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**IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

NOS. 50 & 51 WAP 2017

In re: T.S. and E.S., MINORS, *Appellees*.
Appeal of: T.H.-H., Natural Mother.

AMENDED BRIEF OF JUVENILE LAW CENTER,
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA,
COMMUNITY JUSTICE PROJECT, COMMUNITY LEGAL
SERVICES, INC., NATIONAL ASSOCIATION OF COUNSEL FOR
CHILDREN, NATIONAL COALITION FOR A CIVIL RIGHT TO
COUNSEL, PENNSYLVANIA LEGAL AID NETWORK,
AND KARA R. FINCK,
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT T.H.-H.

Appeal from the August 25, 2017, Order of the Superior Court,
at Nos. 364 & 365 WDA 2017, Affirming the February 3, 2017
Order of the Court of Common Pleas of Allegheny County, Orphans' Court, at
Nos. CP-02-AP-0000208-2016, CP-02-AP-0000209-2016.

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are non-profit organizations that promote the rights of children and their families in the child welfare system or that advocate for the right to counsel in civil proceedings. *Amici* have a special interest and substantial expertise with respect to the needs and rights of court-involved children and their interest in meaningful access to justice. No person or entity other than *amici*, its members, or counsel, have (i) paid in whole or in part for the preparation of this brief, or (ii) authored this brief in whole or in part.

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Core to Juvenile Law Center's work is ensuring that children's rights to due process are protected by access to quality counsel able to fully assert a child's legal interests at all stages of the proceedings. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

American Civil Liberties Union of Pennsylvania (“ACLU-PA”) is the Pennsylvania state affiliate of the American Civil Liberties Union (“ACLU”), a nonprofit, nonpartisan organization founded in 1920 to protect and advance civil liberties throughout the United States. ACLU-PA has over 15,000 members throughout the Commonwealth of Pennsylvania. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty embodied in the United States Constitution. Those principles are primarily designed to structure the relationship between the individual and the state in a manner that affords proper protection for individual rights and ensures against any abuse of power by state officials. The ACLU has a long history of protecting rights of due process, especially the right to counsel. The ACLU believes appointment of counsel for minors affected by parental-rights-termination proceedings is essential to ensuring fair and just decision making.

The **Community Justice Project (“CJP”)** is a statewide project of the Pennsylvania Legal Aid Network. CJP’s mission is to engage in impact advocacy—such as class action litigation and administrative advocacy—on behalf of low-income families and individuals in civil matters. Much of CJP’s work is either done directly on behalf of children or for the benefit of children, such as seeking to keep families housed, assisting parents in obtaining child care assistance and health care coverage for their children, obtaining lawful status and work

authorization for children through the Deferred Action for Childhood Arrivals program, and representing families to address unlawful familial status discrimination, to give a few examples. Protecting the rights of children is a central part of CJP's work. CJP also has done extensive work to ensure access to the courts for low-income Pennsylvanians. These two interests converge in the context of a child's right to counsel in contested termination of parental rights proceedings.

For over 50 years, **Community Legal Services, Inc. ("CLS")** has served the legal needs of low-income Philadelphia residents by providing them with advice and representation in civil matters, advocating for their legal rights, and conducting community education about legal issues. The Family Advocacy Unit ("FAU") is a unit within CLS which provides high quality representation to hundreds of parents each year in Philadelphia dependency and termination of parental rights proceedings. As part of its mission, the FAU works to ensure that low-income vulnerable families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice in these extremely important proceedings. In addition to individual client representation, the FAU engages in policy advocacy and continuing legal education at both a statewide and local level to improve outcomes for children and families.

Founded in 1977, the **National Association of Counsel for Children** (“NACC”) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the wellbeing of America’s children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children’s law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

Formed in January 2004, the **National Coalition for a Civil Right to Counsel** (“NCCRC”) is an unincorporated association that seeks to advance the recognition of a right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, and child custody. NCCRC is comprised of nearly 300 participants from 38 states, including civil legal services attorneys, supporters from public interest law firms, and

members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others.

NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel, including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates on a unanimous vote) that urges federal, state and territorial governments to recognize a right to counsel in certain civil cases.¹ By promoting such a civil right to counsel, NCCRC works tirelessly to try to close the "justice gap" in the United States that has grown to the point where less than 20 percent of the legal needs of poor people are addressed.² Among its body of work is research into potential support for a civil right to counsel in the constitutions of each of the fifty states (and the District of Columbia), and a comparative analysis thereof.

The **Pennsylvania Legal Aid Network, Inc. ("PLAN")** is a client-centered 501(c)(3) organization providing leadership, funding, and support to

¹ American Bar Association Resolution 112A (Aug. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_s_sclaid_06A112A.authcheckdam.pdf.

² Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

improve the availability and quality of civil legal aid. PLAN is the state's coordinated system of organizations providing civil legal aid for those with nowhere else to turn. PLAN provides funding to civil legal aid providers across the state and offers direct services itself. It conducts numerous statewide trainings for public interest lawyers, it administers and funds a Martin Luther King Jr. Internship and Fellowship Program, and it provides leadership and support for legal aid providers in their proper accounting for funds and contract compliance.

The network of programs that PLAN funds offers a continuum of critically needed legal information, advice, and services through direct representation of low-income individuals and families facing urgent civil legal problems, with family law matters representing about 30% of the approximately 75,000 cases handled annually. This network provides direct representation to clients in every Pennsylvania county.

Professor **Kara R. Finck** is a Practice Professor of Law and the Director of the Interdisciplinary Child Advocacy Clinic at the University of Pennsylvania Law School. Professor Finck focuses her scholarship and clinical work in the area of child advocacy, family defense and interdisciplinary practice. She co-authored *Social Work and the Law* (Springer 2011) and presents nationally on best practices in legal representation for children and parents in Family Court, child advocacy and collaboration with the social work, medical and behavioral

health fields. The Interdisciplinary Child Advocacy Clinic pairs law students and social work students together to represent children and adolescents in dependency, custody and special education proceedings through a holistic model of legal representation.

II. STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici incorporate the Statement of the Scope and Standard of Review in the Brief of Appellant.

III. STATEMENT OF THE QUESTION INVOLVED

Whether, in a contested termination of parental rights hearing, children are entitled to client-directed counsel who represent their legal interests, and who do not serve the dual role of guardian *ad litem*.

Answer of the Superior Court: No.

Suggested Answer: Yes.

IV. SUMMARY OF ARGUMENT

The Adoption Act requires that a “court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents.” 23 Pa. C.S. § 2313(a). This statute is a clear and unambiguous direction that trial courts appoint an attorney to represent a child’s legal interests. *In re L.B.M.*, 161 A.3d 172, 179-80 (Pa.

2017). Despite the mandate of the Adoption Act, the trial court failed to appoint legal counsel for the children when their mother disputed termination of her parental rights. Under *L.B.M.*, this failure is structural error requiring reversal. *Id.* at 182-83. The error is no less damaging to the children’s rights here simply because they cannot direct legal counsel. Even young, preverbal children have rights that are at stake when courts consider forever severing their family units, including a right to family unity. It is the role of legal counsel, and not the guardian *ad litem* (“GAL”), to safeguard a child’s legal rights. Ensuring an attorney is dedicated to advocating those rights is too important to risk that legal counsel’s role is subsumed when a single person also serves the role of GAL. Moreover, the critical task of defending children’s legal interests is inherently compromised when the same attorney must fulfill the dual roles of GAL and legal counsel. Given the weightiness of the child’s interest in maintaining the family unit and avoiding erroneous termination of parental rights, courts cannot risk compromising the role of legal counsel who is duty-bound to defend it.³

³ *Amici* do not suggest that this is the child’s only legal interest at stake in dependency proceedings. Children have a legal interest in, among other things, achieving permanency through adoption if they cannot be reunified with their parents, 42 Pa. C.S. § 6351(f.1), and in the preservation of their relationship with their foster parents, *In re William L.*, 383 A.2d 1228. But children’s interest in maintaining family unity is the weightiest right at TPR and is the reason the General Assembly requires appointment of counsel in the first place. *In re L.B.M.*, 161 at 183.

Accordingly, the Juvenile Act places an affirmative obligation on trial courts to appoint separate counsel for children at contested TPRs in every instance.

V. ARGUMENT

Earlier this year, this Court recognized the importance of counsel who advocates for the legal interests of the child subject of a termination of parental rights hearing (“TPR”). *L.B.M.*, 161 A.3d 172.⁴ The *L.B.M.* Court recognized the clarity of the Pennsylvania statute, which unambiguously grants to children the right to legal counsel in contested TPRs. *Id.* at 180 (citing 23 Pa. C.S. § 2313(a)). The statutory origin of this right in no way diminishes its fundamental nature: at contested TPRs, “critical rights are at stake.” *Id.* at 182. As this Court held:

[O]ur General Assembly has decided that counsel for the child is required because of the primacy of children’s welfare, the fundamental nature of the parent-child relationship and the permanency of termination. The legislature has codified a process that affords a full and fair opportunity for all of the affected parties to be heard and to participate in a TPR proceeding. The denial of mandated counsel compromises the framework of the proceedings and constitutes a structural error.

Id. at 183.

Section 2313(a) of the Adoption Act does not limit the right to counsel to only those children who can direct their own representation. Indeed, counsel plays a critical role for youth who are unable to formulate a legal position: identifying and advocating for the legal interests of the child who is both the subject of and a party to the TPR. This role is compromised when a single attorney

⁴ Unless otherwise noted, all *L.B.M.* citations are to Parts I and II(A) and (C) of Justice Wecht’s opinion, joined by a majority of this Court.

also fills the role of the child's best interests GAL. This conflict is inherent and impedes effective legal interests advocacy on behalf of the child, even when the child's best and legal interests are aligned. But the role of legal counsel is too important to risk losing with a case-by-case conflict analysis. *Amici* thus urge this Court to adopt the position taken by the plurality in *L.B.M.* and hold that trial courts have an affirmative obligation to appoint separate legal counsel for children in all contested TPRs.

A. Children Are Entitled to Legal Counsel at a Contested TPR Hearing Regardless of Their Ability to Direct Representation

Terminating parental rights is a serious decision inflicting a grievous loss on families that is equivalent to the "death sentence" to a parent-child relationship. *In re Coast*, 561 A.2d 762, 778 (Pa. Super. Ct. 1989) (Tamilia, J., concurring); *see also Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (holding that the commanding private interest at stake in a termination hearing requires application of the clear and convincing evidence standard). Both parents and children "share an interest in avoiding erroneous termination," even if ultimately their interests diverge. *Santosky*, 455 U.S. at 760; *see also In re Adoption of K.G.M.*, 845 A.2d 861, 864 (Pa. Super. Ct. 2004) ("Not only are [father's] rights at stake here, but [the child's] right to a relationship with her father is also at

stake.”).⁵ The child’s interest in family integrity is a legal interest that deserves protection.⁶

For a child, the risk of an erroneous termination includes not only the loss of his parents, but his extended family members and potentially his siblings. He also risks the prospect of a lifetime in substitute care without a meaningful relationship to a permanent adoptive family. *See Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 837 (1977) (“[E]ven when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family.”). In 2012, Pennsylvania was home to 1,321 such children waiting for adoption whose parents’ rights had been terminated. U.S. DEP’T OF

⁵ This Court need not determine that children have a liberty interest in the parent-child relationship to consider the undeniable impact termination will have on some children. Regardless, *amici* note for the Court that at least one federal district court has recognized that children are entitled to counsel at termination hearings because the proceeding implicates a child’s fundamental interests in health, safety, family integrity, and physical liberty. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga. 2005) (“[T]he private liberty interests at stake support a due process right to counsel in deprivation and TPR proceedings.”); *see also In re M.S.R.*, 271 P.3d 234, 243 (Wash. 2012) (“[T]he child’s liberty interest in a dependency proceeding is very different from, but at least as great as, the parent’s.”).

⁶ The dissenting justices in *L.B.M.* noted that appointing a new attorney to serve as legal counsel for a child at the TPR stage disrupts “continuity of representation.” 161 A.3d at 188 (Baer, J., dissenting). While continuity of representation is not a right found in the law, *amici* agree that counsel can better protect children’s legal rights if they are appointed when dependency proceedings commence. Children—young, preverbal children included—have myriad rights at stake in dependency proceedings; rights that, if not upheld at permanency proceedings, may further compromise the child’s legal interests if the case reaches TPR.

HEALTH AND HUMAN SERVICES, CHILD WELFARE OUTCOMES 2009–2012 at 284 (2014), available at <http://www.acf.hhs.gov/programs/cb/resource/cwo-09-12>.

A child’s right to his family is no less weighty merely because the child is young, non-verbal, or otherwise has diminished capacity. But in many ways, a child’s inability to participate at TPR makes appointment of counsel to represent these legal interests all the more important: even “[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence . . . them; certainly children cannot.” *In re Gault*, 387 U.S. 1, 38 n.65 (1967) (quoting PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 86-87 (1967)).

American courts, juvenile and orphans’ courts included, rely upon licensed attorneys to enforce and protect parties’ legal rights. At a contested TPR, legal counsel for the child is duty bound to identify the legal rights that are implicated by the posture of the case and to advocate solely for those rights. Pa. R. Prof’l Conduct § 81.1(2) (“[A] lawyer provides a client with informed understanding of the client’s legal rights and obligations [A] lawyer zealously asserts the client’s position under the rules of the adversary system.”). Legal counsel “must assiduously study the facts of the case, thoroughly research the law, and present both facts and law vigorously to the tribunal.” Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal*

Representation for Children, 59 N.Y.U. L. REV. 76, 79 (1984). The role of legal counsel is, to a certain extent, an objective one. Counsel advocates for client-defined objectives, *see L.B.M.*, 161 A.3d at 180, or safeguards the interests that are recognized by the law when the client is unable to direct counsel, American Bar Association, *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* § 7(d) cmt. (Aug. 2011) (recommending that legal counsel for preverbal children safeguard the child’s legal interests “based on objective criteria as set forth in the laws applicable to the proceeding”) [hereinafter “ABA Model Act”].

This is the role that legal counsel is ethically bound to follow, and it is also the one required in an adversarial system founded on the existence of an impartial judge and a zealous advocate. The goal of our judicial system—child welfare proceedings included—is a reasoned, informed decision preceded by full evidentiary review. Andrew Hoffman, *The Role of Child’s Counsel in State Intervention Proceedings*, 3 CONN. PUB. INT. L.J. 326, 333 (2004); Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93, 119 (2009) (“The American conception of justice is not simply encapsulated in the notion of Due Process, but is encapsulated in a notion of Due Process defined in terms of adversarial presentation. Because the American legal system is adversarial, counsel fills an indispensable role in ensuring that

individual claimants are respected and that the requisites of due process are met.”); *see also Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 43 (1981) (Burger, J., dissenting) (recognizing the adversarial nature of TPR); *In re T.S.M.*, 71 A.3d 251, 259 (2013) (explaining that TPR demands an adversarial approach to child welfare not necessarily found when other permanent placements are pursued).

Counsel for preverbal children thus plays the same role envisioned by this court in *L.B.M.*: an advocate whose sole responsibility is to protect the legal interests of the child.

B. The Youth’s Right to Counsel is Too Weighty to Risk an Erroneous Determination that a Single Attorney Can Serve as Both Legal Counsel and GAL

Section 2313(a) is clear on its face that trial courts must appoint counsel to the child in involuntary TPRs:

The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents.

23 Pa. C.S. § 2313; *L.B.M.*, 161 A.3d at 179. This provision rests the obligation to ensure counsel for children on the trial court. But courts face both procedural and substantive hurdles to determining if a single attorney can adequately safeguard the child’s legal and best interests. If a court fails to appoint separate legal counsel when warranted, it risks forever losing the advocacy of a dedicated legal interests

attorney. Given the critical nature of the rights at stake, the stakes are too high for a trial court to get it wrong.

This express language of the Adoption Act places an affirmative obligation *on the court* to appoint counsel in every instance. *See L.B.M.*, 161 A.3d at 179 (“The lawmakers codified a mandatory appointment of counsel for contested TPR cases . . .”). This appointment is mandatory. *Id.* (“Here, the use of ‘shall’ is unambiguous and hence, mandatory. The statutory language does not suggest anything other than the general meaning of the word.”). It is not contingent on the child’s age or ability.⁷ Failure to appoint counsel for the child is structural error, requiring reversal without a separate showing of harm. *Id.* at 183. Placing the burden on another party to ask for appointment of legal counsel would subject a child’s right to counsel to the whims of another party—one whose interests are not necessarily aligned with the child’s. Only the court is positioned to safeguard the child’s right to counsel in every case.

Mandatory appointment of independent counsel makes sense given the difficulty courts and parties face when determining if a conflict exists between a child’s legal and best interests. As both the plurality and concurring opinions

⁷ Unlike appointment laws in some states, Section 2313(a) of the Adoption Act does not limit the right to legal counsel to only those children of a certain age or who can direct their own representation. *See, e.g.*, Idaho Code § 16-1614(1), (2) (requiring appointment of GAL for children under age 12, but requiring appointment of counsel for children age 12 and older); Minn. Stat. § 260C.163 subd. 3(d) (requiring children age 10 and older be informed of right to appointed counsel).

recognized in *L.B.M.*, the obligation to determine conflict does not lie with the attorney who has been serving as GAL in dependency proceedings. 161 A.3d at 181. (“Recognizing the legislative will, and in view of the risks posed by dual representation with conflicting obligations, the dependency GAL should not be employed as the child's counsel in TPR proceedings.”); *id.* at 184 (Saylor, J., concurring) (“[W]here zealous representation is made impossible because of an attorney’s duties as guardian *ad litem*—or, for that matter, any other reason—*the court* must refrain from making the appointment and should find a suitable candidate.” (emphasis added)). To hold otherwise would, as the plurality stated, “essentially make the GAL the arbiter of the child’s right to counsel.” *Id.* at 181 n.15.

But making the trial court the arbiter of the child’s right to counsel does not solve the problem, either. As the plurality recognized, the child “generally is not in a position to assert, much less to advocate, the presence of a conflict of interest.” *Id.* Unless the child already has legal counsel when the court considers if a conflict requires appointing separate counsel, no one is responsible for safeguarding the child’s right to counsel at this critical juncture.

Nor can a trial court presume that a child’s legal and best interests are indistinguishable due to a child’s inability to express his or her wishes: counsel plays a critical role in helping children, even very young ones, understand their

rights and develop and articulate a legal position. Children “develop differently and mature at different ages. Children differ in their capacity for understanding their situation and for expressing their desires.” Suparna Malempati, *Beyond Paternalism: The Role of Counsel for Children in Abuse and Neglect Proceedings*, 11 U.N.H.L. REV. 97, 123 (2013) (citations omitted). While some very young children can participate meaningfully in their cases by expressing their desires and communicating with counsel, other children cannot assist legal counsel even when they reach adolescence. In the absence of client-directed counsel dedicated to helping a child formulate a legal position, how can a trial court determine that the child is too young to express one?

C. An Attorney Faces Inherent Conflicts When Serving as Both GAL and Legal Counsel

A lawyer serving the dual roles of GAL and legal counsel faces conflicting demands, even when the child’s legal and best interests dictate the same end result. A plurality of this Court recognized this inherent conflict in *L.B.M.*: an attorney cannot follow his client’s direction while simultaneously advocating a position that he deems to be in his client’s best interest. 161 A.3d at 180-82. The conflict does not disappear when a client is very young, preverbal, or otherwise has diminished capacity. Legal counsel is duty-bound to advocate for his client’s rights that are found in the law, while a GAL must advocate for a subjective determination of the child’s best interest. Supporting each position may require

introducing different facts and legal arguments that undermine the lawyer's other role. Moreover, a lawyer acting as legal counsel is bound by ethical rules that may inhibit a GAL from meeting his obligation to advocate for his formulation of the child's best interests. Finally, collapsing the roles into a single attorney is confusing to the court and the parties at the precise moment when the court's attention to the child's legal interests is most critical.

1. Legal counsel must advocate for rights found in the law, while a GAL must be influenced by his own subjective value judgments.

Unlike legal counsel for a child, a GAL is bound by a duty to independently assess the child's best interests and to recommend to the court steps for achieving it. Pa. R. Juv. Ct. Pro. 1154. While a GAL may consider a child's legal interests in formulating a recommendation, the GAL has great discretion—and an obligation—to consider myriad other factors in determining the child's best interests. *See Annette Ruth Appell, Representing Children Representing What?: Critical Reflections on Lawyering for Children, 39 COLUM. HUM. RTS. L. REV. 573, 595 (2008)* (“The attorney has relatively free reign to identify and shape the child's interests and little accountability when acting within this attorney-client-child relationship.”). Neither Pennsylvania law nor the Rules of Professional Conduct offer guidance to lawyers who are acting as a best interests advocate. *See Recommendations of the Conference on Ethical Issues in the Legal Representation*

of Children, 64 FORDHAM L. REV. 1301, 1309 (1996) (“Nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients.”). Thus, best interests advocates must make value judgments before they take a position before the trial court, judgments that are influenced by their own personal opinions and preferences.

The inherently subjective nature of this determination is only amplified when the child cannot communicate with the GAL. Lisa Kelly & Alicia Levezu, *Until the Client Speaks: Reviving the Legal-Interest Model for Preverbal Children*, 50 FAM. L.Q. 383, 388 (2016) (“Without a client who can hold an attorney accountable, the attorney is allowed unfettered power to determine what is best for each child client.”).

It should come as no surprise, then, that bias among child welfare decisionmakers on the basis of class, race, and lifestyle is well documented. *See, e.g.*, Alice M. Hines et al., *Factors Related to the Disproportionate Involvement of Children of Color in the Child Welfare System*, 26 CHILD & YOUTH SERVS. REV. 507 (2004); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002); *see also Smith*, 431 U.S. at 833-34 (citing studies); *id.* at 834 (recognizing that decisions in the child welfare system often reflect a “bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child.”); Appell, 39 COLUM. HUM. RTS. L. REV. at 595 (“[A]ttorneys are

unlikely to share the same socio-economic background, cultural values, or kin as the children they represent; nor are they likely to know the children better than the children's parents or the children themselves.”); Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 247 (2013) (“[The best interest standard] fails to account for the fact that children grow up in a wide variety of different physical, social and cultural circumstances.” (quotation omitted)). These studies are not a condemnation of the advocates who work tirelessly to meet their young clients' needs, but rather a fact of human nature that cannot be divorced from the inherently subjective task GALs perform and the nature of pursuing a best interests standard more generally. As one child advocate has explained:

I believe that this level of discretion makes it inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children's needs, in assessing a client's best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming.

Jean Koh Peters, *The Roles and Content of Best Interest in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1507, 1526 (1996).

While the discretionary nature of best interests advocacy is built into the GAL model, courts risk sacrificing a legal interests advocate when the same attorney also serves as legal counsel for the child. An attorney's personal experiences, unrecognized biases, and even well-informed decisions on what is best for a child are not determinative of the child's legal rights.

2. Legal counsel and GAL must each introduce evidence and make legal arguments that undermine the other's position.

The roles of legal counsel and GAL require developing different facts: those that would encourage a court to find that a particular result is "best" for the child, on one hand, and those that relate to interests defined by the law. Further, advocating for a child's legal interests may undermine a GAL's position that the court should consider more subjective factors when deciding whether to terminate parental rights, and vice versa. Collapsing the two roles into one thus places an attorney in an untenable and conflicted position—serving as a GAL and undertaking to determine what she believes to be the best interests of the child, while at the same time being ethically bound to zealously advocate for the child's legal interests as counsel.

At the TPR stage of a dependency proceeding, deprivation of the right to counsel is irrevocable: termination of parental rights permanently severs the parent-child relationship, and children are given only one chance to have their legal interests heard. The legal interests at stake are too weighty to risk that they are

submerged by best interests advocacy. Recognizing the precarious situation a single attorney faces when advocating both best and legal interests, the American Bar Association in 2011 passed The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, which provides for independent legal counsel for *all* children in all child welfare proceedings. *See generally*, ABA Model Act. The ABA’s model law reflects the national trend that favors appointing legal counsel over best interests advocates. It does not condition the child’s rights on his or her age. The ABA Model Act unequivocally declares that “providing the child with an *independent* and client-directed lawyer ensures that the child’s legal rights and interests are adequately protected.” ABA Model Act § 7(c), cmt. (emphasis added).

3. *Legal counsel must protect confidentiality, while a GAL may disclose all relevant information to the court.*

Legal counsel must maintain confidential client information. Pa. R. Prof’l Conduct § 1.6. Counsel is prohibited from sharing “all information relating to the representation, whatever its source.” *Id.* cmt.3. No duty of confidentiality binds a GAL, who may be *required* to disclose client information if necessary to protect and advocate for the best interests of a child. OFFICE OF CHILDREN & FAMILIES IN THE COURTS, STANDARDS OF PRACTICE FOR PARENTS’ ATTORNEYS, GUARDIANS AD LITEM & LEGAL COUNSEL PRACTICING CHILD WELFARE DEPENDENCY CASES IN PENNSYLVANIA 25 (2011), *available at*

[http://www.ocfcpcourts.us/assets/upload/Resources/Documents/August%202015%20Updated%20typos%20Standards%20of%20Practice\(1\).pdf](http://www.ocfcpcourts.us/assets/upload/Resources/Documents/August%202015%20Updated%20typos%20Standards%20of%20Practice(1).pdf) (“GALs may find it necessary to disclose certain client communications to comply with the Child Protective Services Law, Rules of Professional Conduct or to advance the client’s best interests.”). When a lawyer serves both as GAL and counsel, it may influence what family members are willing to share. But without access to information, a lawyer cannot effectively represent his client’s legal interests.

4. Collapsing the dual roles confuses the court and the parties.

Failure to appoint separate legal counsel also risks confusing the court and the parties. Child welfare experts frequently express concern that even judges are unable to discern whether a GAL is advocating a best interests or a legal interests position. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 95 (2005) (“The problem is compounded when we begin to believe there is something special about the views her randomly assigned lawyer chose to take. Amazingly enough, courts sometimes believe the position really is the child’s, when it is nothing more than the lawyer’s.”); Martin Guggenheim, *Review: Counseling Counsel for Children*, 97 MICH. L. REV. 1488, 1504 (1999) (“[I]t may be impossible for a judge ever to be sure whether the lawyer’s arguments or recommendations are actually the product of the lawyer’s independent views or merely reflect the preferences of the client.”)

VI. CONCLUSION

Failure to appoint legal counsel for a child at a contested TPR hearing is structural error, requiring reversal in every instance. The right to counsel belongs to the child, and courts cannot rely on the other parties to protect that interest. Thus, trial courts are obligated to appoint counsel for children in every contested TPR. Collapsing the role of counsel who represents a child's *legal* interests with a GAL who advocates for the child's *best* interests impedes effective advocacy and ultimately may prevent a child from receiving the full benefit of legal counsel. Given the importance of the legal issues at stake in a termination hearing, failure to appoint independent counsel for T.S. and E.S. was reversible error. Accordingly, this Honorable Court should vacate the decision terminating T.H.-H's parental rights and remand for a new hearing in which T.S. and E.S. are represented by independent counsel to advocate their legal interests.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Amended Brief of Juvenile Law Center, American Civil Liberties Union of Pennsylvania, Community Justice Project, Community Legal Services, Inc., National Association of Counsel for Children, National Coalition for a Civil Right to Counsel, and Pennsylvania Legal Aid Network, and Kara R. Finck, as *Amicus Curiae* in Support of Appellant, T.H.-H., complies with the word count limitation of Rule 531 of the Pennsylvania Rules of Appellate Procedure. This brief contains 5,731 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: December 6, 2017

/s/ Marsha L. Levick
Marsha L. Levick