SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	Word certification: 8,481
COURT OF APPEALS, STATE OF COLORADO (Div. VI) Case No. 07 CA 1971	
DISTRICT COURT, COUNTY OF EL PASO, COLORADO The Honorable Steven T. Pelican, Judge, The Honorable Barbara L. Hughes, Magistrate Case Nos. 01 PR 1265 & 07 CV 3451	
In the Matter of: **D.I.S., Minor** **ALAN SIDMAN** **SHERYL SIDMAN, Petitioners** **v.** **MICHAEL SIDMAN** **RENEE SIDMAN, Respondents**	**COURT USE ONLY**
Attorneys for *Amici curiae* Donna Furth, J.D. (Cal. State Bar # 80950)* 1333 Balboa Street, Suite 1 San Francisco, CA 94118 (415) 221-6254 in association with Maureen Farrell-Stevenson, J.D. (Reg. #13726) 13123 East 16th Avenue, B390 Aurora, CO 80045 (303) 864-5320	**Case Number: 2009 SC 483**

BRIEF OF *AMICI CURIAE*

NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,

OFFICE OF THE CHILD'S REPRESENTATIVE, and

ROCKY MOUNTAIN CHILDREN'S LAW CENTER

* A motion for Ms. Furth's admission *pro hac vice* is submitted concurrently with this brief. C.R.C.P. 221 (6)(b).

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203 COURT OF APPEALS, STATE OF COLORADO, Case No. 07 CA 1971 DISTRICT COURT, COUNTY OF EL PASO, COLORADO The Honorable Steven T. Pelican, Judge, The Honorable Barbara L. Hughes, Magistrate Case Nos. 01 PR 1265 & 07 CV 3451 **In the Matter of:** **D.I.S.,** **Minor** **ALAN SIDMAN** **SHERYL SIDMAN,** **Petitioners** **v.** **MICHAEL SIDMAN** **RENEE SIDMAN,** **Respondents**	**COURT USE ONLY**
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CERTIFICATE OF COMPLIANCE	

* A motion for Ms. Furth's admission *pro hac vice* is submitted concurrently with this brief. C.R.C.P. 221 (6)(b).

I hereby certify that this brief complies with all the applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

(a) The brief complies with C.A.R. 28(g) in that it is 8,481 words in length, although it does exceed 30 pages, and

(b) An *amicus curiae* is not a party to the proceeding, hence its brief is not required to comply with the provisions of rule C.A.R. 28(k).

Attorneys for *Amici curiae*
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN,
OFFICE OF THE CHILD'S REPRENTATIVE, and
ROCKY MOUNTAIN CHILDREN'S LAW CENTER

Donna Furth, J.D. (Cal. State Bar # 80950)[*]
1333 Balboa Street, Suite 1
San Francisco, CA 94118
in association with
Maureen Farrell-Stevenson, J.D. (Reg. #13726)
NACC President/CEO
13123 East 16th Avenue, B390
Aurora, CO 80045

BY _____

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STATEMENT OF THE CASE[1]

This is a custody dispute regarding the child D.I.S. born October 13, 1999, to Petitioners Alan and Sheryl Sidman. In May 2001 (when the boy was 19 months old) the parents placed him in the physical custody of his paternal aunt and uncle, Respondents Mike and Renee Sidman, who live in Colorado. In January 2002, the parents consented to the appointment of the aunt and uncle as the boy's permanent legal guardians.[2]

In June 2006 (when the boy was six and half years old), the mother filed a petition in the El Paso County District Court to terminate the guardianship. (Case No. 2001 PR 1265.) Relying on *Troxel v. Granville*, 530 U.S. 57 (2000), mother urged that custody resides first in the parents, and fit parents are presumed to make decisions in the best interests of their children. Thus (she reasoned), when a natural parent seeks to terminate a guardianship, the burden is on the *guardians* to

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[1] This summary is taken from the facts and procedural history as reflected in the decisions of the lower courts, copies of which are attached as Exhibit A through D.

[2] "Whether an order for . . . custody is temporary or final is determined from the substance and effect of the order. [Citations.] Permanent orders establish parental rights that stay in effect until one party establishes a change in circumstances sufficient to support a modification. Temporary orders regarding parenting time and decision-making responsibility are intended to determine those matters pending final orders, and they do not carry res judicata (claim preclusion) effect." *In re C.T.G.*, 179 P.3d 213, 221 (Colo. App. 2007).

show by clear and convincing evidence that terminating the guardianship is *not* in the best interests of the child.

Ruling of El Paso County District Court (Hon. Barbara Hughes, Magistrate), filed June 22, 2007 in Case No. 2001 PR 1265 (Exhibit A)

In a pretrial ruling filed June 22, 2007, Magistrate Barbara Hughes concluded that the parental presumption was "inapplicable" in this case:

> Where, as here, the biological parents knowingly and voluntarily assented to the relinquishment of custody, care and nurturing of the minor child the presumption itself was relinquished. . . .Though the initial ("first") right was constitutionally vested in the biological parents, once that right was relinquished by consent or conduct of the biological parents, the analysis shifts and is appropriately *moored* to the *child* using the "best interest of the child" standard.[3]

In reaching this conclusion, the magistrate, finding no Colorado authority on the issue, relied on a California case in which the parents had also consented to the appointment of an aunt and uncle as permanent guardians, *Guardianship of L.V.*, 38 Cal.Rptr.3d 894 (Cal.App.2006). When L.V.'s parents petitioned to terminate the guardianship, the California court held that *Troxel* was inapplicable because it "dealt with judicial interference in the day-to-day child rearing decisions of a fit,

[3] Magistrate's ruling of June 22, 2007 (Exhibit A), ¶9 at 3.

custodial parent."[4] It also concluded that "'parental rights derive from a biological connection with the child *and* from acting in the role of the parent.'"[5]

Magistrate Hughes, relying on the reasoning of *L.V.*, concluded that the burden at the evidentiary hearing was on the *parents* to show, by a preponderance of the evidence, that it would be in the best interest of D.I.S. to terminate the guardianship.[6]

Decision of the El Paso County District Court (Hon. Barbara Hughes, Magistrate) filed August 22, 2007 in Case No. 2001 PR 1265 (Exhibit B)

Following an evidentiary hearing on August 7 and 8, 2007, the magistrate issued a second decision concluding that parents had not met their burden of proof. The court found, among other things, there had been "a dearth of interaction" between D.I.S. and his mother; that the parent-child relationship between them was "virtually nonexistent"; that the father's relationship was more "avuncular" than

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[4] Magistrate's ruling of June 22, 2007 (Exhibit A), ¶10 at 3, citing *Guardianship of L.V., supra*, 38 Cal.Rptr.3d at 905.

[5] Magistrate's ruling of June 22, 2007 (Exhibit A), ¶10 at 3 citing *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)

[6] Magistrate's ruling of June 22, 2007 (Exhibit A), ¶11 at 4, citing *In the Custody of A.D.C.*, 969 P.2d 708 (Colo.App.1998) (due process does not require clear and convincing evidence to support award of custody to a non-parent; award of custody to non-parent with standing may be made upon a showing by a preponderance of the evidence that it is in the best interests of the child).

parental; that D.I.S. perceived the guardians as his parental figures; and that removing the boy from the guardians' care would be "traumatic" for him.[7]

After examining the best interest factors set forth in COLO. REV. STATS. §14-10-124 (1.5) (2005),[8] the court declined to terminate the guardianship, reaffirmed the guardians' authority to make "all major decisions" regarding the child, appointed a parenting coordinator, and ruled that parents were permitted to exercise parenting time every six weeks in Colorado.[9] It also ordered the guardians to travel to Massachusetts with D.I.S. within the next twelve months to foster parenting time between the boy and his parents and, if possible, the extended family.[10]\

Decision of the El Paso County District Court (Hon. Steven Pelican, Judge) filed October 23, 2007, in Case Nos. 2001 PR 1265 and 2007 CV 3451 (Exhibit C)

The parents sought declaratory relief, challenging the constitutionality of the magistrate's rulings. (Case No. 2007 CV 3451). The district court judge (Hon. Steven Pelican, Judge) consolidated the two matters and, in a decision filed October 23, 2007, denied the motion for declaratory relief and affirmed the magistrate's

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7 Magistrate's ruling of August 22, 2007 (Exhibit B) ¶¶11-12, at 3-4.

8 Magistrate's ruling of August 22, 2007 (Exhibit B) ¶14 at 4.

9 Magistrate's ruling of August 22, 2007 (Exhibit B) ¶15 at 4-5.

10 Magistrate's ruling of August 22, 2007 (Exhibit B), ¶15 at 5.

orders of June 22 and August 22, 2007.[11] Judge Pelican concurred with the magistrate's legal conclusions, including her conclusion that "[t]he presumption recognizing the fundamental liberty interest of the biological parents in the custody, care and nurture of the child is inapplicable in the present case."[12] The court also agreed that *Troxel* and its progeny were inapplicable because "'they dealt with judicial interference in the day-to-day child-rearing decisions of a fit custodial parent. Here, the parents no longer had custody of the minor. A guardianship had been established and the guardians had provided the minor with day-to-day custody and care for several years.'"[13]

Unpublished opinion of the Court of Appeals, Division VI
in In re D.I.S., Case No. 2007 CA 1971 (Colo. App. 2009) (Exhibit D)

In an unpublished decision announced April 23, 2009 (by Judge Carparelli), the Court of Appeals, Division VI affirmed. (Case No. 2007 CA 1971). The reviewing court also found reasoning of *Guardianship of L.V.* persuasive:

> when a parent has relinquished the role of day-to-day caregiver through judicial proceedings that have resulted in a permanent order, the parent has enjoyed and exercised his or her fundamental rights and

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[11] Judge Pelican's decision filed October 23, 2007 (Exhibit C) at 3.

[12] Judge Pelican's decision filed October 23, 2007 (Exhibit C) at 2.

[13] Judge Pelican's decision filed October 23, 2007 (Exhibit C) at 3, citing *Guardianship of L.V.*, *supra*, 38 Cal.Rptr.3d at 902.

> the subsequent application of the statutory standards for terminating guardianships [i.e., the best interest standard] causes no deprivation of that parent's constitutional right to due process.[14]

The Court of Appeals acknowledged that the clear and convincing standard is applied when the state seeks to *terminate* parental rights based on a parent's unfitness; however, a permanent guardianship "does not terminate parental rights and does not require a finding that the parent is unfit." [15] Hence (it held) the preponderance standard was constitutionally sufficient in the circumstances of this case, and the burden was on the parents to demonstrate that terminating the guardianship was in D.I.S.' best interests.[16]

The parents sought certiorari, which the court granted as to the following two questions.

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[14] Decision of the Court of Appeals, Division VI announced April 23, 2009 (Exhibit D) at 8-9

[15] Decision of the Court of Appeals, Division VI, announced April 23, 2009 (Exhibit D) at 8, citing *L.L. v. People*, 10 P.3d 1271, 1276 (Colo. 2000).

[16] Decision of the Court of Appeals, Division VI announced April 23, 2009 (Exhibit D) at 9, citing *In re Parental Responsibilities of M.J.K.*, 200 P.3d 1106, 1112. (Colo.App.2008). As discussed *infra*, in *M.J.K.*, Division V of the Court of Appeals relied on *Guardianship of L.V., supra*, 38 Cal.Rptr.3d 894 to hold that when a parent had relinquished the role of day-to-day caregiver through judicial proceedings that result in a permanent order, the parent has enjoyed and exercised his or her fundamental rights and the subsequent application of the statutory standards for terminating guardianships (i.e., the best interests standard) causes no deprivation of that parent's constitutional right to due process. *M.J.K.*, 200 P.3d at 1112.

ISSUES PRESENTED FOR REVIEW

I. Whether a parent relinquishes his or her fundamental liberty interest in the care, custody, and control of his or her child by consenting to guardianship.

II. Whether it was error to place the burden upon parents to prove, by a preponderance of the evidence, that termination of non-parents' guardianship would be in the best interests of the minor child, where parents originally consented to the guardianship.

SUMMARY OF ARGUMENT

The right of a natural parent to the care, custody, and control of his or her child is among the fundamental interests entitled to heightened protection under the due process clause. The right rests upon a presumption that the natural bonds of affection impel a parent, as the natural guardian of his or her child, to make decisions in the best interests of his or her child. Accordingly, "so long as a parent provides adequate care for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, *supra*, 530 U.S. at 68-69.

However, parents' rights do not spring solely from the biological connection. They are a counterpart of the responsibilities the parents have assumed. Hence, the

constitutional deference to which a parent's interest is entitled at any particular point in time is determined by balancing the three factors set forth in *Mathews v. Eldridge*, 424 U.S 319, 335 (1976): the private interests protected by the proceeding, the risk of error created by the state's chosen procedure, and the countervailing government interest supporting use of the challenged procedure.

The private interests are those of the parents *and* the child. By consenting to a guardianship, parents do not "relinquish" their fundamental right to the care, custody and control of a child; however, by relinquishing *the day-to-day role of caregivers* through a judicial proceeding that results in a permanent order, parents necessarily consent to a shift in the constitutional deference to which their rights are due. "[T]he importance of the family relationship to the individuals involved and to society stems from the *emotional attachments that derive from the intimacy of daily association*, and from the role it plays in 'promot(ing)' a way of life' through the instruction of children [citation], as well as from the fact of blood relationship." *Smith v. OFFER*, 431 U.S. 816, 844 (1977), italics added. Thus, a developed parent-child relationship, forged in the intimacy of daily association, is entitled to greater constitutional deference than a potential parent-child relationship in a case such as *Lehr* v. *Robertson*, *supra*, 463 U.S. 248 or *Quilloin v. Walcott*, 434 U.S. 246 (1978) – or a case such as this.

This is not a case in which the state is seeking to terminate the parent-child relationship based on the parents' unfitness.[17] *Instead, parents seek to terminate the guardian-child relationship without demonstrating that doing so would be in the best interests of the child.* Where, as here, the parent-child relationship is virtually non-existent, the guardianship had endured since 2002, and the guardians have become the child's parental figures, the interests of the parents must be balanced against the significant interests of the child and the *parens patriae* interest of the state in the child's welfare. After an extended guardianship and very little parental contact, the balance necessarily shifts toward the interests of the child in preserving and protecting the relationships that serve his welfare. The trial court did not err in placing the burden on the parents to prove that the result they sought, viz.,

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[17] Contrary to the position of *amicus curiae* American Association of Matrimonial Lawyers, Colorado Chapter, the court's decision in this case will have far-reaching implications for the use of guardianships as a safety and permanency option for children. "Consensual" guardianships are used by many county departments of social services to address safety concerns identified in a parent's household in lieu of filing a dependency and neglect (D&N) case. D&N cases themselves terminate in guardianship based on preponderance of the evidence. *See, e.g., L.L. v. People,* 10 P.3d 1261,1273-1274. The ability of parents to be able to come into court at any time and demand that guardians prove by clear and convincing evidence that the guardianship remains in the child(ren)'s best interest would significantly undermine this safety and permanency option for children. Although Colorado recently promulgated rules authorizing subsidized guardianships for children who were the subject of dependency and neglect proceedings pursuant to the Federal Fostering Connections Act, see Rule Manual Volume 7, Child Welfare Services, 7.311 et seq.; 12 CCR 2509-4; 42 U.S.C. 671(a)(28), a holding that such guardianships could be disrupted at any time would quite possibly obliterate this new permanency option for children.

termination of the guardianship to which they had consented, would be in the best interests of the child.

ARGUMENT

I.

A PARENT DOES NOT "RELINQUISH" HIS OR HER FUNDAMENTAL "LIBERTY" INTEREST IN THE CARE, CUSTODY, AND CONTROL OF HIS OR HER CHILD BY CONSENTING TO A GUARDIANSHIP.

Under the due process clause of the Fourteenth Amendment, "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law . . . ." (U.S. CONST., Amend. XIV, §1.) This provision is a guarantee of *procedural* due process, but also *substantively* protects certain liberties from state infringement except when justified by the most compelling reasons. A substantive due process claim relies upon the line of cases that construe "the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Reno v. Flores*, 507 U.S. 292, 301-302 (1993).

Perhaps the oldest of the fundamental "liberty" interests is the right of parents "to direct the education and upbringing of [their] children." *Troxel v. Granville*, *supra*, 530 U.S. 57, 65, citing, *inter alia*, *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923) (right of parents to "establish a home and bring up children" and "to control the education of their own"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("liberty of parents and guardians to direct the upbringing and education of children under their control"; the liberty of "those who nurture [the child] and direct his destiny"); and *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder).

Thus, the decision of the parents in this case, in May 2001, to place their son in the care of his aunt and uncle in Colorado – and their decision in January 2002 to consent to the appointment of the aunt and uncle as the boy's permanent legal guardians -– were entitled to heightened protection under the due process clause and were presumptively in the child's best interests.

Nonetheless, the parents did not, by consenting to the guardianship, "*relinquish" their fundamental right*. As this court explained in *L.L. v. People*, 10 P.3d 1271 (2000), a guardianship is not the functional equivalent of an order

terminating parental rights. In *that case,* the juvenile court had appointed the foster parents as permanent guardians of children and prohibited contact between the children and their mother until the children turned 18. The mother petitioned for certiorari. This court acknowledged that the mother was "*losing the majority of her parental rights, including the right to the custody, care, and companionship of her children.* . . . [T]he foster parents, as permanent legal guardians, are conferred the authority to consent to marriage, to enlistment in the armed forces, and to medical or surgical treatment. They have the authority to represent the child in legal actions, and they have all the 'rights and responsibility [sic] of legal and physical custody." *Id*. at 1277. Nonetheless, despite the fact that the mother was "losing many of her parental rights," an order of permanent guardianship differs significantly from an order terminating parental rights:

> First, the trial court retained jurisdiction over the case until the children are twenty-one years old. See §19-3-205. [18] This means that Petitioner may petition to seek a modification of the disposition to regain custody or increase parenting time . . . [¶] In addition, although she loses many of her rights under the order, [the natural mother], as the parent of her minor children, retains the right to consent or withhold consent to adoption, the right to reasonable parenting time except as restricted by the court, and the right to determine the children's religious affiliation. See §19-1-103 (93).[19]

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[18] *L.L*. was a dependency case; however, a probate court also retains jurisdiction over the child as a ward of guardianship until the minor attains majority. COLO. REV. STAT. §15-14-210(1) (2001).

In re L.L., supra, 10 P.3d at 1277.

The court acknowledged the tension between the "appearance of finality" in guardianship order and the continuing jurisdiction of the court to address the mother's right to seek modification of that order; however, it concluded, both the "permanency" and "finality" of a permanent guardianship order "yield to any modifications that are subsequently made by the court as a result of substantial changes in circumstances." *Id*. "Because guardianship orders are merely a plan for permanency that is subject to change as warranted by the best interests of the children, [the mother's] residual right to petition for modification is sufficient to refute the argument that this guardianship was the functional equivalent of termination." *Id*.

Thus, in this case, the district court retains jurisdiction over D.I.S. as a ward of the guardianship until the minor's death, adoption, emancipation, attainment of majority, or as ordered by the court. See COLO. REV. STAT. §15-14-210 (1) (2001). During that period, the court retains discretion to terminate the guardianship as the

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[19] Under COLO. REV. STAT. §19-1-103(3)(93) (2001): "'[r]esidual parental rights and responsibilities' as used in article 3 of this title means those rights and responsibilities remaining with the parent after legal guardianship, guardianship of the person, or both have been vested in another person, agency or institution, including, but not necessarily limited to, the right to reasonable parenting time unless restricted by the court, and the right to determine the child's religious affiliation."

best interests of the boy require; and the parents retain the opportunity the due process clause has always guaranteed them, to develop a relationship with their son and to petition the court to regain custody. If the court restored physical and legal custody to the parents, they would again be entitled to the deference accorded to fit, *custodial* parents and their child-rearing decisions would once again be presumptively in the child's best interests.

II.

HOWEVER, BY RELINQUISHING *THE DAY-TO-DAY ROLE OF CAREGIVER* THROUGH A JUDICIAL PROCEEDING THAT RESULTS IN A PERMANENT ORDER, THE PARENT MAY IN TIME BE DEEMED TO CONSENT TO A SHIFT IN THE CONSTITUTIONAL DEFERENCE TO WHICH HIS OR HER FUNDAMENTAL RIGHT IS DUE

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A. During a guardianship, it is the *guardian* who exercises the principal parental rights and duties, the *guardian* who is entrusted with the care, custody, and control of the child – subject to the supervision of the probate court.

In Colorado, the probate court "may appoint a guardian for a minor if the court finds the appointment is in the minor's *best interest*," and one of four circumstances exists, including that the parents consented to the appointment. *In re the Matter of J.C.T.*, 176 P.3d 725, 730 (Colo. 2007), quoting COLO. REV. STAT. §15-14-204(2) (2007)

> In his or her court-appointed role, a guardian is "responsible for the ward's physical well-being," including the provision of "shelter, food, clothing, medical care or other necessities of life." *The guardian has essentially the same authority as responsibilities with regard to the child as a parent would have,* with the exceptions that the guardian typically does not provide the financial resources to support the child and serves solely at the pleasure of the appointing court.

Matter of J.C.T., at 730, italics added; *see also* COLO. REV. STAT. §15-14-208(1) (2007) ("[A] guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare.") Indeed, under section 19-1-103 (60) C.R.S. (1987), the guardian of a minor ward also has:

> the duty and authority vested by court action to make major decisions affecting a child, including, but not limited to: (a) The authority to consent to marriage, to enlistment in the armed forces, and to medical or surgical treatment; (b) the authority to represent a child in legal actions and to make other decisions of substantial legal significance concerning the child; . . . and (d) the rights and responsibilities of legal custody when legal custody has not been vested in another person, agency, or institution.[20]

Hence, during the pendency of the guardianship, it is the *guardians* who exercise the principal parental duties and responsibilities– subject to the

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[20] In addition, "[a] guardian shall act at all times in the ward's best interest and exercise reasonable, diligence, and prudence." *See* COLO. REV. STAT. §15-14-207 (1) (2001). The guardian is required to '[b]ecome or remain personally acquainted with the ward and maintain sufficient contact with the ward to know the ward's capabilities, limitations, needs, opportunities, and physical and mental health" and to "inform the court of any change in the ward's custodial dwelling or address." COLO. REV. STAT. §15-14-207 (2)(a) & (f) (2001).

supervision of the probate court. Thus, although D.I.S.'s parents did not "relinquish" their fundamental right to the care, custody and control of their son by consenting to a guardianship, they *did* relinquish their role as the child's day-to-day caregivers and thereby effect a shift in the constitutional deference to which their rights are due *during the pendency of the guardianship*.

The United States Supreme Court has developed a methodology for determining whether a particular interest is one of the protected interests deemed "fundamental" and hence entitled to heightened protection under the due process clause. First, the court makes a "'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg, supra*, 521 U.S. 702, 721. This "careful description" is concrete and particularized, rather than abstract and general. Hence, in *Glucksberg*, a case addressing a statute forbidding assisted suicide, the court rejected the view that the protected interest was "'whether there is a liberty interest in determining the time and manner of one's death'" or a "'liberty to choose how to die.'" *Id.* at p. 723. Instead, the court formulated the interest as "whether the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Id*.

Next, the court determines whether the asserted interest, as carefully described, is "'deeply rooted in this Nation's history and tradition." *Id*. at 721, citing

Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); *Snyder v. Massachusetts* 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"); and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) ("implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed"). Only if the asserted interest can be characterized as "fundamental" under this standard is the court required to proceed to the next step in the analysis – namely, weighing the competing interests to determine whether the state's interest is sufficiently compelling to justify infringement of the asserted interest. This approach "avoids the need for the complex balancing in every case." *Washington v. Glucksberg, supra*, 521 U.S. at 722.

The precise issue in this case is whether parents, having exercised their fundamental right in January 2002 to consent to a legal guardianship, have an equally fundamental right to terminate that guardianship six years later without showing that termination would be in the child's best interests.

The lower courts, finding no Colorado authority on the issue, relied on the reasoning of *Guardianship of L.V., supra*, 38 Cal.Rptr.3d 894 (2006). In *L.V.* too, the trial court had appointed legal guardians for the child with her parents' consent. When the parents petitioned to terminate the guardianship two years later, they

asserted, among other things, that they were now able to provide adequate care for the minor. The trial court denied the petition, finding that, although the parents "can, at this time, provide food, shelter and clothing for the child," it would be detrimental to the minor to terminate the guardianship. *Id*. at 898. The California court affirmed, holding that a parent's constitutional right against judicial interference with the parent's day-to-day child-rearing decisions applies to a *fit parent who has custody of the child*. Hence (it held) *Troxel* was inapplicable. L.V.'s parents did not have custody; a guardianship had been established, and the guardians had provided the minor with day-to-day custody and care for several years. Thus, because the parents "were not participating in the day-to-day parenting of the minor, they were not entitled to the constitutional protection afforded to parents acting in that role." *Guardianship of L.V., supra,* 38 Cal.Rptr.3d at 904.

The court in *L.V.* also noted that continuing the guardianship would *not* have the effect of breaking up an existing family over the family's objections.

> Rather, the refusal to terminate the guardianship continued the family unit already in existence, a result desired by all concerned except the natural parents. As did the United States Supreme Court in the situation presented in *Quilloin [v. Walcott],supra,* 434 U.S. 246, we conclude that constitutional protections did not require the trial court to find anything more than it was in the best interest of the minor not to terminate the guardianship.

Guardianship of L.V., supra, 38 Cal.Rptr. 3d at 904, citing *Quilloin, supra,* at 255.

In a decision filed in 2008 – *In re Parental Responsibilities of M.J.K.*, 200 P.3d 1106 (Colo. App. 2008) – Division V of the Court of Appeals relied on the reasoning of *Guardianship of L.V.* to conclude that where a parent relinquishes her role as day-to-day caregiver through judicial proceedings that result in a permanent order, the parent has enjoyed and exercised his or her fundamental right.[21] Thus, subsequent application of the "statutory standards for terminating guardianship . . . does not violate the parent's constitutional rights." *Id*. at 1112. The court added that to hold otherwise would give such a parent "a substantial, if not automatic, right to terminate a guardianship. . . with no regard for the perhaps significant impact on his or her children. . . . [S]uch a result would contradict Colorado's statutory scheme, which carefully balances a parent's fundamental rights against the significant interests of his or her children in a safe and stable environment and the state in the child's welfare." *In re M.J.K., supra,* 200 P.3d at 1112.

[21] The decision in *Guardianship of L.V., supra,* 38 Cal.Rptr.3d 894 was also cited with approval by the California Supreme Court in *Guardianship of Ann S.*, 202 P.3d 1089, 1122, 1123, 1124 (Cal. 2009)

B. The constitutional deference to which a parent's rights are entitled *at any particular point in time* is determined by balancing the parents' rights against the significant interests of the children in continuity and stability, and the state in the child's welfare. Early in the process, the balance tends toward the parent; after years of guardianship and lack of parental contact, the balance tends toward the child.

As the Court of Appeals recognized in *M.J.K.*, Colorado's statutory scheme, carefully balances a parent's fundamental rights against *both* the significant interests of the child in a safe and stable environment *and* the interests of the state in the child's welfare. *In re M.J.K., supra,* 200 P.3d at 1112. The process that is "due" to the parent's interest at any point in time (and hence the constitutional deference to which that interest is entitled) turns on a balancing of the competing interests.

The child has an interest in a "normal family home" with his parents if possible, which has been characterized as "important." *Santosky, supra*, 455 U.S. at 754, fn. 7. The child also has an interest in continuity and stability of his relationships with his caregivers. As the high court has also said: "It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or [other caregivers]. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,'

. . . especially when such uncertainty is prolonged." *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 513-514 (1982).

The state has a "*parens patriae* interest in preserving and promoting the welfare of the child . . ." which the high court has characterized as "urgent." *Santosky*, *supra*, 455 U.S. at 766, citing *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27 (1981).

As discussed above, the natural parents have the fundamental right to direct the education and upbringing of their children; however, parents' rights are a "counterpart of the responsibilities they have assumed." *Lehr. v. Robertson*, *supra*, 463 U.S. at 257. "It is the parent's "right, *coupled with the high duty*, to recognize and prepare the child for additional obligations." *Pierce* v. *Society of Sisters*, *supra*, 268 U.S. 510, 535, italics added.[22]

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[22] The high court observed in *Smith v. OFFER* that"[t]he scope of these rights extends beyond natural parents. The 'parent' in *Prince* itself, for example, was the child's aunt and legal custodian." *Smith*, 431 U.S. at 843, fn. 7, citing *Prince v. Massachusetts, supra*, 321 U.S. at 159 and *Moore v. City of East Cleveland*, *supra*, 431 U.S. at 504-506 (Brennan, J., concurring).

However, the rule in most states – including Colorado – is that the presumption favoring biological parents does *not* extend to legal guardians. *See In re M.G.*, 58 P.3d 1145, 1147 (Colo.App. 2002) ("First, nothing in *Troxel* requires a trial court to defer to a custodian's wishes. Second, the status of a custodian differs from that of a biological parent because one standing in loco parentis may elect to be relieved of that status and its attendant obligations."); *see also K.A.S. v. R.E.T. and S.L.T.*. 917 So.2d 1056, 1063 (Dist. Ct. Florida 2005) citing *In re M.G., supra*, and cases from other jurisdictions (the appointment of grandparents as guardians "did not bestow upon them the constitutional

Moreover, "the importance of the family relationship to the individuals involved and to society stems from the *emotional attachments that derive from the intimacy of daily association,* and from the role it plays in 'promot(ing)' a way of life' through the instruction of children [citation], as well as from the fact of blood relationship." *Smith v. OFFER, supra*, 431 U.S. at p. 844, italics added, quoting *Wisconsin v. Yoder*, 206 U.S. 205, 231-232 (1972). Hence, a developed parent-child relationship in case such as *Stanley v. Illinois, supra,* is entitled to greater constitutional deference than a potential parent-child relationship in a case such as *Lehr* v. *Robertson, supra,* 463 U.S. 248 or casual parent-child relationship in a case such as *Quilloin v. Walcott,* supra, 434 U.S. 246 – *or a case such as this*.

In *Lehr,* the parental rights of a biological father who had no custodial, personal, or financial relationship with his two-year-old daughter were held sufficiently protected by the existence of a putative father registry entitling him to notice of any adoption proceeding.

> The significance of the biological connection is that it offers the natural father an opportunity no other man possesses to develop a relationship with the child. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the

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privacy interest that natural parents enjoy regarding the care and custody of their children").

> Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Lehr, *supra*, 463 U.S. at 262.

Similarly in *Quilloin*, *supra*, 434 U.S. 246, the biological father had paid child support, given the child gifts, and taken the boy into his home for visits "on many occasions," but had never assumed the responsibilities of a day-to-day caregiver and had never legitimated the child. *Id*. at 251. The trial court permitted the child to be adopted by the mother's husband, over Quilloin's objection. *Id*. at p. 247. Quilloin appealed, claiming that, absent a finding of unfitness, "he was entitled as a matter of due process . . . to an absolute veto over the adoption of his child." *Id*. at 253. The high court disagreed, concluding that Quilloin's rights as a parent were *not* violated by application of a "best interests of the child' standard" in terminating his parental rights. *Id*. at p. 254. "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of their parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin, supra,* 434 U.S. at p. 255, quoting *Smith v. OFFER*, *supra*, 431 U.S. at 862-863, conc. opn. of Stewart, J.

However, *Mr. Quilloin had not "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."*

Quilloin, *supra*, at p. 256. Moreover, the court noted, the result of the adoption in was "to give full recognition to a family unit already in existence, a result desired by all concerned, except [Quilloin]. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption . . . [was] in the '"best interests of the child."' *Id*.

The brief of amicus curiae AAML expresses concern regarding the "chilling effect on parental willingness to utilize a voluntary guardianship if the parents' interests are not appropriately recognized and protected when it comes to the termination of that voluntary guardianship." Brief of Amicus Curiae AAML, Colorado Chapter, at 5. This concern fails to recognize that it is not the guardianship itself, but rather *the parents' actions after the guardianship is created* that leads to a shift in the balancing of interests. In other words, if a parent consents to a guardianship that lasts for six months to address a particular issue and, during that time, continues a relationship with the child, the presumption in favor of parental decision-making remains intact. On the other hand, where (as here) the parents elect to minimize their role in the child's life for a protracted period of time thereby allowing, even encouraging, the child to establish a new

home and new primary relationships, the balance shifts – as a result of the parents' actions – to the interests of the child and the state in the child's welfare.

C. The trial court did not err by placing the burden on the parents in this case to prove, by a preponderance of the evidence, that terminating the guardianship to which they had consented would be in the child's best interests.

In short, the parents in this case have not been the daily caregivers for their son since at least May 2001. In the intervening years (the magistrate found) "there had been a dearth of 'interaction' between the minor child and biological mother and the 'interrelationship' between the minor child and biological mother, in terms of a parent/child relationship, is virtually non-existent." The court also found that the father's relationship with the boy was more "avuncular" than parental. Judging from the record, the parents have shouldered virtually none of the daily responsibilities for the child's care and education and, it would appear, participated in very few (if any) of the decisions regarding the boy's welfare and education.

As in *Quilloin*, if the lower court orders are affirmed by this court, D.I.S. will remain in the family where he has lived since infancy, under the care of those he views as parental figures, a result desired by all concerned *except* the biological parents. In these circumstances, nothing more was required *to terminate Mr.*

Quillion's parental rights than a showing that the best interests of the child would be served by the adoption! It necessarily follows that no more was required in this case than a finding that the "best interests" of the child would *not* be served by terminating the guardianship – or, as otherwise phrased, in requiring parents to show that it was in the child's best interests to terminate the guardianship to which they had consented.

In fact, any custodial preference to which the parents *were* entitled at that stage of the proceeding was rebutted by evidence that terminating the guardianship would be "traumatic" for D.I.S.. Colorado courts recognize that "inherent in the bond between child and psychological parent is the risk of emotional harm to the child should that relationship be significantly curtailed or terminated." *In the Interest of E.L.M.C.*, 100 P.3d 546, 559-560 (Colo.App. 2004), citing *Custody of C.C.R.S., supra,* 892 P.3d at 258 (disrupting emotional bonds between child and psychological parents "would likely prove devastating to the child and would result in long-term, adverse psychological effects on the child"); *Root v. Allen,* 377 P.2d 117, 119 (Colo.1962) ("It is unmistakably important that children have a sense of continuity, or otherwise stated, that they are [able] to avoid the damages that result from serious separations."); and cases cited in *E.L.M.C., supra,* 100 P.3d at 559;

In fact, the court in *E.L.M.C.* concluded that *"emotional harm to a young*

child is intrinsic in the termination or significant curtailment of a child's relationship with a psychological parent under any definition of that term." 100 P.3d at 561 and, for purposes of permanent orders, "this threatened harm rebut[s] the presumption favoring the parent and constitut[es] a compelling state interest" justifying modification of the parent's parenting plan. *Id*. at 562, citing *C.C.R.S.*, *supra* (noting that a custodial dispute should be resolved in the least damaging manner to the child); *cf. In re Parental Responsibilities of Reese*, __ P.3d __, 2010 WL 376432, Colo.App., February 4, 2010 (No. 08CA2428).[23]

Notably, there is also element of estoppel here. "The damage to the child, who cannot understand what is happening, from breaking these bonds [with a psychological parent] is something which even competent psychiatrists may be

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[23] *Reese* was an appeal by the adoptive mother from a trial court order finding it in the best interests of her daughter to grant sole decision-making authority and majority parenting time to the couple who had provided her child care for several years and who, the trial court found, were the child's psychological parents. The Court of Appeal, Division II (in an opinion also by Justice Carparelli) reversed and remanded for factual findings based on clear and convincing evidence. It held that, "when a non-parent seeks an allocation of parental responsibilities contrary to the wishes of a parent, the court may not allocate parental responsibilities to the non-parent unless it complies with the *Troxel* requirement to accord 'special weight' to the parent's determination of the best interests of the child." *In re Parental Responsibilities of Reese*, __ P.3d _, 2010 WL 376432 *3. The court also held that the court must consider "all relevant factors, including those listed in section 14-10-124 (1.5) (a) and (b). In addition, the court may allocate parental responsibilities to the non-parent only if it enters findings based on clear and convincing proof that the best interests of the child justify such an allocation." *Id*., citing *Adoption of C.A.*, 137 P.3d 318, 327-28 (Colo. 2006), *L.L. v. People*, *supra*, 10 P.3d at 1277; *M.J.K.*, *supra*, 200 P.3d 1106, 1112.

unable to predict. . . . [*S]uch a breach should not be permitted lightly at the request of either of the natural parents who had their chance to take care of the child themselves and who themselves have created the unfortunate situation*." *Youmans v .Ramos*, 711 N.E.2d 165, 173, fn. 20 (Mass.1999), italics added.

The parents in this case do not dispute that the *standard* to be applied in is the best interests standard.[24] They contend that the statute is unconstitutional as applied to them unless construed to place the burden on the *guardians* to show *by clear and convincing evidence* that terminating the guardianship is *not* in the interests of the child. Opening Brief at 35. Parents argue that the preponderance standard is inappropriate because it allocates the burden equally between the parties. The parents and the guardians "are not on the same footing," they argue, because the guardians are not the constitutional equivalent of a parent. In support, they rely on *In re Adoption of C.A.*, 137 P.3d 318 (Colo. 2006) (which, they suggest, may overrule *C.C.R.S.*). Opening Brief, at 24, fn. 3.

The two cases are factually distinguishable. As discussed above, the issue in *Custody of C.C.R.S., supra*, was the standard to be applied in awarding *custody* between a parent and a nonparent. *Adoption of C.A.*, *supra*, was a case not unlike

[24] Under COLO. REV. STAT. § 15-14-210 (2008): "(1) a guardianship of a minor terminates. . . as ordered by the court. (2) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interests of the ward."

Troxel in which issue was the standard to be applied in awarding grandparent visitation over the opposition of *fit, custodial, adoptive* parents. The court held that, to overcome the presumption that fit parents will make decisions in the best interests of their children, the grandparents were required to demonstrate by clear and convincing evidence that the visitation they sought, and not the parents' determination, was in the child's best interests. It also required that any order granting grandparent visit over parental opposition, must be supported by findings of fact and conclusions of law identifying the "special factors" on which it relied. granted grandparent visitation.

The parents in this case appear to view "parental rights" as static, unalterable commodities. In fact, due process is a flexible concept: the process that is due in any particular situation at any particular point in time (and the constitutional deference that is due) is a result of the *balancing* of the interests of the parents, the child, and the state – any shift in the deference due the parents' private interests being due the parents' actions. When parents fulfill their roles as the day-to-day caregivers of their children, the balance tends toward the parent. Indeed, the law presumes that deferring to the wishes of fit, custodial parents will serve the child's interests as well, because the interests of parent and child are assumed to be consistent with one another.

However, when parents relinquish their role as day-to-day caregivers for an extended period of time and permit the parent-child relationship to languish, the balance tends toward the interests of the child, whose interest in his own welfare becomes aligned with that of the state. The totality of the circumstances must be considered in determining the process that is "due" – including the wishes of the parents, the wishes of the child, the duration of the guardianship, the nature of the relationship between the child and the parent, the nature of the relationship between the child and the guardian, and whether terminating the guardianship will be detrimental to the child. *See* COLO. REV. STAT. §14-10-124 (1998).

III.

THE FOREMOST PRIORITY IN ANY CUSTODY DISPUTE IN THIS STATE IS TO *MINIMIZE* DETRIMENT TO THE CHILD, WHICH IS PRECISELY THE RESULT ACHIEVED BY THE LOWER COURTS IN THIS CASE.

The overarching rule in this state, articulated by this court a century ago, is "*the interest and welfare of the child is the primary and controlling question by which the court must be guided*" in any controversy affecting the custody of a child. *Wilson v. Mitchell*, 111 P. 21, 25 (Colo. 1910), italics added. As the court explained there, parental custody is given preference "'not on account of any

absolute right of the father, but for the benefit of the infant the law presumes it to be in its interest to be under the nurture and care of his natural protector . . .'" *Id.*

The court has not deviated from that principle.[25] In *Custody of C.C.R.S.*, *supra*, for example, the parties were adoptive parents with whom the child had been placed shortly after birth and the biological mother, who had withdrawn her consent to the adoption. The mother argued that granting custody to nonparents absent a finding of parental unfitness violated her fundamental liberty interest, citing cases such as *Stanley* v. *Illinois*, *Quilloin*, *Lehr*, and *Santosky*, *supra*. This court did not agree: "All of these cases dealt with the termination of parental rights by which the natural parent was denied 'physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child. . . . [N]one supports

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[25] *See, e.g., Coulter v. Coulter*, 347 P.2d 494 (Colo. 1959) (paternal grandmother awarded custody over natural mother, despite mother's showing of changed circumstances); *Walcott v. Walcott*, 336 P.2d 298 (Colo. 1959) (paternal grandmother awarded custody over natural mother based on child's best interests); *Root v. Allen*, 377 P.2d 117 (Colo.1962) (natural father, even though a fit and proper person to have custody, was not entitled to restoration of custody of child where it was determined that best interests of the child would be served by permitting the child to remain with her stepfather); *Abrams v. Connolly*, 782 P.2d 651 (Colo. 1989) (custody of child does not automatically vest with non-custodial parent when custodial parent dies; court must look at best interests of the child); *In re Custody of C.C.R.S.*, 892 P.2d 246 (Colo. 1995) (parents' presumptive right to custody rebutted by a showing that it is in the child's best interest to remain in custody of nonparent).

C.R.S.'s assertion that she has a substantive custodial right to the child." *Custody of C.C.R.S., supra*, 892 P.2d at 255.

The court in *C.C.R.S.* acknowledged the split of authority nationally but reaffirmed that, in this state,"*the best interests of the child standard is the prevailing determination in a custody contest between biological parents and psychological parents. Our foremost priority is therefore to resolve the dispute in a way that minimizes the detriment to the child*." *Id*. at 257-258; *see also L.L. v. People*, 10 P.3d 1271, 1274 (recognizing children's need for stability and permanency and thus upholding placement of children in permanent guardianship of foster parents); *In re Matter of J.C.T.*, 176 P.3d 725, 731, fn. 4 (Colo. 2007) ("While *L.L.* was a case of guardianship in the juvenile court, its best interest of the child standard is also applicable in the context of probate court guardianships," citing *In re R.M.S.*, 128 P.3d 783, 787 (Colo. 2006) (discussing guardianship in probate court and finding "that paramount consideration in appointing a guardian is the best interest of the minor").[26]

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[26] The General Assembly has also recognized the primacy, in a best interests determination, of assuring children stability and continuity and of preserving the relationships between children and their psychological parents. Under COLO. REV. STAT. § 14-10-123, for example, a proceeding to seek parental responsibility may be commenced, under subdivision (1)(b), by a "person other than a parent . . . if the child is not in the physical care of one of the child's parents" and under subdivision (c) by a "person other than a parent who has had physical care of a child for a period of six

In so holding, the court has implicitly recognized that the child has an independent interest in preserving relationships that serve his or her welfare and protection – an interest which (amicus would submit) is cognizable under the due process clause. Thus the interests of the parents and the child must be balanced. As Justice Stevens wrote in *Troxel*:

> A parent's rights with respect to her child have . . . never been regarded as absolute, but rather are limited by the existence of an actual developed relationship with a child, and are tied to the presence or absence of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interest in a child must be balanced against the State's long-recognized interests as parens patriae [citations] and, critically, the child's own complementary interest in preserving relationships that serve her welfare and protection.

Troxel, 120 S.Ct. at 2072, dis. opn. of Stevens, J., citing *Santosky*, 455 U.S. at 760. That is precisely the result achieved by the lower courts in this case.

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months or more." "Subsection [(1)](c), which was adopted later . . . implements the Colorado General Assembly's recognition of 'psychological parenting.'" *In the Interest of E.L.M.C.*, *supra*, 100 P.3d 546, 553 citing *In re K.M.B.*, 80 P.3d 914, 916 (Colo.App.2003); *see also C.C.R.S.*, *supra*, 892 P.3d at 252 ("The adoption of this section constitutes legislative recognition of the effects of 'psychological parenting' upon the best interests of a child."); *In re V.R.P.F.*, 939 P.2d 512, 514 (Colo.App.1997) (this statutory grant of standing to a non-parent to seek [parental responsibilities for] a child constitutes legislative recognition of the importance of 'psychological parenting' to the best interests of a child").

CONCLUSION

For the reasons set forth above, the National Association of Counsel for Children, the Office of the Child's Representative, and the Rocky Mountain Children's Law Center – as *amici curiae* in support of the interests of children in guardianship disputes in preserving and protecting their established relationships with their psychological parents – urge that the judgment be AFFIRMED.

Respectfully submitted,

Attorneys for *Amici Curiae*
National Association of Counsel for Children,
Office of the Child's Representative, and
Rocky Mountain Children's Law Center

Donna Furth, J.D. (Cal. State Bar 80950)
in association with Maureen Farrell-Stevenson, J.D. (Regis. No. 13726)
NACC President/CEO
BY

_____
DONNA FURTH

Case Number: 2009 SC 483
Caption: In the Interest of D.I.S.

CERTIFICATE OF SERVICE

I hereby certify that on the date that appears below, a copy of the foregoing BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN IN SUPPORT OF THE INTERESTS OF THE CHILD was served by mail via United States Postal Service, postage prepaid on each of the following persons or courts at the addressed indicated below each name:

Daniel A. West
Beltz & West, P.C.
729 South Cascade Avenue
Colorado Springs, CO 80903

Leo Finkelstein, Esq.
111 East Dale Street
Colorado Springs, CO 80903

Hon. Russell Carparelli
Colorado Court of Appeals
Division VI
2 East 14th Avenue
Denver . CO 80203

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Honorable Barbara L. Hughes
El Paso County
El Paso County Judicial Building
20 East Vermijo, P.O. Box 2980
Colorado Springs, CO 80903

El Paso County
El Paso County Judicial Building
20 East Vermijo, P.O. Box 3980
Colorado Springs, CO 80903

Honorable Steven T. Pelican
County of El Paso
El Paso County Judicial Building
20 East Vermijo, P.O. Box 2980
Colorado Springs, CO 80903

I certify that the foregoing statements are true and correct of my personal knowledge and that this certification was executed on March ___, 2010 at San Francisco, California

_____
Donna Furth (Cal. State Bar No. 80950)