

No. 73469-5-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

In re Dependency of K.P.T., Minor Child

**AMICUS CURIAE BRIEF IN SUPPORT OF MOTION TO
MODIFY COMMISSIONER'S RULING DENYING
DISCRETIONARY REVIEW**

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TABLE OF CONTENTS

IDENTITY AND INTERESTS OF AMICI 1

STATEMENT OF THE CASE..... 1

ARGUMENT 1

I. DUE PROCESS REQUIRES APPOINTMENT OF COUNSEL
FOR CHILDREN IN DEPENDENCY PROCEEDINGS. 1

 A. Children’s Fundamental Liberty Interests Are at Stake in
 Dependency Proceedings and Require the Guiding Hand of
 Counsel for Adequate Protection. 1

 B. Independent Legal Counsel is Necessary to Protect Children’s
 Interests in Dependency Proceedings. 6

CONCLUSION..... 10

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Dependency of MSR</i> , 174 Wash. 2d 1 (2012) (en banc).....	<i>passim</i>
<i>In re Gault</i> , 387 U.S. 1 (1967).....	1, 2, 3, 8
<i>Goss v. Lopez</i> , 419 U.S. 565 (1975).....	3
<i>Graham v. Florida</i> , 560 U.S. 48 (2010).....	2
<i>J.D.B. v. North Carolina</i> , 131 S. Ct. 2394 (2011).....	2
<i>Kenny A. v. Perdue</i> , 356 F. Supp. 2d 1353 (N.D. Ga. 2005).....	4, 5, 10
<i>Lassiter v. Dep’t of Social Serv.</i> , 452 U.S. 18 (1981).....	4
<i>Miller v. Alabama</i> , 132 S.Ct. 2455 (2012).....	2
<i>In re Myricks’ Welfare</i> , 85 Wash. 2d 252 (1975) (en banc).....	6
<i>In re Parentage of L.B.</i> , 155 Wash. 2d 679 (2005).....	6, 7
<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	2
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	4

Statutes

Ala. Code §§ 12-15-102(10), 12-15-304(a)7

Ark. Code Ann. § 9-27-316(f)7

Colo. Rev. Stat. §§ 19-1-103(59), 19-3-203(1).....7

Conn. Gen. Stat. § 46b-129(a)(2).....7

D.C. Code § 16-2304(b)(5).....7

Ga. Code Ann. § 15-1 1-1037

Kan. Stat. Ann. § 38-2205(a)7

Ky. Rev. Stat. Ann. § 620.100(1)(a).....7

Mass. Gen. Laws Ann. ch.1 19, § 297

Md. Code Ann., Cts. & Jud. Proc. § 3-8137

Mich. Comp. Laws § 722.630.....7

Miss. Code Ann. § 43-21-2017

Mo. Rev. Stat. § 210.160(1)7

N.D. Cent. Code § 50-25.1-087

N.J. Stat. Ann. § 9:6-8.237

N.M. Stat. Ann. § 32A-4- 1 0(C).....7

N.Y. Fam. Ct. Act § 249(a).....7

Neb. Rev. Stat. § 43-272(1)-(3)7

Ohio Rev. Code Ann. § 2151.3527

Okla. Stat. tit. 10A, § 1-4-306(A)(5)7

42 Pa. Cons. Stat. § 6311(a).....7

S.D. Codified Laws § 26-8A-18.....	7
Tenn. Code Ann. § 37-1-126(a)(1)	7
Tex. Fam. Code Ann. § 107.012	7
Utah Code Ann. § 78A-6-902(2)	7
Va. Code Ann. § 16.1-266(A).....	7
Vt. Stat. Ann. tit. 33, § 5112(a).....	7
W. Va. Code Ann. § 49-4-601	7
Wash. Rev. Code Ann. § 13.34.020.....	5
Wash. Rev. Code § 2.56.030(15), 13.34.102(1)	8
Wash. Rev. Code § 13.04.040.....	8
Wash. Rev. Code § 13.34.030.....	8
Wash. Rev. Code § 13.34.090.....	6
Wash. Rev. Code § 13.34.105(1).....	8
Wis. Stat. Ann. § 48.235	7
Wyo. Stat. Ann. § 14-3-211(a).....	7

Other Authorities

<i>A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children</i> 123-24	7
Catherine J. Ross, <i>From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation</i> , 64 Fordham L. Rev. 1571, 1595 (1996)	2
<i>Child Representation in America: Progress Report from the National Quality Improvement Center</i> , 46.....	9

Elizabeth S. Scott & Thomas Grisso, <i>The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform</i> , 88 J. Crim. L. & Criminology 137, 168-70 (1997).....	2
J. Goldstein, A. Freud & A. Solnit, <i>Beyond the Best Interests of the Child</i> 5-6 (1973).....	5
Jean Koh Peters, <i>How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005</i> , 6 Nev. L.J. 966, 967 (2006)	3
Lucy Johnston-Walsh, et al., <i>Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania</i> 17-18 (2010).....	10
<i>Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases</i> § B-4 cmt. (1996)	9

IDENTITY AND INTERESTS OF AMICI

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

STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case.

ARGUMENT

I. DUE PROCESS REQUIRES APPOINTMENT OF COUNSEL FOR CHILDREN IN DEPENDENCY PROCEEDINGS.

A. Children's Fundamental Liberty Interests Are at Stake in Dependency Proceedings and Require the Guiding Hand of Counsel for Adequate Protection.

The Supreme Court has long recognized that children require counsel to effectively navigate complex legal proceedings. In holding that due process requires counsel for children in delinquency adjudications, the Court made clear in its landmark *Gault* decision that children need “the guiding hand of counsel at every step in the proceedings.” *In re Gault*, 387 U.S. 1, 36 (1967) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). As the Court explained, even “[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.”¹ *Id.* at 38

¹ Recent scholarship has further reinforced *Gault's* reasoning. Scientific research suggests that, because children have developmental limitations that may impair their effective participation in legal proceedings, having the assistance of counsel to navigate

n.65. Since *Gault*, the Supreme Court has relied on this “common sense” understanding of the differences between children and adults to require that children are entitled to enhanced legal protections, including robust due process protections. *See, e.g. J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2407 (2011) (citing *Eddings v. Oklahoma*, 455 U. S. 104, 115-16 (1982) (Children “generally are less mature and responsible than adults.”)).²

The fundamental liberty interests at stake in dependency proceedings render the teachings of *Gault* and its progeny equally relevant to that context. Dependency proceedings implicate the most central questions in a child’s life: “Where is home? Who takes care of me? Who are my parents, my siblings, my extended family and my classmates?”

the legal system is even more important for children than adults. *See, e.g.,* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. Crim. L. & Criminology 137, 168-70 (1997) (discussing juvenile defendants’ relative deficiencies in understanding the meaning of legal procedure and rights); Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences in Delinquency*, 32 L. & Hum. Behav. 78, 79-80 (2008) (arguing that youths’ demonstrated lack in mature judgment must be considered in legal contexts). “The bundle of vulnerabilities [usually attributed to youth] bears directly and affirmatively on the children’s need for appointed counsel.” Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 Fordham L. Rev. 1571, 1595 (1996).

² For additional Supreme Court cases that recognize the particular vulnerability and distinctive treatment of children in the sentencing and interrogation contexts, *see also* *Miller v. Alabama*, 132 S.Ct. 2455 (2012) (declaring mandatory life without parole unconstitutional for juveniles); *J.D.B. v North Carolina*, 131 S.Ct. 2394 (2011) (holding that a child’s age must be considered for the purposes of the *Miranda* custody test); *Graham v. Florida*, 560 U.S. 48 (2010) (holding unconstitutional the imposition of life without parole sentences on juveniles convicted of non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that imposing the death penalty on individuals who committed murders as juveniles violated the Eighth Amendment).

Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*, 6 Nev. L.J. 966, 967 (2006). Interests of constitutional magnitude – the right to safety, family integrity, and physical liberty – are at stake for children who are the subject of dependency proceedings. Indeed, it is the child upon whom the proceeding will likely have the greatest impact – now and in the future. Fundamental fairness requires that the child be provided with robust due process protections, including the right to counsel.

It is well established that children have a substantive right to physical liberty and an interest in avoiding the state’s unnecessary intrusion on that liberty. *See In re Dependency of MSR*, 174 Wash. 2d 1, 16 (2012) (en banc) (hereinafter *MSR*); *see also Goss v. Lopez*, 419 U.S. 565, 574-75 (1975) (concluding that children have liberty interests that must be protected by due process); *Gault*, 387 U.S. at 36 (holding that the potential for restraint of a child’s physical liberty entitles him to due process protections). The Washington Supreme Court has explicitly acknowledged that a child’s distinctive physical liberty interest is at stake in dependency proceedings:

[u]nlike the parent, the child in a dependency or termination proceeding may well face the loss of a physical liberty interest both because the child will be physically removed from the parent’s home [...] or [...] put in the custody of the State as a foster child, powerless

and voiceless, to be forced to move from one foster home to another.

MSR, 174 Wash. 2d at 16. In addition to facing removal from their families, “foster children in state custody are subject to placement in a wide array of [...] foster care placements, including institutional facilities where their physical liberty is greatly restricted.” *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) (finding a due process right to counsel for children in dependency proceedings). Because of this potential deprivation of the child’s physical liberty, there is a presumption that due process requires the right to have counsel appointed. *See Lassiter v. Dep’t of Social Serv.*, 452 U.S. 18, 26-27 (1981) (stating there is a presumption that due process requires the appointment of counsel if an indigent litigant may be deprived of his or her physical liberty).

Dependency proceedings also implicate a child’s liberty interests in family, safety, and well-being. The Supreme Court’s historical recognition that “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment” is entrenched in our constitutional jurisprudence. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Washington state law echoes this fundamental interest in the family unit as a “resource to be nurtured,” Wash. Rev. Code Ann. § 13.34.020, and the state Supreme Court has recognized that the

child's interest in family integrity is as great as the parent's, *MSR*, 174 Wash. 2d at 17-18. The child also has significant legal interests in the right "to be free from unreasonable risks of harm ... and a right to reasonable safety [...] and ... to basic nurturing, including a safe, stable, and permanent home," all of which are at stake in dependency proceedings. *See id.* at 17. As the court explained in *Kenny A.*,

On the one hand, an erroneous decision that a child is not deprived [...] can have a devastating effect on a child, leading to chronic abuse or even death. On the other hand, an erroneous decision that a child is deprived [...] can lead to the unnecessary destruction of the child's most important family relationships.

356 F. Supp. 2d at 1359-60.³

Every child's fundamental interests in physical liberty and family integrity are at stake in dependency proceedings – and the risks of an erroneous decision are high. Due process therefore requires that the child

³ The importance of this independent legal interest to the child was also recognized in *In re Jamie T.T.*, where the court stated: "We would be callously ignoring the realities of Jamie's plight during the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process. . . . Notably, Jamie had a strong interest in obtaining State intervention to protect her from further abuse and to provide social and psychological services for the eventual rehabilitation of the family unit in an environment safe for her. . . . Jamie's interest in procedural protection was heightened because of the irreconcilably conflicting positions of her and her parents in this litigation. 599 N.Y.S.2d 892, 894 (App. Div. 1993). *See also* J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 5-6, 24-26 (1973) (describing the trauma that may result from removal from the home); Child Welfare Information Gateway, *Long Term Consequences of Child Abuse and Neglect* (2008), available at http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf.

be assured representation by counsel, without which the child is left “powerless and voiceless” in the proceeding. *See In re Parentage of L.B.*, 155 Wash. 2d 679, 712 n.29 (2005).

B. Independent Legal Counsel is Necessary to Protect Children’s Interests in Dependency Proceedings.

Despite being the subject of the proceedings, in Washington the child is the *only* party to a dependency proceeding without the right to have counsel appointed to represent him or her. Dependency proceedings are complex legal processes that often involve expert medical testimony, implicate numerous federal and state laws, and require an understanding of multiple service delivery systems. *See* Donald N. Duquette & Ann M. Haralambie, *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases*, 166-67 (2nd ed. 2010). Accordingly, the state relies on counsel to represent its interests, and the Washington Supreme Court recognized more than forty years ago that the “nature of the rights in question” and “the relative power of the antagonists” in a deprivation proceeding necessitates counsel for the parent. *In re Myricks’ Welfare*, 85 Wash. 2d 252, 255 (1975) (en banc); *see also* Wash. Rev. Code § 13.34.090 (codifying this requirement). Yet under current state law, the child, who is “the most vulnerable” and arguably has the most at stake – remains

“powerless and voiceless” in dependency proceedings without counsel. *See In re Parentage of L.B.*, 155 Wash. 2d at 712 n.29; *see also MSR*, 174 Wash. 2d at 17-18 (noting that the child’s interests in dependency proceedings are “as great as” the parent’s). Indeed, Washington is a significant outlier in not statutorily requiring appointed counsel for children in dependency proceedings.⁴

The assistance of a Guardian *ad Litem* (GAL) cannot substitute for legal representation by counsel. Rather than provide guidance or advocate for the child, the GAL serves the court by assisting in determining the best interests of the child. *See* Wash. Rev. Code § 13.34.030 (defining

⁴Thirty-two states and the District of Columbia provide an automatic right to legal representation for children in dependency proceedings, either by statute, regulation, or rule. *See* Ala. Code §§ 12-15-102(10), 12-15-304(a); Ark. Code Ann. § 9-27-316(f); Colo. Rev. Stat. §§ 19-1-103(59), 19-3-203(1); Conn. Gen. Stat. § 46b-129(a)(2); D.C. Code § 16-2304(b)(5); Ga. Code Ann. § 15-1-1-103; Iowa Code. § 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; Mass. Gen. Laws Ann. ch.1 19, § 29; Mich. Comp. Laws § 722.630; Miss. Code Ann. § 43-21-201; Miss. Unif. Rules of Youth Ct. Pract. Rule 13(a); Mo. Rev. Stat. § 210.160(1); Neb. Rev. Stat. § 43-272(1)-(3); N.J. Stat. Ann. § 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); N.D. Cent. Code § 50-25.1-08; N.D.R.Ct.8.7; Ohio Rev. Code Ann. § 2151.352; Okla. Stat. tit. 10A, § 1-4-306(A)(5); 42 Pa. Cons. Stat. § 6311(a); S.D. Codified Laws § 26-8A-18; Tenn. Code Ann. § 37-1-126(a)(1); Tex. Fam. Code Ann. § 107.012; Utah Code Ann. § 78A-6-902(2); Vt. Stat. Ann. tit. 33, § 5112(a); Va. Code Ann. § 16.1-266(A); W. Va. Code Ann. § 49-4-601; Wis. Stat. Ann. § 48.235; Wyo. Stat. Ann. § 14-3-211(a). In fact, in the most recent edition of First Star’s *National Report Card on Legal Representation for Abused & Neglected Children*, Washington was one of only ten states to receive a failing grade on its record of protecting a child’s right to counsel in dependency cases, and the state’s score of fifty-three is the fourth worst in the nation. *See* The Children’s Advocacy Institute (CAI) and First Star, *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 123-24 (3d ed. 2012), available at http://www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf.

“guardian *ad litem*”). As such, “GALs [...] are not trained to, nor is it their role to, protect the legal rights of the child.” *MSR*, 174 Wash. 2d at 21; *see also* Wash. Rev. Code § 2.56.030(15), 13.34.102(1) (establishing the training requirements for GALs). A GAL collects and reports factual information regarding the child’s situation to the court, and must “monitor all court orders for compliance.” Wash. Rev. Code § 13.34.105(1). As the Supreme Court explained in *MSR*, GALs “are often the eyes and ears of the court and provide critical information about the child and the child’s circumstances.” 174 Wash. 2d at 21.

In that respect, GALs serve a similar function to probation officers in the delinquency context, who are also tasked with making recommendations to the court regarding the child’s needs and with supervising court orders. *See* Wash. Rev. Code § 13.04.040 (defining the duties of a probation counselor); *see also Gault*, 387 U.S. at 35-36 (rejecting the argument that “[t]he parent and the probation officer may be relied upon to protect the infant’s interests”). Thus, while the GAL is extremely valuable to the court and the child, she is no substitute for counsel.

A child’s lawyer, on the other hand, is appointed to represent the expressed interests of the child, which puts the child on equal footing with all other parties to the dependency proceeding. *See American Bar*

Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (2011) § 7(c) cmt. Counsel for a child owes his or her client “the same duties, including undivided loyalty, confidentiality, and competent representation as is due an adult client.” *Id.* § 1(c). As in any other attorney-client relationship, the attorney for a child in a dependency proceeding must advise the child and facilitate the child’s ability to make and assert informed choices. American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* § B-4 cmt. (1996). Without an attorney, the child has no person to turn to for legal advice or for guidance in understanding and navigating the complex dependency process. Moreover, establishing a trusting and client-directed attorney-client relationship encourages the child to share information central to his representation and fosters the child’s trust in the proceeding. *See* Donald Duquette & Julian Darwall, *Child Representation in America: Progress Report from the National Quality Improvement Center*, 46 *Fam. L.Q.*, 100-105 (2012).

Most importantly, by representing the child’s wishes to the court, the attorney facilitates the child’s participation and voice in the proceedings, ensuring that each party’s counseled wishes are heard. The court therefore has a full record upon which to make a fair decision that is

in the best interests of the child, reducing the risk of an erroneous deprivation of the child's liberty interests. *See* Lucy Johnston-Walsh, et al., *Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania* 17-18 (2010). Independent legal representation for the child – whose future safety and well-being is the very subject of the proceeding – is therefore a necessary component of due process. *See Kenny A.*, 356 F. Supp. 2d at 1361 (concluding that, given the liberty interests at stake, “only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and [termination] proceedings”).

CONCLUSION

Amici urge this Court to revise the commissioner's ruling declining discretionary review and to set this matter for briefing and argument before the Court on the fundamental issue of the state and Federal Constitutional rights to counsel for children in dependency proceedings.

Date: September 21, 2015

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Lindsay Chastain, hereby certify that on September 21, 2015, true and correct copies of the foregoing documents were served on the parties listed below:

The Court of Appeals of the State of Washington Division 1	Via Electronic Filing (JIS-Link)
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/s/ Lindsay Chastain
Lindsay Chastain