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STATE OF WASHINGTON

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Supreme Court No. 84132-2
COA No. 27394-6-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

In re: The Termination of D.R. & A.R.

STATE OF WASHINGTON,

Respondent,

v.

D.R. and A.R.,

Petitioners

FILED
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REPLY BRIEF OF MOTHER, T.R.

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A. ARGUMENT.

OTHER PARTIES CANNOT ADEQUATELY
REPRESENT CHILDREN'S INTERESTS IN
TERMINATION PROCEEDINGS.

As the Oklahoma Supreme Court noted in 1993:

[I]f the child is not represented by independent counsel, the child is caught in the middle while each attorney argues from his client's viewpoint. Although each side phrases arguments in terms of the child's best interests, each attorney desires to prevail for his client, who is not the child. But when the trial court appoints an attorney for the child, testimony is presented and cross-examination is done by an advocate whose only interest is the welfare of the child.

S.A.W., 856 P.2d 286, 289 (Okla. 1993). This declaration that only an attorney can adequately protect a child's interests in termination of parental rights proceedings (TPRs) has been reiterated by numerous state and federal courts in recent decades. See Kenny A. ex rel v. Perdue, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005); In the Matter of Jamie T.T., 191 A.D.2d 132, 136, 599 N.Y.S.2d 892 (N.Y. App. Div. 3d Dep't 1993); Roe v. Conn, 417 F. Supp. 769, 780 (M.D. Ala. 1976).

The State ignores modern jurisprudence and instead asserts that "...the child's interest is usually represented by the contending parties." Resp. Brief at 35 (citing In re Kapcsos, 468 Pa. 50, 58, 360

A.2d 174 (1976)). The State's heavy reliance on Kapcsos, which ignores the due process balancing test of Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), disregards the complicated modern realities of TPRs and children's liberty interests at stake in these proceedings. See Kapcsos, 468 Pa. at 59.¹

Moreover, the State's assertion contradicts the basic premise of the adversary system, "that the best decision will be reached if each interested person has his case presented by *counsel* of unquestionably undivided loyalty. There is no person more interested in a child custody dispute than the child." Veazey v. Veazey, 560 P.2d 382, 390-91 (Alaska 1977), overruled on other grounds, Deivert v. Oseira, 628 P.2d 575 (Alaska 1981) (emphasis added). As the State admits, TPRs are adversarial proceedings in which the State must prove by clear and convincing evidence the required elements in RCW 13.34.180. Resp. Brief at 2-3, 6-7.

Other parties in TPRs -- children's parents (who have been separated from their children by the State's own actions), the State

¹The dissent in Kapcsos noted that, given that children had a right to counsel in dependency proceedings, "since the termination of parental rights is a far more drastic result than a finding of dependency, it would be inconsistent not to require counsel at the termination proceedings." 468 Pa. at 59.

(which is beholden to its pecuniary interests) and a Guardian ad Litem (GAL) (who has neither legal training nor an attorney-client relationship with the child) -- cannot adequately protect dependent children's interests in this complex, high-stakes legal proceeding. The State has admitted as much in this case, conceding that Ms. R.'s children's liberty interests were not protected by any other party. The State fails to articulate how D.R. and A.R.'s situation is different from any other dependent child involved in a TPR.

Parents and their attorneys cannot adequately, and should not be called upon to protect dependent children's interest in TPRs. Kenny A., 356 F. Supp. 2d at 1359 (there is an 'inherent conflict of interests' between a child and his parent or caretaker in a deprivation proceeding) (citing 1976 Op. Att'y Gen. No. 76-131 at 237).

Even where the interests of parents and children may converge, the viewpoints and situations of a parent and child are always unique. Because of the state's intervention, the parent is not in a position to protect the child's interests in family integrity, physical liberty, privacy, or education leading up to, during, and after a TPR. Because the State has interfered with the parent's role of providing care to the child as well as the parent's access to the

child, the parent and his/her counsel has limited ability to protect that child from actions that may help lead to termination, such as lack of appropriate mental health and physical care, educational instability, incarceration or hospitalization, or sibling separation.

In determining whether due process required the appointment of counsel only in situations where the parents and children disagree (and thus, whether discretionary appointment of counsel would be sufficient), the In re Gault Court explored the State's view "that '[t]he parent . . . may be relied upon to protect the infant's interests.'" 387 U.S. 1, 35, 87 S. Ct. 1428. The Gault Court rejected the State's contention that parents can adequately represent their children's interests in court and that discretionary appointment of counsel is constitutionally sufficient. Id. The Court concluded that due process required that "the child and his parents must be notified of the child's right to be represented by counsel..." Id. at 41.

Again, the State's contention that parents can represent their dependent children's interests in a TPR ignores the realities of a TPR. It is quite likely, as it was here for Ms. R., that a parent has not lived with or even seen her children in months or years since the filing of the TPR. It is unclear how the State expects a parent to

represent her children's interests when the parent does not have unfettered access to her children during the dependency and almost certainly once a TPR petition has been filed.

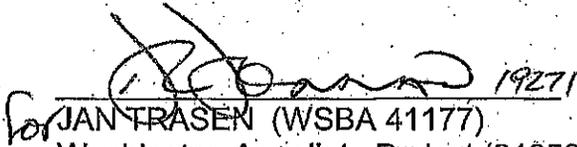
Furthermore, TPRs may involve more than one parent and these parties may have widely divergent interests. The potential for conflicting interests is multiplied further in termination cases, such as this one, where more than one child is involved. Accordingly, it is unrealistic to assume that one or both parents will adequately represent the interests of each child.

Finally, the State's argument that parents can represent a child's position in a TPR is inconsistent with all other Washington juvenile legal proceedings where the State is seeking to place a child outside of the parents' custody. In none of these proceedings is a parent called upon to represent his/her child's interests, even where those interests may not openly conflict with the child or where or where the child remains in the parent's custody during the proceeding. See, e.g., RCW 13.32A.192(1)(c) (at-risk youth); RCW 13.32A.160(1)(c) (child in need of services); RCW 71.34.710(3) (civil commitment); RCW 13.40.140(2) (juvenile offenders).

B. CONCLUSION.

Because "each attorney argues from his client's viewpoint ... [desiring] to prevail for his client, who is not the child," the unrepresented child is caught in the middle. S.A.W., 856 P.2d at 289. Dependent children in TPR proceedings -- a proceeding that can result in a childhood in the State's care -- must have an attorney to advocate for their position, protect their legal rights, and present testimony and cross-examine witnesses. S.A.W., 856 P.2d at 289. "[O]nly the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and TPR proceedings." Kenny A., 356 F. Supp. 2d at 1361.

Respectfully submitted this 24th day of November, 2010,


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