

No. 84132-2

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SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE TERMINATION OF

D.R. and A.R.,

Minor Children.

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*AMICI CURIAE* BRIEF OF NATIONAL CENTER FOR YOUTH LAW,  
FIRST STAR, THE NATIONAL ASSOCIATION OF COUNSEL FOR  
CHILDREN, THE CHILDREN'S LAW CENTER OF LOS ANGELES,  
LAWYERS FOR CHILDREN, AND KIDSVOICE

IN SUPPORT OF PETITIONERS

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. IDENTITY AND INTEREST OF AMICI .....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT .....	2
A. The Majority of States Mandate Legal Counsel for Children in Termination Proceedings by Statutes and Case Law. ....	2
1. Statutory mandates for provision of an attorney. ....	2
2. State case law expands on statutory authority. ....	4
B. Washington’s Failure to Guarantee Counsel to Children Is a Minority Position and Against the Clear National Trend.....	7
C. Only Legal Counsel Provides the Unique Expertise, Confidentiality, and Privilege Essential to the Effective Representation of Children.....	8
1. Attorneys play a critical role in the adversarial process by advocating effectively for a child’s rights. ....	9
2. Attorneys provide their child clients with confidentiality and attorney-client privilege. ....	12
3. Attorneys’ training and expertise provide beneficial results for child clients.....	13
4. Concerns over client-directed versus best- interests representation of children do not justify a conclusion that children do not have a due process right to attorney representation.....	14

5.	Although TPR proceedings are ultimately focused on the child's best interests, an independent attorney or attorney-GAL for the child is needed to reach this goal.....	16
V.	CONCLUSION.....	18

## TABLE OF AUTHORITIES

	Page
<b>WASHINGTON STATE CASES</b>	
<i>In re J.M.</i> , 130 Wn. App. 912, 125 P.3d 245 (2005) .....	11
<i>In re Myricks</i> , 85 Wn.2d 252, 533 P.2d 841 (1975).....	11
<b>FEDERAL CASES</b>	
<i>Duchesne v. Sugarman</i> , 566 F.2d 817 (2d Cir. 1977) .....	4
<i>Franz v. United States</i> , 707 F.2d 582 (D.C. Cir. 1983).....	4
<i>Kenny A. v. Purdue</i> , 356 F. Supp. 2d 1353 (N.D. Ga. 2005).....	passim
<i>Roe v. Conn.</i> , 417 F. Supp. 769 (M.D. Ala. 1976).....	4, 16
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816 (1977).....	4
<i>Stanley v. Illinois</i> , 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972).....	4
<i>Wooley v. City of Baton Rouge</i> , 211 F.3d 913 (5th Cir. 2000) .....	4
<b>OTHER STATE CASES</b>	
<i>In re Fish</i> , 569 P.2d 924 (Mont. 1977).....	11
<i>In re H.R.C.</i> , 781 N.W.2d 105 (Mich. Ct. App. 2009).....	5
<i>In re Jamie T.T.</i> , 599 N.Y.S.2d 892 (N.Y. App. Div. 1993).....	5, 10, 11
<i>In re K.D.K.</i> , 940 P.2d 216 (Okla. 1997).....	6, 11

<i>In re Orlando F.</i> , 40 N.Y.2d 103 (N.Y. 1976) .....	18
<i>In re S.A.W.</i> , 856 P.2d 286 (Okla. 1993) .....	6, 11
<i>In re T.M.H.</i> , 613 P.2d 468 (Okla. 1980) .....	passim
<i>In re Tiajianna M. et. al.</i> , 867 N.Y.S.2d 287 (N.Y. App. Div. 2008) .....	5
<i>N.J. Div. of Youth &amp; Fam. Serv. v. Wandell</i> , 382 A.2d 711 (N.J. Cumberland County Ct. 1978) .....	6

**WASHINGTON STATE STATUTES AND RULES**

2010 Wash. Legis. Serv. Ch. 180 § 1(2) .....	12
RCW 13.34.030(9) .....	7
RCW 13.34.100(1) .....	8
RCW 13.34.100(6) .....	12
RCW 13.34.100(6)(e) .....	8
RCW 13.34.100(6)(f) .....	7
Wash. Juv. Ct. R. 9.2(c)(1) .....	7, 8

**OTHER STATE STATUTES AND RULES**

2010 Conn. Practice Book § 32a-1(b) .....	3
23 Pa. Cons. Stat. Ann. § 2313(a) .....	2
42 Pa. Cons. Stat. Ann. § 6311 .....	2
42 Pa. Cons. Stat. Ann. § 6311(b) .....	3, 15
Ala. Code § 12-15-102(10) .....	2
Ala. Code § 12-15-304(a) .....	2
Ariz. R. Juv. P., Rule 103(D) .....	3
Ariz. Rev. Stat. Ann. § 8-235(D) .....	3
Ark. Code Ann. § 9-27-316(f)(1) .....	2
Cal. Rules of Court, Rule 5.661(b)–(c) .....	3
Colo. Rev. Stat. Ann. § 19-1-103(59) .....	2

Colo. Rev. Stat. Ann. § 19-3-203(3).....	2, 3
Conn. Gen. Stat. Ann. § 46b-129a(2) .....	2
D.C. Code § 16-2304(b)(5) .....	2, 3
DC Family Court Administrative Order 04-05 .....	3
Del. Code Ann. tit. 29, § 9007A(c)(6) .....	3
Iowa Code Ann. § 232.89(2).....	2
Iowa Rule of Appellate Procedure 6.109(4).....	3
Kan. Stat. Ann. § 38-2205(a) .....	2
Kan. Stat. Ann. § 38-2205(d).....	3
Ky. Rev. Stat. Ann. § 620.100(1)(a) .....	2
La. Child. Code Ann. art. 1042(C).....	3
La. Child. Code Ann. art. 607.....	2
Mass. CFLP, Standards Governing the Representation of Children 1.3 .....	3
Mass. Gen. Laws Ann. ch. 119, § 29 .....	2
Md. Code Ann., Cts. & Jud. Proc. § 3-813(a) .....	3
Md. Code Ann., Cts. & Jud. Proc. § 3-813(d)(1) .....	2
Me. Rev. Stat. Ann. tit. 22, § 4006 .....	3
Mich. Comp. Laws Ann. § 712A.17d(1)(b) .....	3
Mich. Comp. Laws Ann. § 722.630.....	2
Miss. Code Ann. § 43-21-201(5) .....	3
Miss. Uniform Rules of Youth Court Practice, Rule 13(a).....	2
Mont. Code Ann. § 41-3-425 .....	3
Mont. Code Ann. § 41-3-425(2)(b) .....	2
N.C. Gen. Stat. Ann. § 1002(1).....	3
N.C. Gen. Stat. Ann. § 7B-601 .....	3
N.C. Gen. Stat. Ann. § 7B-601(a).....	2
N.J. Stat. Ann. § 9:6-8.21(d) .....	2
N.J. Stat. Ann. § 9:6-8.23 .....	2

N.M. Stat. Ann. § 32A-1-7.1(B) .....	3
N.M. Stat. Ann. § 32A-4-10(C) .....	2
N.Y. Ct. Rules § 7.2(d)(2).....	15
N.Y. Fam. Ct. Act § 1120(b).....	3
N.Y. Fam. Ct. Act § 241 .....	3, 9
N.Y. Fam. Ct. Act § 249 .....	3
N.Y. Fam. Ct. Act § 249(a).....	2
Neb. Rev. Stat. § 43-272(1) .....	3
Neb. Rev. Stat. § 43-272(3) .....	2
Ohio Rev. Code Ann. § 2151.352.....	2
Okla. Stat. tit. 10A, § 1-4-306(A)(2) .....	3
Okla. Stat. tit. 10A, § 1-4-306(A)(5) .....	2, 3
Or. Uniform Trial Court R. 11.020 .....	3
Pa. Rules of Juvenile Court Procedure No. 1150(B).....	3
S.D. Codified Laws § 26-8A-18 .....	2, 3
Tenn. Code Ann. § 37-1-149 .....	2
Tenn. Rule of Juvenile Procedure 36(b) .....	3
Tenn. Rules of Juvenile Procedure, Rule 2.....	2
Tex. Fam. Code Ann. § 107.012 .....	2
Utah Code Ann. § 78A-6-317 .....	3
Utah Code Ann. § 78A-6-317(2) .....	2
Utah Code Ann. § 78A-6-317(4) .....	2
Utah Code Ann. § 78A-6-902(2) .....	2
Utah Code Ann. § 78A-6-902(5) .....	3
VA Standards for GAL Representation of Children, Standard J Comments.....	3
Va. Code Ann. § 16.1-266(A).....	2
Vt. Stat. Ann. tit. 33, § 5112 .....	2

Vt. Sup. Ct. Admin. Orders, Rules Governing the Assignment of Counsel and Payment Thereof in Family and Probate Cases, § 3(b) .....	3
W. Va. Code Ann. § 49-6-2(a) .....	2
Wyo. Rules and Regs. For GAL Program, Ch. 2, § 3(b)(xiv) .....	3
Wyo. Stat. Ann. § 14-3-211(a) .....	2

**OTHER AUTHORITIES**

ABA Model Code of Prof'l Resp'y .....	9, 10, 12
ABA Model Rules of Prof'l Conduct .....	12
American Bar Association, <i>Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases</i> (adopted Feb. 5, 1996) .....	9
Andrew E. Zinn & Jack Slowriver, <i>Expediting Permanency: Legal Representation for Foster Children in Palm Beach County 1</i> (2008) .....	13
Black's Law Dictionary 725 (8th ed. 2004) .....	11
Erik Pitchal, <i>Children's Constitutional Right to Counsel in Dependency Cases</i> , 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 663-65 (2006) .....	13, 14
First Star & Children's Advocacy Institute, <i>A Child's Right to Counsel: A National Report Card on Legal Representation for Abused &amp; Neglected Children</i> (2d ed. 2009) .....	2, 3, 4, 7
LaShanda Taylor, <i>American Bar Association Center on Children and the Law Bar – Youth Empowerment Project White Paper: A Lawyer for Every Child: Client-Directed Representation in Dependency Cases</i> , 47 Fam. Ct. Rev. 605 (2009) .....	2, 13
Merril Sobie, <i>The Child Client: Representing Children in Child Protective Proceedings</i> , 22 Touro L. Rev. 745 (2006) .....	2, 3, 11
National Association of Counsel for Children, <i>NACC Recommendations for Representation of Children in Abuse and Neglect Cases</i> (2001) .....	4, 9, 12



## I. INTRODUCTION

Nearly 40 states, the American Bar Association, and numerous well-respected child advocacy groups, all recognize the necessity of separate legal representation for children in dependency and parental rights termination proceedings. Court rules and procedures can confuse an untrained party or child representative, so children rely on attorneys to identify legal issues and represent them in a manner that cannot be accomplished by non-lawyers. Washington has remained one of a minority of states for too long, allowing children and non-lawyer advocates to fend for themselves during high-stakes legal proceedings. This Court should join the national trend and recognize children's universal right to legal counsel in termination of parental rights ("TPR") proceedings.

## II. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *Amici* are set forth in *Amici's* Motion to File *Amici Curiae* Brief, filed herewith.

## III. STATEMENT OF THE CASE

*Amici* adopt the Statement of the Case set forth in the Petitioners' Petition for Review and Children's Joint Opening Brief.

#### IV. ARGUMENT

##### A. The Majority of States Mandate Legal Counsel for Children in Termination Proceedings by Statutes and Case Law.

###### 1. Statutory mandates for provision of an attorney.

“[T]he clear trend” in the United States “is toward universal attorney representation” for children in TPR proceedings.<sup>1</sup> Nearly 40 states provide a statutory right to counsel for children in dependency proceedings, and in most of these states, this includes representation at TPR proceedings.<sup>2</sup>

The commitment of this majority of states reaches further than providing a conditional statutory option for the appointment of counsel. The children in these states are entitled to legal counsel without question

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<sup>1</sup> Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *Touro L. Rev.* 745, 746 (2006).

<sup>2</sup> LaShanda Taylor, *American Bar Association Center on Children and the Law Bar – Youth Empowerment Project White Paper: A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 *Fam. Ct. Rev.* 605, 610-11 (2009); First Star & Children’s Advocacy Institute, *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (2d ed. 2009) (attached as Appendix 1). *See, e.g.*, Ala. Code §§ 12-15-102(10), 12-15-304(a); Ark. Code Ann. § 9-27-316(f)(1); Colo. Rev. Stat. Ann. §§ 19-1-103(59), 19-3-203(3); Conn. Gen. Stat. Ann. § 46b-129a(2); D.C. Code § 16-2304(b)(5); Iowa Code Ann. § 232.89(2); Kan. Stat. Ann. § 38-2205(a); Ky. Rev. Stat. Ann. § 620.100(1)(a); La. Child. Code Ann. art. 607; Md. Code Ann., Cts. & Jud. Proc. § 3-813(d)(1); Mass. Gen. Laws Ann. ch. 119, § 29; Mich. Comp. Laws Ann. § 722.630; Miss. Uniform Rules of Youth Court Practice, Rule 13(a); Mont. Code Ann. § 41-3-425(2)(b); Neb. Rev. Stat. § 43-272(3); N.J. Stat. Ann. §§ 9:6-8.21(d), 9:6-8.23; N.M. Stat. Ann. § 32A-4-10(C); N.Y. Fam. Ct. Act § 249(a); N.C. Gen. Stat. Ann. § 7B-601(a); Ohio Rev. Code Ann. § 2151.352; Okla. Stat. tit. 10A, § 1-4-306(A)(5); 42 Pa. Cons. Stat. Ann. § 6311, 23 Pa. Cons. Stat. Ann. § 2313(a); S.D. Codified Laws § 26-8A-18; Tenn. Code Ann. § 37-1-149, Tenn. Rules of Juvenile Procedure, Rule 2; Tex. Fam. Code Ann. § 107.012; Utah Code Ann. §§ 78A-6-317(2)&(4), 78A-6-902(2); Vt. Stat. Ann. tit. 33, § 5112; Va. Code Ann. § 16.1-266(A); W. Va. Code Ann. § 49-6-2(a); Wyo. Stat. Ann. § 14-3-211(a).

or qualification if the rights of their parents are subject to termination.<sup>3</sup> In some instances, the practice of providing counsel is decades long.<sup>4</sup> Many of these states provide counsel regardless of the age of the child client.<sup>5</sup> A majority of these states require that, once appointed, counsel represent the child throughout dependency and TPR proceedings, including during appeals.<sup>6</sup> Additionally, to ensure that each child receives adequate attention, some states limit case loads for attorneys representing children

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<sup>3</sup> See First Star & Children's Advocacy Institute, *supra* note 2.

<sup>4</sup> In 1962, the New York State Legislature authorized the New York Family Court to appoint attorneys to represent children in (among other actions) child protective proceedings, finding that "counsel [for children] is often indispensable to a practical realization of due process." Sobie, *supra* note 1, at 752 (quoting the Family Court Act, 1962 N.Y. Laws, ch. 686 (codified at N.Y. Fam. Ct. Act § 241)). "Over the course of the thirty year period since the initial legislation [in New York], the majority of states have enacted statutes requiring the legal representation of children." *Id.* at 754-55.

<sup>5</sup> See, e.g., N.Y. Fam. Ct. Act § 249; Okla. Stat. tit. 10A, § 1-4-306(A)(2); D.C. Code § 16-2304(b)(5).

<sup>6</sup> First Star & Children's Advocacy Institute, *supra* note 2. See, e.g., Colo. Rev. Stat. Ann. § 19-3-203(3); 2010 Conn. Practice Book § 32a-1(b) (available at [www.jud.ct.gov/pb.htm](http://www.jud.ct.gov/pb.htm)); DC Family Court Administrative Order 04-05 (available at [www.dccourts.gov/dccourts/superior/admin\\_orders/admin\\_orders.jsp](http://www.dccourts.gov/dccourts/superior/admin_orders/admin_orders.jsp)); Iowa Rule of Appellate Procedure 6.109(4) (available at [www.legis.stat.ia.us/asp/CourtRules/PubDateListing.aspx](http://www.legis.stat.ia.us/asp/CourtRules/PubDateListing.aspx)); Kan. Stat. Ann. § 38-2205(d); La. Child. Code Ann. art. 1042(C); Md. Code Ann., Cts. & Jud. Proc. § 3-813(a); Mass. CFLP, Standards Governing the Representation of Children 1.3; Mich. Comp. Laws Ann. § 712A.17d(1)(b); Miss. Code Ann. § 43-21-201(5); Mont. Code Ann. § 41-3-425; Neb. Rev. Stat. § 43-272(1); N.M. Stat. Ann. § 32A-1-7.1(B); N.Y. Fam. Ct. Act § 1120(b); N.C. Gen. Stat. Ann. §§ 7B-601, 1002(1); Okla. Stat. tit. 10A, § 1-4-306(A)(5); 42 Pa. Cons. Stat. Ann. § 6311(b); Pa. Rules of Juvenile Court Procedure No. 1150(B); S.D. Codified Laws § 26-8A-18; Tenn. Rule of Juvenile Procedure 36(b) (available at [www.tsc.state.tn.us/opinions/tsc/rules/tnrulesofcourt/jurproindex.htm](http://www.tsc.state.tn.us/opinions/tsc/rules/tnrulesofcourt/jurproindex.htm)); Utah Code Ann. §§ 78A-6-317, 78A-6-902(5); Vt. Sup. Ct. Admin. Orders, Rules Governing the Assignment of Counsel and Payment Thereof in Family and Probate Cases, § 3(b) (available at [www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0](http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0)); VA Standards for GAL Representation of Children, Standard J Comments; Wyo. Rules and Regs. For GAL Program, Ch. 2, § 3(b)(xiv). See also Cal. Rules of Court, Rule 5.661(b)-(c) (mandating counsel on appeal only if child is the party appealing). Additionally, several states require that an attorney, once appointed, serve throughout the entire appeals process. See Ariz. Rev. Stat. Ann. § 8-235(D), Ariz. R. Juv. P., Rule 103(D); Del. Code Ann. tit. 29, § 9007A(c)(6); Me. Rev. Stat. Ann. tit. 22, § 4006; Or. Uniform Trial Court R. 11.020 (available at [courts.oregon.gov/OJD/programs/utcr/utcrules.page](http://courts.oregon.gov/OJD/programs/utcr/utcrules.page)).

in TPR proceedings.<sup>7</sup>

2. *State case law expands on statutory authority.*

In addition to the statutory mandates and rule-based rights to legal representation, case law in several states has recognized a child's constitutional right to legal counsel in dependency and TPR proceedings. Courts have recognized generally that children have a fundamental right to safety and family integrity separate and apart from their parents' rights.<sup>8</sup> Several courts have held that due process requires that a child have an attorney to ensure those fundamental rights are protected in dependency and TPR proceedings. One federal court held that an "Alabama child custody procedure violates the due process clause of the Constitution because that procedure does not provide for the appointment of independent counsel to represent a child in a neglect proceeding." *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976).

Another federal court acknowledged this due process-based right,

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<sup>7</sup> First Star & Children's Advocacy Institute, *supra* note 2, at 13, 33 (Arkansas), 73 (Massachusetts), 95 (New York), 135 (Wyoming). See also National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases*, III.A.2. cmt.A (2001) (recommending full-time attorneys represent no more than 100 clients at a time) (attached as Appendix 2).

<sup>8</sup> See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent, [*Smith v.*] *Organization of Foster Families*, 431 U.S. [816], 844 [(1977)]."); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) ("a child's right to family integrity is concomitant to that of a parent"); *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983).

declaring that “[e]ven if there were not a statutory right to counsel for children in deprivation cases and TPR proceedings . . . such a right is guaranteed under the Due Process Clause of the Georgia Constitution.”

*Kenny A. v. Purdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005). The court clarified that:

...children have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.

*Id.* at 1360.

State courts also have found a state and/or federal constitutional right to counsel for children in child protective proceedings. *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894 (N.Y. App. Div. 1993) (holding that “[in addition to a statutory right,] [w]e are also of the view . . . that the Due Process Clauses of the Federal and State Constitutions mandate that there be *some form* of legal representation of [the child’s] interests in the proceedings on the petition,” because the child’s “liberty interest was clearly at stake” (citations omitted));<sup>9</sup> *In re H.R.C.*, 781 N.W.2d 105, 115 (Mich. Ct. App. 2009) (“It is true that children have a right to appointed counsel in child protective proceedings, and that a child’s attorney

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<sup>9</sup> New York courts have reiterated this principle on a number of occasions. *See, e.g., In re Tiagianna M. et. al.*, 867 N.Y.S.2d 287, 288 (N.Y. App. Div. 2008) (“the child has a constitutional and statutory right to legal representation of her interests in the proceedings on a neglect petition”).

appointed under the juvenile code 'has the same duties that any other client's attorney would fulfill when necessary.' In addition, although child protective proceedings are not criminal in nature, where the right to effective counsel arises from the Sixth Amendment, the Due Process Clause indirectly guarantees effective assistance of counsel in the context of child protective proceedings." (citations omitted); *N.J. Div. of Youth & Fam. Serv. v. Wandell*, 382 A.2d 711, 713-14 (N.J. Cumberland County Ct. 1978) ("Surely if due process required that a mature adult subjected to these proceedings requires assistance of able counsel, no less should be required to protect the interests of a minor incapable of speaking for himself.").

Thirty years ago, in *In re T.M.H.*, the Oklahoma Supreme Court expanded a statutory right to counsel in specified instances to a universal, constitutional right to counsel for children in all TPR proceedings. 613 P.2d 468, 469-71 (Okla. 1980); *see also In re K.D.K.*, 940 P.2d 216, 217 (Okla. 1997) (describing *T.M.H.* as a case where "this Court held that a child has a constitutional right to counsel in a proceeding initiated by the state for the termination of parental rights").<sup>10</sup> Washington should join Oklahoma's decades long recognition that "[t]he matter of independent representation by counsel, so that a child may have his own attorney when

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<sup>10</sup> *See also In re S.A.W.*, 856 P.2d 286, 288-89 (Okla. 1993).

his welfare is at stake, is the most significant and practical reform that can be made in the area of children and the law.” 613 P.2d at 470.

**B. Washington’s Failure to Guarantee Counsel to Children Is a Minority Position and Against the Clear National Trend.**

Washington is out of step with the majority of jurisdictions and the steady national trend toward providing a universal right to representation to children in TPR proceedings. Under Washington law, a court may appoint an attorney to a child in a TPR hearing only if: (1) the child requests counsel and is twelve or more years of age; (2) the non-attorney guardian ad litem (“GAL”) determines that the child needs to be independently represented by counsel; or (3) the court determines that the child needs to be independently represented by counsel. RCW 13.34.100(6)(f).<sup>11</sup> Additionally, there is no express requirement for legal representation on appeal. *Id.*<sup>12</sup>

Washington law focuses mainly on the appointment of a non-attorney GAL to represent the child’s “best interests.” RCW 13.34.030(9). Washington provides a GAL at the discretion of the court if no attorney is provided. A Washington court shall appoint a GAL “unless [it] for good cause finds the appointment unnecessary,” and this requirement is “deemed satisfied if the child is represented by independent counsel in the

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<sup>11</sup> See also Wash. Juv. Ct. R. 9.2(c)(1).

<sup>12</sup> First Star & Children’s Advocacy Institute, *supra* note 2, at 126.

proceedings.” RCW 13.34.100(1). In other words, Washington law does not guarantee that children subject to TPR proceedings are provided with a legal professional who can advocate for their needs and interests.<sup>13</sup>

This Court is faced with a similar issue presented to Oklahoma’s highest court thirty years ago when its legislature provided a very limited right to counsel.<sup>14</sup> The Washington statute, moreover, ignores the practicalities of TPR proceedings and provides no check to ensure the appointment of counsel is even considered.<sup>15</sup> As the Oklahoma Supreme Court held thirty years ago, conditional statutes deny children’s fundamental rights and fail to protect their interests.

**C. Only Legal Counsel Provides the Unique Expertise, Confidentiality, and Privilege Essential to the Effective Representation of Children.**

Attorneys play a critical role in TPR proceedings—a role that cannot be fulfilled by a court-appointed special advocate (“CASA”) or non-attorney GAL. Outcomes in the legal process “are directly tied” to the quality of legal representation, which cannot be provided by a CASA

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<sup>13</sup> Washington’s Juvenile Court Rules mandate that, in dependency or TPR proceedings, “[u]pon request of a party or on the court’s own initiative, the court shall appoint a lawyer for a juvenile who has no [GAL] and who is financially unable to obtain a lawyer.” Wash. Juv. Ct. R. 9.2(c)(1). This requirement is still inadequate because it still permits a court to refrain from appointing an attorney if the child is represented by a non-attorney GAL or if neither the court nor a party raise the issue of attorney appointment.

<sup>14</sup> *In re T.M.H.*, 613 P.2d at 469-71 (expanding a statutory right to counsel in specified instances to a universal, constitutional right to counsel for children in all TPR proceedings).

<sup>15</sup> See RCW 13.34.100(6)(e) (providing a mechanism for consideration of appointment of counsel only after a child turns 12).



or non-attorney GAL.<sup>16</sup> Attorneys possess the legal skill to conduct adversarial proceedings for the benefit of their clients, and their relationship with the child client benefits from the confidentiality of attorney-client privilege.

*1. Attorneys play a critical role in the adversarial process by advocating effectively for a child's rights.*

Only an attorney fully understands how the law and legal process can protect a child's interests.<sup>17</sup> The American Bar Association ("ABA") Model Code provides specifically for the zealous advocacy of child clients.<sup>18</sup> Attorneys' unique training and education enable them to perform several functions that cannot be performed (or as effectively performed) by a CASA or non-attorney GAL. Among these functions are:

- o Participation in Legal Proceedings: The attorney examines and cross-examines witnesses and participates in depositions, settlement negotiations, discovery, pretrial conferences, jury selection, and hearings.<sup>19</sup> The attorney knows when and how to appeal adverse decisions, and how to preserve issues for appeal.<sup>20</sup>

<sup>16</sup> National Association of Counsel for Children, *supra* note 7, at II.A.

<sup>17</sup> New York's family law statute acknowledges the special role that attorneys play in protecting the due process rights of child clients and ensuring proper fact development and case disposition: "[C]ounsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition." N.Y. Fam. Ct. Act § 241.

<sup>18</sup> ABA Model Code of Prof'l Resp'y, EC 7-1 (available at [www.abanet.org/cpr/mrpc/mcpr.pdf](http://www.abanet.org/cpr/mrpc/mcpr.pdf)).

<sup>19</sup> American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, at pp. 3, 17 (adopted Feb. 5, 1996) (attached as Appendix 3).

<sup>20</sup> *Id.* at pp. 21-22.

- Develop Theory and Strategy: The attorney must develop a workable legal approach and theory to help the child achieve his or her goals in the proceedings.<sup>21</sup>
- Obtain, Understand and File Pleadings: The child's attorney obtains copies of all pleadings and relevant notices, interprets them with legal acumen, and files petitions, motions, responses or objections as necessary to represent the child. The attorney requests legal relief and services for the child.<sup>22</sup>
- Counsel the Child: The attorney counsels the child regarding the subject of litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the process.<sup>23</sup>

Some of these functions can be provided only by attorneys, and all can be provided most effectively by attorneys.

Courts in other jurisdictions have recognized that attorneys are uniquely capable of protecting children's rights in dependency and TPR hearings. The court in *Kenny A.* analyzed whether there is significant risk of erroneous decisions in TPR hearings without legal representation. It noted that: (1) juvenile court standards in TPR proceedings allow wide latitude for judicial discretion and subjective determinations; (2) this magnifies the risk of erroneous fact finding; and (3) judges and CASAs do not adequately mitigate the risk of such errors. 356 F. Supp. 2d at 1361. The court concluded that "only the appointment of counsel can effectively

<sup>21</sup> *Id.* at p. 4; *see, e.g., In re Jamie T.T.*, 599 N.Y.S.2d at 895 (explaining that effective counsel for the child was needed to develop child's trial strategy where evidence of sexual abuse hinged on he-said-she-said testimony from the child and adoptive father).

<sup>22</sup> American Bar Association, *supra* note 19, at pp. 14-15.

<sup>23</sup> *Id.* at p. 4.

mitigate the risk of significant errors in deprivation and TPR proceedings.” *Id.*<sup>24</sup>

A non-attorney GAL or CASA “is a far different creature than an attorney.”<sup>25</sup> A GAL’s purpose is to make decisions for a legally incompetent client such as a child.<sup>26</sup> Similarly, CASAs typically are part-time, non-lawyers acting as GALs.<sup>27</sup> In practice, the GAL usually retains an attorney and then, acting as a surrogate client, instructs the attorney or consents to appropriate legal measures.<sup>28</sup> CASAs and non-attorney GALs fight admirably for what they think is best for the children they serve, but they lack the legal training that attorneys use to advocate for the positions of their clients effectively in legal proceedings. Accordingly, a CASA or non-attorney GAL is not an adequate substitute for legal representation.

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<sup>24</sup> A variety of other state court decisions have highlighted the unique skills that attorneys provide in their representation of child clients. See *In re Jamie T.T.*, 599 N.Y.S.2d at 895 (listing trial activities effective counsel would have undertaken to protect child’s interests: (1) fully developing evidence, (2) presenting expert witnesses, (3) cross-examining witnesses, (4) bolstering child’s testimony and out-of-court statements with records and other witnesses); *In re Fish*, 569 P.2d 924, 928 (Mont. 1977) (developing facts and producing evidence relevant to child’s best interests); *In re S.A.W.*, 856 P.2d at 289-90 (presenting testimony and cross-examination in a manner that represents the child’s goals and interests); *In re K.D.K.*, 940 P.2d at 218 (same); *In re T.M.H.*, 613 P.2d at 470 (same); *Kenny A.*, 356 F. Supp. 2d at 1361 (“CASAs are also volunteers who do not provide legal representation to a child.”). See also *In re Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975) (in the context of a parent’s right to counsel in dependency proceedings, listing the complexities of trial practice that a non-lawyer would struggle to navigate); *In re J.M.*, 130 Wn. App. 912, 922-25, 125 P.3d 245 (2005) (in the context of a parent’s right to counsel/ineffective assistance of counsel case, listing evidentiary issues that can arise in a TPR hearing that a non-attorney would not be competent to address).

<sup>25</sup> Sobie, *supra* note 1, at 753.

<sup>26</sup> See Black’s Law Dictionary 725 (8th ed. 2004).

<sup>27</sup> Sobie, *supra* note 1, at 753.

<sup>28</sup> *Id.* at 753 n.21.

2. *Attorneys provide their child clients with confidentiality and attorney-client privilege.*

Children taking part in termination proceedings are particularly vulnerable. As a result of their personal hardships they may lack trust in others. Accordingly, children in termination proceedings require the protection of confidentiality to disclose freely any vital information about their life experiences and goals in order to communicate effectively with their representative.<sup>29</sup> Attorneys are required and trained to maintain the confidentiality of communications with their clients, and the confidentiality arising from the attorney-client privilege is the cornerstone of legal representation.<sup>30</sup> They exceed the baseline non-attorney GAL/CASA-child relationship by providing children the confidential communication that encourages them to speak freely and frankly.<sup>31</sup> The privilege is suited uniquely to provide an avenue to investigate and pursue the child's interests because the most sensitive information may never come to light without confidentiality protections.

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<sup>29</sup> National Association of Counsel for Children, *supra* note 7, at III.A.5.

<sup>30</sup> See Model Code of Prof'l Resp'y, *supra* note 18, at DR 4-101; ABA Model Rules of Prof'l Conduct, ER 1.6(a) (available at [www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html)).

<sup>31</sup> In 2010, the Washington Legislature amended RCW 13.34.100(6) to require the state agency, GAL, and court in termination and dependency proceedings to periodically inform children age 12 and older that they may request attorney representation (although the court's responsibility to appoint such representation is still discretionary). As part of the legislation's findings, the Legislature noted that "[a]ttorneys ... have different skills and obligations than guardians ad litem and court-appointed special advocates, especially in forming a confidential and privileged relationship with a child, ..." 2010 Wash. Legis. Serv. Ch. 180 § 1(2) (emphasis added).

3. *Attorneys' training and expertise provide beneficial results for child clients.*

Legal representation can lead to greater placement permanency, which has significant positive results for the child. In one recent study, children in a legal representation program experienced exit to permanent homes at “a significantly higher rate” than children who were not afforded counsel.<sup>32</sup> Children also moved from case plan approval to permanency at approximately twice the rate of comparison children.<sup>33</sup>

A competent attorney representing a child can have an immense impact on the child's life. One law review article describes the experience of legal counsel representing twelve-year-old Sam and his ten-year-old brother Patrick.<sup>34</sup> The brothers lived in foster care because their mother had a drug habit. The children wanted to live with their Aunt Tanya, but caseworkers did not believe that would be a sufficient option. Judging his clients to be “[a]rticulate, sharp, and street smart beyond their years,” the attorney advocated the brothers' plan to live with their aunt.<sup>35</sup>

[P]resented with a clear directive from my clients . . . I used all the

<sup>32</sup> Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* 1 (2008), available at [http://www.chapinhall.org/sites/default/files/old\\_reports/428.pdf](http://www.chapinhall.org/sites/default/files/old_reports/428.pdf) (attached as Appendix 4). Providing legal representation is a financial investment for the state, but “attorneys for children have been shown to provide a benefit not only to the child but to the government as well.” Taylor, *supra* note 2, at 616. Increased permanency results in significant reduction in costs associated with court hearings and child protection agency monitoring. *Id.*

<sup>33</sup> Zinn, *supra* note 32, at 20.

<sup>34</sup> Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 663-65 (2006).

<sup>35</sup> *Id.* at 663.

tools in my attorney arsenal to do so. I served discovery demands and interrogatories on the agency and showed up at the hearing with two banker's boxes of documents and lengthy notes for cross-examination of the caseworker. The judge was shocked, the agency attorney was not interested in a fight, and we settled the case. It took a few months of bureaucratic maneuvering to implement the agreement, but Sam and Patrick were soon on their way to South Carolina with their aunt.<sup>36</sup>

This example is not unique. Working within a complex legal system, the attorney was able to utilize his legal skill and training to achieve the result his clients desired. He accomplished this even though the state-appointed caseworker advocated a different course of action. This example highlights the general experience of *Amici*. Separate legal representation for children can actually prevent error by serving as a check on the opinions of state caseworkers. Furthermore, due to the unique relationship resulting from attorney-client confidentiality, attorneys for children in these proceedings gain access to the special insights of the children, who often understand the overall family situation better than any other party.

4. *Concerns over client-directed versus best-interests representation of children do not justify a conclusion that children do not have a due process right to attorney representation.*

The State argues against recognition of children's constitutional due process rights to legal representation because they claim that

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<sup>36</sup> *Id.* at 665.

confusion over whether an attorney is representing a child's stated interests or best interests may lead to erroneous results. Brief of Respondent Department of Social and Health Services ("DSHS Brief") at pp. 14, 20-21, 28-29, 36-37. This red-herring argument has been adequately addressed through court rules, legislation, and bar guidelines in other states.<sup>37</sup> The issue in this case is not whether there may be confusion if the attorney represents the child's stated wishes or best interests, but whether children have a constitutional right to an attorney in TPR proceedings, regardless of the attorney's role.

This Court may save for the State's policymakers the questions of how such representation should be structured, but denial of rights to counsel based on any purported "confusion" as to the attorney's role is unjustified. *Amici's* experience in the majority of states that provide legal representation for children in dependency and TPR proceedings demonstrates that these states have resolved the dilemma through a variety

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<sup>37</sup> Compare N.Y. Ct. Rules § 7.2(d)(2) ("If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests.") with 42 Pa. Cons. Stat. Ann. § 6311(b) ("The [attorney] guardian ad litem shall be charged with representation of the legal interests and the best interests of the child at every stage of the proceedings and shall do all of the following: ... (7) Make specific recommendations to the court relating to the appropriateness and safety of the child's placement and services necessary to address the child's needs and safety. ... (9) Advise the court of the child's wishes to the extent that they can be ascertained and present to the court whatever evidence exists to support the child's wishes. When appropriate because of the age or mental and emotional condition of the child, determine to the fullest extent possible the wishes of the child and communicate this information to the court. A difference between the child's wishes under this paragraph and the recommendations under paragraph (7) shall not be considered a conflict of interest for the [attorney] guardian ad litem.").

of client-directed, best-interests, and hybrid representation models. No one has been paralyzed into ineffectiveness by the ongoing debate over advocacy models.

5. *Although TPR proceedings are ultimately focused on the child's best interests, an independent attorney or attorney-GAL for the child is needed to reach this goal.*

The State argues that because all parties in a TPR proceeding—the parents, the state agency, and judge—are framing their arguments or making decisions based on the best interests of the child, an attorney for the child is unnecessary. DSHS Brief at pp. 13, 15, 27, 35-36. Other states have rejected this argument:

In a termination proceeding, if a child is not represented by independent counsel, each attorney presents his arguments from the viewpoint of his client, with the child caught in the middle. Beneath each side's argument in terms of best interests of the child, lies the desire to prevail for a client, who is not the child. When the court appoints an attorney for the child, testimony is presented and cross-examination done by an advocate who is only interested in the welfare of the child.

*In re T.M.H.*, 613 P.2d at 470 (footnote omitted). Indeed, the court found “that in all termination proceedings there are potential conflicts between the interests of the children and those of both the state and the parents . . . .” *Id.* (emphasis added); *see also Roe*, 417 F. Supp. at 780 (holding that the child's interests could not be represented adequately by parents' counsel).

The State also argues that judges can divine in individual cases



when neither the state agency nor the parents will represent the child's interests and appointment of counsel is necessary in that individual case. DSHS Brief at 21-22. Courts in other states also have rejected this argument, opting instead for appointment in all cases. The court in *T.M.H.* held that conditioning the right to counsel on an actual, identified conflict or any other criteria was insufficient because “[c]ourts may fail to perceive [that] children will be affected by the outcome of the litigation, or that potential conflicts between the interests of the children and the interests of other parties require that the child have separate counsel.” 613 P.2d at 470; *see also id.* (“Too often the judge assumes the child’s interests are adequately protected by [the state agency party]. This position is undermined when, as here, [the state agency party] is challenged and as such it becomes an interested party, the source of the inquiry.” (footnote omitted)); *Kenny A.*, 356 F. Supp. 2d at 1361.

*Amici*'s experience verifies the observations of the court in *T.M.H.* All of the other parties in a dependency or TPR proceeding have a loyalty to some person or institution other than the child—however much these parties may portray themselves as advocating for the child's best interest. State agencies have interests in protecting their budget and competence of

their employees<sup>38</sup> and often must follow state regulations that may or may not be consistent with the child's best interests. Parents have an interest in avoiding blame for abuse/neglect and getting the state to stop meddling in their lives.<sup>39</sup> Furthermore, if two parents are involved in the proceeding, they may have conflicting views on what is in the child's best interests. Only through attorney representation of the child through either independent counsel or an attorney GAL will the courts receive a complete picture of issues impacting the child's best interests.

## V. CONCLUSION

Washington should join the majority of jurisdictions and the American Bar Association in recognizing children's universal right to legal counsel in TPR proceedings. Courts elsewhere recognize this constitutional due process right because children have a clear liberty

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<sup>38</sup> *Kenny A.*, 356 F. Supp. 2d at 1359 n.6 ("Even after the Division of Family and Children Services (DFCS) has assumed custody of the child, there continues to be a conflict of interests between the child and DFCS, which precludes the attorneys who represent DFCS from also representing the child. This is true because the institutional concerns of DFCS may conflict with the needs of the deprived child. For example, there is evidence that a shortage of family foster homes in Fulton and DeKalb Counties has lead DFCS to place children in inappropriate and overcrowded homes, to shuffle children from one placement to another, and to overuse institutional placements. Because such conflicts between the broad programmatic needs of DFCS and the specific needs of the individual child may arise in every case, children are entitled to representation by separate counsel throughout the course of the deprivation proceedings.").


<sup>39</sup> *In re Orlando F.*, 40 N.Y.2d 103, 112 (N.Y. 1976) ("The usual situation in a permanent neglect proceeding pits the natural parent, with his or her own special interest at stake, against an agency who seeks termination of parental rights so that the child might ultimately be adopted. These parties may well believe that the 'best interests' of the child will be served by a 'legal victory' on their part. One court recently observed: 'Without such representation, the natural parent vigorously focuses on parental rights and claims. The approach centers on whether 'this child belongs to me', without an equal inquiry, on behalf of the unrepresented infant on whether 'this parent belongs to me'." (citation omitted)).

interest at stake in these life-changing legal proceedings. They also recognize that providing legal representation in the form of an attorney is the only way to effectively guard that interest. CASAs and non-attorney GALs provide a valuable service, but they cannot replace the role of the attorney in advocating a child's legal rights. By recognizing this constitutional right to counsel, Washington would finally provide this essential legal right to its most vulnerable citizens.

DATED this 23rd day of December, 2010.

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## APPENDICES

1. First Star & Children's Advocacy Institute, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (2d ed. 2009).
2. National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001).
3. American Bar Association, *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (adopted Feb. 5, 1996).
4. Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (2008).

## DECLARATION OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below I served a copy of the foregoing document by emailing and mailing the same, properly addressed and prepaid, to:

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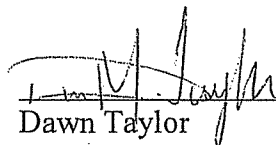
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