137</sup> Finally, a jury of community members legitimizes the outcome because the decision is made by the defendant’s peers.<sup>138</sup>

Several aspects of Wisconsin’s procedure for termination of parental rights create an increased risk of error if the right to a jury trial is not available. First, termination of parental rights trials are closed to the public.<sup>139</sup> Because the hearings are closed, parents are unable to “focus[] public attention” and obtain “redress through the medium of public indignation” in a termination of parental rights case.<sup>140</sup> The jury trial, therefore, is the only form of public oversight available.

133. See generally *Santosky v. Kramer*, 455 U.S. 745, 747, 760–61 (1982); *Lassiter*, 452 U.S. at 27.

134. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 31 (1986).

135. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 2 *THE WRITINGS OF THOMAS JEFFERSON: MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON* 495 (Thomas Jefferson Randolph, ed., 1829). John Adams agreed, noting that “the constitution requires . . . that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.” John Adams, Diary entry (Feb. 12, 1771), in 2 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS* 253 (Charles Francis Adams, ed. 1850). Alexis de Tocqueville stated, “The institution of the jury . . . always preserves its republican character, in that it places the real direction of society in the hands of the governed . . . and not in that of the government.” ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 361 (Henry Reeve, trans., 1898). And Abraham Lincoln once asked, “Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?” Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 *COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1787–1897*, at 11 (James D. Richardson, ed. 1897).

136. Jason Mazzone, *The Justice and the Jury*, 72 *BROOK. L. REV.* 35, 38 (2006).

137. *Id.* at 38–39.

138. *Id.* at 39. See also Holtz & Lee, *supra* note 18 (“[W]hen a material factual issue is present, a jury trial allows parents to present their case to a cross-section of the community, which enhances the parents’ belief in the credibility of the process.”).

139. WIS. STAT. § 48.424(2)(b) (2011–12).

140. *McKeiver v. Pennsylvania*, 403 U.S. 528, 554–555 (1971). See also *supra* note 24 and accompanying text (discussing the purpose of a jury trial).

Second, often in Wisconsin the same judge who presided over a child welfare proceeding will also preside over the termination of parental rights proceeding.<sup>141</sup> Some critics of the use of jury trials in termination of parental rights cases argue that having a single judge hear all stages of a case increases the quality of the decisions.<sup>142</sup> However, this means that the judge knows information about the underlying child welfare case that would not be available to jurors, creating a risk of bias. “Like ordinary people, judges are susceptible to a wide range of cognitive biases that operate at a subconscious level.”<sup>143</sup> Jurors, on the other hand, only have access to information presented at trial and are therefore less likely to be influenced by inadmissible facts.<sup>144</sup>

Thus, the three-factor *Eldridge* test weighs in favor of preserving a parent’s right to a jury trial. First, the private interest at stake—the right to parent one’s own child—is fundamental, and the State cannot interfere with it absent a strong, countervailing interest.<sup>145</sup> Second, the State’s countervailing interest in reducing administrative costs is not strong enough to overcome a parent’s fundamental interest in his or her child.<sup>146</sup> Third, jury trials protect against error by providing public oversight and protecting against potential bias of the judge.<sup>147</sup>

## 2. THE JURY IS NOT AN IMPEDIMENT TO IMPROVIDENT TERMINATION

Many proponents of eliminating the right to a jury trial in termination of parental rights cases have stated that jury trials do not provide additional due process because juries terminate parent rights as often, if not more, than judges do.<sup>148</sup> However, there is no consensus

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141. CHILDREN’S COURT IMPROVEMENT PROGRAM, *supra* note 21, at 14.

142. See Sowinski & Wiensch, *supra* note 72 (citing U.S. DEP’T HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. & FAMS., <http://archive.acf.hhs.gov/programs/cb/pubs/adopt02/02adpt6.htm>).

143. Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 782 n.180.

144. See Andy Mergendahl, *Bench Trial Best Practices—Including When to Go with a Jury*, LAWYERIST (July 28, 2009), <http://lawyerist.com/bench-trial-best-practices/> (noting that the rules of evidence that “are designed to filter out evidence that might prejudice a jury” do not filter out evidence in a bench trial). Although the Supreme Court rejected a similar argument in *McKeiver*, it did so with the reasoning that the context of the juvenile justice system is paternalistic, fair, and sympathetic to youth, not adversarial. *McKeiver*, 403 U.S. at 550. In contrast, a termination of parental rights action is “distinctly formal and adversarial.” *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 42 (1981).

145. See *supra* Part II.A.1.a.

146. See *supra* Part II.A.1.b.

147. See *supra* Part II.A.1.c.

148. See, e.g., Foley Memo, *supra* note 74, at 7.

among participants of termination of parental rights proceedings as to whether or not a jury is more or less likely to terminate parental rights.<sup>149</sup> For example, some Arizona participants believe that a jury is less likely to terminate parental rights because jurors are more inclined to give parents an opportunity to change.<sup>150</sup> Others believe that a jury is more likely to terminate parental rights because the evidence in a child abuse or neglect case is more shocking to jurors than it would be to a judge.<sup>151</sup> And some believe there is no difference.<sup>152</sup>

The statistical data from Arizona suggests that juries may be slightly less likely to terminate parental rights than judges.<sup>153</sup> Of the thirty-four jury trials completed, 88 percent resulted in a termination of parental rights, while 92 percent of the bench trials resulted in termination.<sup>154</sup> All interviewed participants in the Arizona study agreed that any difference in outcome between jury trials and bench trials is small.<sup>155</sup>

Despite the fact that jury trials result in roughly the same number of unfitness findings as bench trials, the use of a jury still serves an important strategic purpose in a parent's defense. A jury trial may be more beneficial for a parent because it provides him or her with the opportunity to appeal to the public, specifically to twelve of his or her peers.<sup>156</sup> Additionally, a jury may be a less biased fact-finder in a termination of parental rights hearing because of a judge's access to information about previous criminal history and child welfare proceedings.<sup>157</sup> These important jury functions promote a parent's interest in the accuracy and justness of the decision by ensuring the fairest, least biased fact-finding process.<sup>158</sup> Because juries play a strategic

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149. See A SECOND YEAR ANALYSIS, *supra* note 103, at 13. This analysis is based on interviews with judges, assistant attorneys general, and jury commissioners in Arizona. *Id.* at 5–6.

150. *Id.* at 13. Interview participants who thought juries were less likely to terminate noted that this is especially true in cases in which the child is placed with a relative. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* These statistics are based on data from five counties (Maricopa, Mohave, Pima, Yavapai, and Yuma) through December 2, 2005. *Id.* at 12.

155. *Id.* at 13. In addition, both bench and jury trials were very likely to result in termination of parental rights. *Id.*

156. Wendy J.N. Klicko, *Presentation by Wendy J.N. Klicko, Sauk County Assistant Corporation Counsel, to the Special Committee for Permanency for Young Children in the Child Welfare System* (Sept. 11, 2012), <http://legis.wisconsin.gov/lc/committees/study/2012/WELFR/files/11Sept12.mp3>.

157. See *supra* notes 141–44 and accompanying text.

158. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) (“A parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.”).

role in preserving the accuracy and justness of termination proceedings, the right to a jury trial should be preserved.

*B. How to Achieve Faster Permanency for Children, Preserve Due Process for Parents, and Reduce Costs*

Eliminating the right to a jury trial will not achieve any of the legislature's goals.<sup>159</sup> Rather than eliminating a parent's right to a jury trial, an important due process protection in termination of parental rights cases, there are other solutions that promise to achieve the State's goals without reducing the procedural protections available to parents. These solutions will help to achieve faster permanency for children, a stated goal of ASFA and of proponents of eliminating the right to a jury trial.<sup>160</sup> At the same time, they will reduce system costs and preserve parents' procedural due process rights in these important matters.<sup>161</sup>

1. CONSISTENT REPRESENTATION IN CHILD WELFARE AND  
TERMINATION PROCEEDINGS WILL ACHIEVE TIMELY  
PERMANENCY AND INCREASE DUE PROCESS

One important solution would be to increase the effectiveness of parent representation by enabling the same defense attorney to represent a parent in both the underlying child welfare case and the termination of parental rights case.<sup>162</sup> While a parent does not have a constitutional right to counsel in termination of parental rights proceedings,<sup>163</sup> effective legal representation for parents "is essential for a well-functioning child welfare system."<sup>164</sup> Parent attorneys serve many important functions in child welfare proceedings, including safeguarding parents' interests, empowering parents in complex proceedings, proposing creative solutions to the court, and improving outcomes.<sup>165</sup> Studies done by the Washington State Office of the Public Defender and the Center for Family Representation in New York City found that enhancing parent representation led to faster hearings, increased reunification rates, decreased rates of termination of parental rights proceedings, and

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159. See *supra* Part II.A.1.b.

160. See *supra* notes 100–02 and accompanying text.

161. See *supra* notes 119–21 and accompanying text.

162. Klicko, *supra* note 156. Attorney Klicko is Assistant Corporation Counsel for Sauk County, Wisconsin, and she is the only attorney in her office who handles termination of parental rights cases. Minutes of the Special Comm. *supra* note 120, at 3.

163. *Lassiter*, 452 U.S. at 33–34.

164. Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 CHILD L. PRAC. 97, 97 (2009).

165. *Id.* at 97, 102.

decreased rates of children “aging out” of the foster care system.<sup>166</sup> National organizations have also begun to recognize the importance of strengthening parent representation in child welfare cases.<sup>167</sup> However, there are barriers to achieving effective parent representation, one of which is systemic weakness.<sup>168</sup>

In Wisconsin, it is common practice for there to be either no attorney appointed in child welfare cases, or for a different attorney to be appointed at the termination of parental rights stage of the case.<sup>169</sup> This is a systemic weakness that results in time delays and requires greater financial resources.<sup>170</sup> The child welfare cases that actually proceed to a termination of parental rights case are the most complex child welfare cases.<sup>171</sup> When a new attorney steps in at the termination of parental rights stage, she must take additional time to familiarize herself with the underlying child welfare case.<sup>172</sup> A lack of counsel at the child welfare stage, or a change in attorneys between the child welfare and termination of parental rights stages, discourages effective representation because it creates a “significant delay in achieving permanency.”<sup>173</sup> Enabling consistent representation across child welfare and termination

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166. *Id.* at 102. For information regarding the Washington State Office of the Public Defender study, see Nat'l Council of Juveniles and Family Court Judges, *Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluation* (2003), available at [http://www.opd.wa.gov/documents/0047-2003\\_PRP\\_Evaluation.pdf](http://www.opd.wa.gov/documents/0047-2003_PRP_Evaluation.pdf). For information regarding the Center for Family Representation results, see *Our Results*, CENTER FOR FAM. REPRESENTATION, <http://www.cfrny.org/about-us/our-results/> (last visited April 11, 2013).

167. Sankaran, *supra* note 164, at 97. Some of these national organizations include the Pew Commission on Children in Foster Care, the American Bar Association Center on Children and the Law, and the National Association of Counsel for Children. *Id.*

168. *Id.* at 103–04. Other barriers include the quality of advocacy and a lack of access to resources. *Id.*

169. Klicko, *supra* note 156. Under current Wisconsin law, a parent does not have a right to appointed counsel in a CHIPS case. WIS. STAT. § 48.23(3) (2011–12). The Wisconsin Supreme Court ruled this statute to be unconstitutional because it violates Wisconsin's separation of powers doctrine. *Joni B. v. State*, 202 Wis. 2d 1, 7, 549 N.W.2d 411 (1996). The Special Committee of Permanency for Young Children in the Child Welfare System has proposed a statutory amendment that will give parents a right to counsel in CHIPS cases and will allow a judge to appoint the State Public Defender as parent counsel. See JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 4, 19–20. For the text of the proposed statutory amendment, see ASSEMB. B. 151, 2013–2014 Leg., 100th Reg. Sess. (Wis. 2013), available at <https://docs.legis.wisconsin.gov/2013/related/proposals/ab151.pdf>.

170. See JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 4, 19–20.

171. See Minutes of the Special Comm., *supra* note 120, at 3.

172. Klicko, *supra* note 156.

173. Minutes of the Special Comm., *supra* note 120, at 3.

proceedings would eliminate this delay and lead to timelier permanency.<sup>174</sup>

Maintaining the same parent attorney throughout the child welfare and termination proceedings would reduce costs on the system because the parent's attorney would spend less time, and bill fewer hours for, reviewing the child welfare case details at the termination stage.<sup>175</sup> Even though providing consistent representation across child welfare and termination proceedings requires always appointing an attorney in the initial child welfare case, effective representation at this early stage will also serve to decrease the number of termination of parental rights cases, thereby reducing overall costs to the system.<sup>176</sup> Additionally, providing consistent and effective representation to parents in child welfare and termination proceedings will increase procedural protections,<sup>177</sup> while eliminating the right to a jury trial will decrease them.

## 2. OPEN ADOPTION AGREEMENTS WILL ACHIEVE TIMELY PERMANENCY WITHOUT SACRIFICING DUE PROCESS

A second potential solution that would achieve faster permanency and reduce system costs would be to allow for post-termination contact agreements, commonly referred to as open or collaborative adoption.<sup>178</sup> Children's law practitioners have recognized "that adoption can best be described as a lifelong three-way link between the adoptee and his or her two families."<sup>179</sup> Children involved in the child welfare system come with existing relationships, and "[c]ollaborative planning that respects these past connections is essential to moving these children into adoptive homes and maintaining them there."<sup>180</sup> Open adoption is often in the

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174. See Sankaran, *supra* note 164, at 102.

175. See generally JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 20. In addition to providing consistent representation at the termination of parental rights stage, good representation at the CHIPS stage improves outcomes for children who are reunited with their parents because good attorneys "know how to ask for the support that could make [parents] successful when they are reunited with their children." See Jeremy Olson, *The Unpopular but Crucial Role of Representing Abusive Parents*, STAR TRIBUNE, (Nov. 2, 2012, 11:54 AM), <http://www.startribune.com/local/blogs/176973541.html> (quoting Minnesota Supreme Court Justice Helen Meyer).

176. Sankaran, *supra* note 164, at 102.

177. See *id.*

178. See JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 13. The report notes that one advantage of enforcing post-termination contact agreements is that birth parents who enter into an agreement will be assured that they will not lose all contact with their child. *Id.*

179. Annette R. Appell, *Blending Families through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 997 (1995) [hereinafter Appell, *Blending Families*].

180. *Id.* at 998.

child's best interest because it allows children to maintain relationships with important people in their lives.<sup>181</sup> Open adoption may also increase the number of voluntary termination of parental rights cases because parents who otherwise would be unwilling to agree to a termination of parental rights may be willing to do so if an opportunity for future contact is available.<sup>182</sup>

The Wisconsin Special Committee of Permanency for Young Children in the Child Welfare System is proposing a statutory amendment that would allow post-termination contact agreements.<sup>183</sup> Under the proposal, a post-termination contact agreement would allow birth parents and adoptive parents to agree to specified contact or interaction between the birth parent and the child once the adoption is completed.<sup>184</sup> The availability and enforceability of such agreements may increase the number of parents who are willing to voluntarily terminate their parental rights because they would know that they could still have some contact with the child.<sup>185</sup> If a parent voluntarily consents to a termination of parental rights, no trial—by jury or bench—is needed.<sup>186</sup> This would significantly increase timely permanency for children and reduce costs to the system by eliminating the need for a trial in these cases. Unlike eliminating the right to a jury trial, allowing enforceable

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181. Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, 18 CHILD. LEGAL RTS. J. 24, 30 (1998) [hereinafter Appell, *Increasing Options*]. See also Appell, *Blending Families supra* note 179, at 1019–20 n.116 (listing numerous studies indicating that open adoption can be helpful and even therapeutic for children).

182. Appell, *Increasing Options, supra* note 181, at 30. Certainly, there are also important concerns about open adoption, including the fear of subsequent litigation, the possibility of coercion, the changing of circumstances over time, and the blurring of the lines of parental authority. *Id.* at 30–31. However, many of these concerns can be remedied by a well-crafted post-termination agreement. *Id.* at 31. For more information about the potential benefits and risks of open adoption, see Leigh Gaddie, Comment, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 507–12 (2009).

183. See JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 13; WLC Memo No. 3, *supra* note 17, at 8. For the text of the proposed statutory amendment, see ASSEMB. B. 150, 2013–2014 Leg., 100th Reg. Sess. (Wis. 2013), available at <https://docs.legis.wisconsin.gov/2013/related/proposals/ab150.pdf>.

184. ASSEMB. B. 150, 2013–2014 Leg., 100th Reg. Sess. (Wis. 2013), available at <https://docs.legis.wisconsin.gov/2013/related/proposals/ab150.pdf>. The new legislation would allow these agreements to provide for visitation between the child and a relative, future contact and communication between the child and a relative, the sharing of information about the child with a relative, and the sharing of medical and genetic history of a relative. JOINT LEGISLATIVE COUNCIL REPORT, *supra* note 17, at 14. Additionally, such agreements would be enforceable by the court. *Id.* at 15.

185. Appell, *Increasing Options, supra* note 181, at 30.

186. See WIS. STAT. § 48.41(1) (“The court may terminate the parental rights of a parent after the parent has given his or her consent . . . the judge may proceed immediately to a disposition . . .”).

open adoption agreements would not take procedural protections away from parents.

#### CONCLUSION

It should not be fast or easy to terminate a parent's rights to his or her child. The parent-child relationship is important and unique, and it cannot be severed without providing meaningful due process. Both the parent and the State have an interest in preserving the family relationship and therefore in preserving procedural protections in termination of parental rights cases. In Wisconsin, a jury trial has been an integral part of a parent's due process rights in termination of parental rights cases.

The three-factor *Eldridge* analysis supports the preservation of a parent's right to a jury trial in termination cases because all three factors weigh in favor of preserving the right to a jury trial. First, a jury trial affects a fundamental private interest. Both the United States and the Wisconsin Supreme Courts have recognized a parent's fundamental interest in his or her children as well as the permanent nature of the a termination of parental rights. Second, the government's interests are in line with preserving the right to a jury trial. At the fact-finding stage of a termination of parental rights case, the State's interests are aligned with the parent's; that is, both have a strong interest in preserving the family and in safeguarding a parent's due process rights. This interest far outweighs the added cost and burden on the system that jury trials may impose. Additionally, while the state has an interest in promoting faster permanency for children, statistical data shows jury trials do not significantly delay permanency. Third, jury trials serve to prevent a risk of erroneous decisions that bench trials present. A jury trial provides important procedural safeguards against judicial bias, and it offers the parent the opportunity to appeal to public opinion.

There are other ways the state can decrease costs while still preserving meaningful due process rights for parents in termination of parental rights cases. Appointing attorneys in child welfare cases and enabling parents to keep the same attorney at the termination stage that they had at the child welfare stage would reduce the number of terminations that are filed and would be more efficient. Allowing post-termination contact agreements may encourage more parents to voluntarily terminate their parental rights and thus result in fewer termination of parental rights trials. The legislature should explore these options before taking the more drastic step of removing the right to a jury trial in termination of parental rights cases.