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Division III, No. 32437-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Welfare of B.P.,

STATE OF WASHINGTON/DSHS,

Respondent,

v.

H.O. (Mother),

Petitioner.

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WASHINGTON STATE
SUPREME COURT

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, LEGAL VOICE, INCARCERATED PARENTS PROJECT OF THE SEATTLE UNIVERSITY SCHOOL OF LAW AND WASHINGTON DEFENDER ASSOCIATION

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization with over 50,000 members and supporters dedicated to the preservation of civil liberties, including the fundamental right of parents to the care and custody of their children. The ACLU has participated in numerous cases supporting the constitutionally protected interest of parents as *amicus curiae*, as counsel to parties, and as a party itself.

Legal Voice is a non-profit public interest organization, founded in 1978 as the Northwest Women's Law Center. Legal Voice works in the Pacific Northwest to advance the legal rights of women through public impact litigation, legislation, and legal rights education. Since its founding, Legal Voice has participated in numerous cases as counsel or as *amicus* in which women's rights to parent their children are at stake. The organization recognizes that state interventions in families fall most heavily on women of color and low-income women—the same women who are most in need of state support and resources. Legal Voice is thus particularly concerned when state child welfare systems fail to ensure due process and appropriate services for mothers.

Inspired by the Jesuit tradition of education through service, Seattle University School of Law is committed to educating lawyers who

are leaders for a just and humane world. One of the clearest illustrations of this commitment is the establishment of the Ronald A. Peterson Law Clinic and the recent development of the Incarcerated Parents Advocacy Clinic (IPAC), in which law students provide representation to incarcerated or formerly-incarcerated parents in dependency and termination proceedings. In so doing, law students fiercely advocate for parents facing the loss of their children to have access to services and visitation necessary for reunification. The Ronald A. Peterson Law Clinic has a strong interest in this case as the interpretation and application of this field of law informs and guides the students' advocacy on behalf of their clients.

The Washington Defender Association ("WDA") is a statewide nonprofit organization whose membership is comprised of public defender agencies, indigent defenders and those who are committed to seeing improvements in indigent defense. The purpose of WDA, as stated in its bylaws, is to "to improve the administration of justice and to stimulate efforts to remedy inadequacies or injustice in substantive or procedural law." WDA advocates on behalf of access to justice issues, including issues relating to the termination of parental rights of incarcerated parents and families in the child welfare system. WDA is particularly interested

when state child welfare systems fail to provide parents due process and appropriate services in order to prevent the termination of parental rights.

II. SUMMARY OF ARGUMENT

The State violated H.O.'s fundamental liberty interest in the care, custody, and management of her child when it denied her attachment services—while providing those services to her child's foster family—and then pointed to lack of attachment as the primary basis for termination. Further, the trial court improperly weakened the burden of proof due process requires by accepting the State's *de facto* "one-year doctrine," wherein a child's lack of attachment to the parent by age one presumptively establishes parental unfitness.

Neither of these errors should be permitted to stand in legal system that explicitly emphasizes the importance of familial reunification. Our society has rejected the proposition that the State can pick and choose parents for children on the basis of who it deems might be a better fit or provide superior parenting—permitting the State to do so would not only be inhumane, it would also disproportionately affect the poor, those who are not in the "mainstream", and people of color.

III. ISSUES ADDRESSED BY *AMICI*

1. Parents have a fundamental right to the care and custody of their children under the due process clauses of the Fourteenth Amendment

to the United States Constitution and Wash. Const. art. 1, sec. 3. Here, the State refused to offer attachment services to the mother, yet provided those services to the foster family, and then claimed the mother's lack of attachment to the child was the primary barrier to reunification. Since the State actively worsened the problem that it ultimately cited as the primary basis for termination, did the trial court's reliance on lack of attachment as the primary parenting deficiency violate the statutory directive to attempt to reunify families and the mother's constitutional rights?

2. The trial court also accepted the State's argument that the window to form a healthy attachment closes after the first year and thus it was not necessary to offer attachment services to B.P.'s mother even though she had achieved sobriety, was in compliance with visits with B.P., and was successfully parenting another child. Did the trial court's ruling in effect presume the mother's unfitness based on the child's lack of attachment by age one (a problem exacerbated by the State's choice to offer services to the non-parents but not the parent), thus weakening the State's burden of proving parental unfitness, contrary to the constitutionally protected fundamental right of parents to the care and custody of their children?

IV. STATEMENT OF THE CASE

The facts pertinent to the arguments of *Amici Curiae* are contained in the statement of facts and procedure set forth in the Petitioner's Supplemental Brief and will not be repeated here.

V. ARGUMENT

A. Both the Termination Statute and Due Process Require the State to Offer Attachment Services to a Parent, and Not Just to the Foster Family, When Lack of Attachment is the Primary Barrier To Reunification

1. Due process zealously protects the interest of parents in their relationship with their children.

Under the due process clauses of the federal and state constitutions, a parent has a fundamental right to the care and custody of his or her child. Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality opinion); In re Welfare of Luscier, 84 Wn.2d 135, 138-39, 524 P.2d 906 (1974); U.S. Const. Am. XIV; Wash. Const. art. 1, sec. 3. In fact, the liberty interest of parents may be the oldest of the fundamental liberty interests recognized by the Supreme Court. Troxel, 530 U.S. at 65 (2000). This constitutionally protected interest of parents to the care and custody of their children has been described as a "sacred right" that is "more precious ... than the right of life itself." Moore v. Burdman, 84 Wn.2d 408, 411, 526 P.2d 893 (1974); In re Myricks, 85 Wn.2d 252, 253-54, 533 P.2d 841 (1975).

Since freedom of personal choice in matters of family life is a fundamental liberty interest, the courts have strictly enforced the due process requirements that apply to proceedings to terminate parental rights. Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). See also In re Custody of T.L., 165 Wn.App. 268, 280, 268 P.2d 963 (2011) ("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 [S]tate can neither supply nor hinder.'") (quoting Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)).

Similarly, consistent with the fundamental nature of parental rights and the constitutional requirement that government intrusion on that right be limited to cases where permanent deprivation of the right is proven to be absolutely necessary, "State interference with the parent's right to rear her or his children is subject to strict scrutiny, 'justified only if the [S]tate can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved.'" T.L., 165 Wn.App. at 280 (quoting In re Custody of Smith, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), aff'd sub nom. Troxel, 530 U.S. 57). And only under "extraordinary circumstances" does there exist a compelling state interest that justifies interference with parental rights. In

re Custody of Shields, 157 Wn.2d 126, 145, 136 P.3d 117 (2006) (quoting In re Marriage of Allen, 28 Wn.App. 637, 649, 626 P.2d 16 (1981)).

To effectuate the due process requirements that must accompany termination of parental rights, RCW 13.34.180(1)(d) requires the State to prove DSHS "offered or provided all and necessary services, reasonably available, capable of correcting the parental deficiencies." Due process also requires the State to prove this element by clear, cogent, and convincing evidence. In re Dependency of K.N.J., 171 Wn.2d 568, 576-777, 257 P.3d 522 (2011). Moreover, because the State seeks to permanently deprive fundamental constitutionally protected parental rights, "[A] parent has a constitutional due process right not to have his or her relationship with a natural child terminated in the absence of a trial court finding of fact that he or she is currently unfit to parent the child." In re Welfare of A.B., 168 Wn.2d 908, 920, 232 P.3d 1104 (2010); See also Santosky, supra, 455 U.S. at 760. Parental unfitness, like the element of providing all necessary services, also must be proven by the State by clear, cogent and convincing evidence. Santosky, 455 U.S. at 769. Adherence to these procedural rules is necessary to carry out the "paramount goal of child welfare legislation," which is to "reunite the

child with his or her legal parents, if reasonably possible." K.N.J., 171 Wn.2d at 577.

It follows as well from the constitutionally protected individual rights at stake that the State lacks the power to permanently deprive a parent of a child and redistribute the child to what it deems the "best family." Custody of Smith, 137 Wn.2d at 20. Neither can it make significant decisions concerning the custody of children merely because it views placement with a non-parent as a "better decision." Id. at 20.

As discussed below, these statutory and due process requirements were violated by the lower court rulings in this case.

2. DSHS and the trial court cited lack of attachment as the primary barrier to reunification and as the key to H.O.'s parental unfitness, yet contrary to applicable legal requirements, the State denied the mother attachment services and provided them to the foster family instead.

The trial court's ruling is clear that the key issue determinative of whether H.O. would be permanently deprived of her parental rights to B.P. was her alleged lack of attachment to B.P. Yet the State chose to provide the very attachment services that would be aimed at remedying that deficiency to the nonparent foster family and not to the mother, H.O. The Court should remedy this error.

The trial court's Findings, Conclusions & Order of Termination revolve around attachment, and specifically the attachment between H.O. and B.P.: although the trial court found H.O. to be an unfit parent to B.P., it concurrently found H.O. to be a fit parent to A. CP 187. The key difference, the trial court found, was attachment: "her parenting of her infant, [A.], looks positive, but that is likely because [A.] has never been out of [H.O.]'s care. The disruption in placement caused by [H.O.] by her relapse in 2012 cannot be ignored. The relationship between [H.O.] and [B.P.] is not comparable to her relationship with [A.]." CP 187.

Despite parent-child attachment being a key issue in the case, no attachment services were ever offered to H.O. by the State. CP 186. Incredibly, the State chose instead to actively weaken her bond with her child, and worsen the attachment problem it cited as the primary basis for termination, by providing attachment services to the nonparent foster family. This governmental choice to favor a child's bond with nonparents over the parent-child relationship is not just cruel; it also offends due process.

As pointed out by Judge Fearing's dissent, the fact that children have been in foster homes and developed ties to their foster parents cannot be the controlling consideration for the court. In re Welfare of Churape, 43 Wn.App. 634, 639, 719 P.2d 127 (1986). The United States Supreme

Court has recognized the dangers of allowing the State to shape the problem that forms the basis for parental rights termination:

> In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. [footnote omitted.] Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups [citation omitted], such proceedings are often vulnerable to judgments based on cultural or class bias. The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. . . . Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers, whom the State has empowered both to investigate the family situation and to testify against the parents. **Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.**

Santosky, 455 U.S. at 762-63 (emphasis added). Here, DSHS actively shaped the events that formed the basis for termination by worsening the problem that it ultimately cited as the primary basis for termination.

The State's decision to provide remedial services to the nonparent instead of the mother, unilaterally acting to destroy the parent-child relationship by attaching the child to another family also violated its statutory duty to provide remedial services aimed at reunifying the family. As the United States Supreme Court has said,

> .... the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at

> the dispositional stage that the interests of the child and the natural parents do diverge. [citation omitted.] But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.

Santosky, 455 US. at 760. The State acted contrary to this vital interest by deliberately attaching B.P. to her foster family before H.O. was found to be unfit. But the State's interest in finding the child an alternative permanent home arises only "when it is clear that the natural parent cannot or will not provide a normal family home for the child." Santosky, 455 U.S. at 767. Here, DSHS acted prematurely—proceeding as though H.O.'s fundamental liberty interest in the care, custody, and management of her daughter had simply evaporated—to the great detriment of both H.O. and her child.

In so doing, it disregarded the guiding principle behind its "parens patriae interest [which] favors preservation, not severance, of natural familial bonds." Santosky, 455 U.S. at 766-67. As Judge Fearing explained in his dissent below:

> The State of Washington must not become an authoritarian nation or a platonic utopia wherein the government may remove a child from a birth parent and deliver the child to other parents to permanently raise because the birth parent is not the choicest of parents and the child is better served by other parents.

In re Welfare of B.P., 353 P.3d 224, 133, 188 Wn.App. 113 (2015) (Fearing, J., dissent).

Existing state precedent also makes clear that H.O.'s rights were violated. In In re Welfare of C.S., 168 Wn.2d 51, 55-57, 225 P.3d 953 (2010), the Court addressed a DSHS denial of necessary training for a mother on how to handle her child's particular behavioral issues while it provided that same training to the child's foster family. C.S. noted that "[s]hort of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights." Id. at 54. C.S. pointed out that until a parent has been found unfit, the presumption that fit parents act in the best interests of their children remains intact. C.S., 168 Wn.2d at 55.

Here, at the time that DSHS initiated attachment services, it was constitutionally impermissible to presume that H.O. and B.P. were adversaries. Santosky, 455 U.S. at 760. B.P. and H.O. still shared "a vital interest in preventing erroneous termination of their natural relationship." Id. At the time that DSHS initiated attachment services with B.P.'s foster family, H.O. was nearing completion of her six month inpatient treatment, CP 182; RP 29, 34, 160, 270, 343; succeeding in treatment, CP 182; RP 30, 353; and successfully parenting A, B.P., 188 Wn. App. at 132. Thus, because the State acted to destroy her relationship with her child rather

than to preserve it, it violated H.O.'s fundamental constitutional right to parent B.P.

3. Because H.O. was succeeding in recovery and successfully parenting her youngest child at the time DSHS chose to deny her attachment services, DSHS's denial of attachment services violated her fundamental constitutional right to the care and custody of her child

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." Santosky, 455 U.S. at 753-54.

As the United States Supreme Court recognized in Santosky, H.O. has a vital interest in preventing the irretrievable destruction of her parenting relationship with B.P. Id. When the State interfered in their relationship, it was the State's responsibility to provide H.O. and B.P. with fundamentally fair procedures relating to the dependency and termination.

Refusing the key service needed to preserve the parent-child bond—attachment services—effectively forced the dissolution of H.O. and B.P.'s familial relationship. The decision to withhold this essential service needed for reunification was imposed on H.O. by the State, and was considered dispositive by the trial court. This decision functionally destroyed the parent-child relationship, was made without due process, and lacked fundamental fairness.

Washington courts have repeatedly underscored the importance of fundamentally fair procedures whenever the State interferes in family affairs, and specifically when a parent has not been offered necessary attachment services. In In re S.J., 162 Wn. App. 873, 256 P.3d 470 (2011) the Court of Appeals found termination of the mother's parental rights was improper because the State failed to offer the mother timely mental health services and attachment and bonding services. See S.J., 162 Wn. App. at 881-84. The court reasoned that attachment and bonding was a major issue identified by the trial court, and that the State acknowledged the mother's need for attachment and bonding services. S.J., 162 Wn. App. at 883-84. As in the instant case, S.J. also reasoned that the mother maintained a relationship with her other children, who did not exhibit this child's behaviors. Id. Furthermore, in S.J. as in the case at bar, the appellant

mother participated in therapeutic visitation with her child up until the time of trial. Id. at 877.

The S.J. court concluded that it was error for the State to fail to provide attachment and bonding services, id. at 881-84, and Court ruled it was DSHS's burden—not the parent's—to ensure proper services are being provided: "And, considering SJ's detachment from TH while in State care, when at the same time, TH awaited delayed services, placing the burden on TH to repair the detachment-damage seems fundamentally unfair in a constitutional due process context." Id. at 883-84. It further noted that the therapeutic visitation provided to S.J.—similar to that provided H.O. and B.P.—was not a substitute for attachment therapy. See S.J., 162 Wn. App. at 877, 881-84; see also CP 184-185; RP 61-62, 66-67, 82, 92-95, 97, 230, 289, 371.

The Court's ruling in In re Welfare of C.S., 168 Wn.2d 51, is consistent. There, this Court found termination of the mother's parental rights was improper because the State failed to offer the mother training on how to handle her child's behavioral problems, instead providing the foster family this service. See C.S., 168 Wn.2d at 55-57.

H.O.'s fundamental liberty interest in the care, custody, and management of B.P. did not evaporate simply because she was not a model parent and lost temporary custody of B.P. to the State. H.O. and

B.P. had a right to procedural protection of their relationship from unilateral destruction by the State. This right came into play when DSHS refused H.O. critical attachment services, which destroyed a weakened family bond without any procedural safeguard or opportunity to be heard. The State made this decision despite overwhelming evidence that H.O. was not permanently unfit to parent B.P. See, e.g., RP 170-174, 176-178 (testimony of chemical dependency program supervisor with whom H.O. worked that she had no current concerns about H.O.'s recovery; RP 240 (testimony of B.P.'s guardian ad litem that "[w]hen [H.O.'s] sober, she is a really good mother."); RP 273; Exhibit 12 (indicating H.O.'s compliance with all ordered services at the time of the final dependency review hearing).

B. The Trial Court's Holding Unconstitutionally Intrudes into ihe Protected Parent-Child Relationship by Accepting the State's Claim that a Child's Lack of Attachment to the Mother by Age One Necessarily Establishes Parental Unfitness.

Parental rights can only be terminated if the State proves parental unfitness by clear, cogent and convincing evidence. Instead of adhering to this constitutionally required standard, the trial court functionally accepted a new and unprecedented doctrine created by DSHS that this Court should flatly reject as unconstitutional. In its holding, the lower court relied heavily on testimony about DSHS's *de facto* "one-year doctrine," wherein

a child's lack of attachment to the parent by age one presumptively establishes parental unfitness. It was this agency position, subsequently adopted wholesale by the trial court, that resulted in the termination of H.O.'s parental rights.

The court's reasoning amounts to a *de facto* rule that if a child has not attached to his or her parent by age one, the attachment has been disrupted, the child is at risk for an attachment disorder, the parent is presumptively unfit, and attachment services are not necessary. Not only does this proposition fail to comport with the State's duty to provide remedial services under RCW 13.34.180(1), but it is also an unconstitutional infringement on the parent's fundamental right to the care and custody of her child. It allows permanent deprivation of the parent-child relationship based not on clear, cogent, and convincing proof of parental unfitness, but on an assumption that the relationship is irredeemably broken at age one regardless of the individualized circumstances and evidence to the contrary.

Moreover, the weakening of the burden of proof required by due process was further exacerbated by the State's role in helping the child attach to the nonparental family instead of fulfilling its duty to provide attachment services to the mother. This Court's guidance is needed to ensure that neither DSHS nor the lower courts continue to rely on this

unconstitutional agency-created doctrine, which here became both a proxy for satisfying the statutory requirements of RCW 13.34.180(1) and a circumvention of H.O.'s due process rights. Both the doctrine itself and the trial court's effectuation of it are wholly inconsistent with the paramount goal of child welfare legislation, "to reunite the child with his or her legal parents, if reasonably possible." K.N.J., 171 Wn.2d at 577.

VI. CONCLUSION

The State urges this Court to adopt an unprecedentedly narrow construction of due process protections for the parent-child relationship in justification of its attempt here to act as judge, jury, and executioner of the parent-child relationship. This overstep is inconsistent with well-settled law and constitutional protections designed specifically to protect our most personal and valuable relationships from undue state interference.

For the foregoing reasons and the reasons stated in H.O.'s Supplemental Brief, *amici* respectfully request that this Court reverse the trial court's order terminating H.O.'s parenting relationship with B.P.

Respectfully submitted this 24th day of March, 2016.

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No. 91757-4

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Petitioner.

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I hereby certify that on April 18, 2016, I caused to be served the foregoing *Motion by American Civil Liberties Union of Washington, Legal Voice, Incarcerated Parents Project of the Seattle University School of Law, and Washington Defender Association for Leave to File Amici Curiae Brief*, the *Brief of Amici Curiae* filed in *In re Welfare of B.P.*, Case No. 91925-9, and this *Certificate of Service* to the parties below, in the manner noted:

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Subject: RE: In re Welfare of K.M.M., No. 91757-4, Amici Filings

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Subject: In re Welfare of K.M.M., No. 91757-4, Amici Filings

Good afternoon,

Attached for filing in Case No. 91757-4, In re the Welfare of K.M.M., are the following documents:

- Motion by ACLU of Washington, Legal Voice, Incarcerated Parents Project of Seattle University School of Law, and Washington Defender Association for Leave to File Amici Curiae Brief
- Brief of Amici Curiae ACLU of Washington, Legal Voice, Incarcerated Parents Project of Seattle University School of Law, and Washington Defender Association (submitted previously in In re Welfare of BP, No. 91925-9)
- Certificate of Service

The documents are filed by Sharon J. Blackford, bar no. 25331 (sharonblackford@gmail.com / (206) 459-0441). Parties' counsel have consented to service by email and are copied above.

Sincerely,
Edward Wixler
Legal Assistant
ACLU of Washington Foundation
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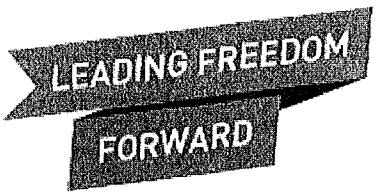

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