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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Termination of D.R. and A.R.

**BRIEF OF *AMICI CURIAE* TEAMCHILD, WASHINGTON
DEFENDER ASSOCIATION, SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS, THE DEFENDER
ASSOCIATION, AND CENTER FOR CHILDREN & YOUTH
JUSTICE**

IN SUPPORT OF PETITIONERS

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I. SUMMARY OF THE ARGUMENT

By the time the state seeks to terminate a parent's relationship with a child, the child has already likely been removed from all that is familiar to her. She will have experienced abuse and neglect, and she will inevitably be unsure who will take care of her in the future, and when – or whether – she will ever have a permanent home. Nonetheless, in a termination of parental rights (TPR) proceeding in Washington, she will likely not have a lawyer who can explain her rights to her, answer legal questions about the proceeding, present evidence to the judge, or help her effectively assert her position in the case.

This lack of legal counsel denies children a meaningful opportunity to be heard in Washington TPR proceedings. There is no doubt that children lack the ability to protect their own interests in such proceedings. They also have the most at stake, and they are the least able to proceed without legal assistance. The State's reliance on *Lassiter v. Department of Social Services*¹ is misplaced; in Washington there is no presumption against appointment of counsel for children. In actuality, law and policy in Washington favor appointment of legal counsel when state action impacts a child's critical interests.

¹ 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

While the Guardian *ad Litem* (GAL)² and counsel for the parent and state play important roles in TPR proceedings, legal counsel for the child is imperative to adequately protect a child's rights and interests, as well as maintain the integrity of the court process. Yet, the current system in Washington leads to the appointment of legal counsel for children who are the subject of TPR proceedings dependent on where they live rather than on their need for legal representation.

II. IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *Amici* in the current matter is set forth in *Amici's* Motion for Leave to File *Amici Curiae* Brief.

III. STATEMENT OF THE CASE

Amici adopt the Children's statement of the case.

IV. ARGUMENT

A. CHILDREN LACK THE ABILITY TO PROTECT THEIR OWN RIGHTS AND INTERESTS IN TPR PROCEEDINGS.

Despite the fact that children generally lack the capacity to assert and defend their own legal rights, the State argues that at least some children do not need lawyers in TPR proceedings, and that there should be a presumption against appointment of legal counsel to children in state-initiated proceedings to sever the relationship between parent and child.

² Under state law, the definition of GAL includes non-lawyer, volunteer Court Appointed Special Advocates (CASAs). RCW 13.34.030(9).

But a child's relative vulnerability increases, not decreases, the need for a lawyer. In addition, Washington law and policy favors appointing legal counsel when the state is a party and a child's critical interests are at stake.

1. The Vulnerability of Children Supports Appointment of Legal Counsel for Children in TPR Proceedings.

Important developmental differences between children and adults impact their respective abilities to proceed without legal counsel.³ As the Court of Appeals recognized recently, children "lack the experience, judgment, knowledge, and resources to effectively assert their rights."

Bellevue School Dist. v. E.S., 148 Wn. App. 205, 214, 199 P.3d 1010 (2009), *review pending* (finding a right to appointed counsel for children in truancy proceedings). Children cannot sign legally binding contracts, bring lawsuits, or even hire a lawyer to represent them in a TPR proceeding. Nonetheless, a child, who almost always has important information to offer and views of their own on the issues in a TPR proceeding, will usually be required to act as her own counsel in a formal, complex, adversarial process. From a child's point of view, TPR proceedings include an impenetrable set of timelines, jargon, and legal procedures, and the child will have few opportunities, if any, to ask questions, voice opinions, or receive guidance regarding their rights. As

³ Developmental differences between children and adults were a critical factor in the U.S. Supreme Court's recent decision to abolish the death penalty for juveniles. See *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed. 2d 1 (2005).

one child explained, “[n]o one explained anything to me. I did not even know what rights I had . . . if I had any [N]o one told me why I had been taken away from my mom. I knew there were bad things going on, but no one really explained it to me.”⁴

Asking any child to go without legal counsel in such a proceeding is troubling, but children in TPR proceedings are at a particular disadvantage. They may have already experienced traumatic abuse and neglect. They are disproportionately likely to have mental health issues.⁵ They are also more likely to have learning disabilities and to fall behind at school than their same age peers.⁶ Only about one-third of children in foster care ever graduate from high school.⁷ The drop out rate for children in foster care is double that of students in general in Washington.⁸ Unfortunately, the well documented challenges faced by A.R. and D.R. are not atypical among foster children in Washington.

The vulnerability of children in the child welfare system also underscores the dramatic imbalance of power in TPR proceedings, one of the key factors regarding appointment of legal counsel in non-criminal

⁴ Gloria Hochman *et al.*, *Foster Care: Voices from the Inside*, Pew Commission on Children in Foster Care (2004).

⁵ Neal Hafron *et al.*, *Health Services for Children in Foster Care*, UCLA Center for Healthier Children, Families, and Communities (September 2002).

⁶ Annie Pennucci, *Educational Advocacy for Foster Youth in Washington State*, Washington State Institute for Public Policy (April 2010).

⁷ Mason Burley, *High School Graduation and Dropout Trends for Washington State Foster Youth*, Washington State Institute for Public Policy (October 2010).

⁸ *See id.*

cases in Washington. *See In re Myricks*, 85 Wn.2d. 252, 255, 533 P.2d 841 (1975). The majority of children, in spite of their youth and inexperience, are not provided with a lawyer, or even a GAL trained as a lawyer. *See infra*, Section B. The child's parent, on the other hand, has a right to appointed counsel and the state not only has a lawyer, but a social worker, hired experts, and the full power of the government to back its case.

Counterintuitively, the State asserts that the child's relative vulnerability and reduced capacity for understanding legal proceedings actually *decrease* the child's need for a lawyer. *See* Respondent's Brief at 28-29. This argument inverts the traditional approach for evaluating procedural due process rights, in which courts demand that the requisite procedures be tailored to the capacities and circumstances of those who are to be heard. *See Goldberg v. Kelly*, 397 U.S. 254, 268-69, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Vulnerability and concerns about capacity are reasons to appoint legal counsel, not deny it.⁹ This is true not only as a

⁹ For example, children in Washington have an absolute right to counsel in civil commitment proceedings (RCW 71.05.300), child in need of services proceedings (RCW 13.32A.160), and at risk youth proceedings (13.32A.192(1)(c)(3)). Children also have a constitutional right to counsel in truancy proceedings. *Bellevue School Dist. v. E.S.*, 148 Wn. App. 205, 199 P.3d 1010 (2009), *review pending*. Counsel is also appointed in Washington to alleged incapacitated adults with limited funds in guardianship trials. *See* RCW 11.88.45.

matter of due process, but because it protects the integrity of the justice system. One commentator noted:

Appointing counsel allows the vulnerable to present their best arguments to decision makers whose authority is backed by the coercive power of the state. It reduces the risk of an arbitrary decision. Appointment of counsel increases the likelihood of an outcome consistent with the child's expressed preferences by partially redressing the imbalance of power between children and the adults who make decisions about them. Appointing counsel thus simultaneously enhances the likelihood of a just decision and the integrity of the justice system.

Catherine Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996).

2. Washington Law Favors Appointing Legal Counsel When the State Is a Party and a Child's Critical Interests Are at Stake.

Under Washington law, children are nearly always appointed legal counsel in proceedings where the state is a party.¹⁰ Children are appointed legal counsel in At-Risk-Youth¹¹ and Child in Need of Services Petitions,¹² where the impact on the child-parent relationship is significantly less severe. Children also have a right to appointed counsel in delinquency and civil commitment proceedings.¹³ The Court of Appeals recently found a constitutional right to appointed counsel in truancy proceedings. *See*

¹⁰ *Amici* agree with the Children and ACLU that the Washington Constitution provides a broader right to counsel for children, and note that pre-existing Washington law and practice support this conclusion. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

¹¹ *See* RCW 13.32A.192(1)(c)(3).

¹² *See* RCW 13.32A.160.

¹³ *See* RCW 13.40.140 (delinquency); RCW 71.05.300 (civil commitment).

Bellevue School Dist. v. E.S., 148 Wn. App. 205, 199 P.3d 1010 (2009),
review pending.¹⁴

Rather than, as the State suggests, presuming children are capable of representing themselves, this Court has strongly urged trial courts to appoint legal counsel for children in dependency, parentage, and custody actions. *In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005). “When adjudicating the ‘best interests of the child’ we must in fact remain centrally focused on those whose interests with which we are concerned, recognizing that not only are they often the most vulnerable, but also powerless and voiceless.” *Id.*¹⁵

The State urges the Court to apply *Lassiter* and its presumption¹⁶ to children in Washington. However, *Lassiter*, which involved adult litigants and never made mention of the different legal and factual capacities of children and adults, has never been applied to children. Even

¹⁴ *Amicus* TeamChild filed an *amicus* brief in *Bellevue School District v. E.S.* in support of E.S. *Amicus* TDA represented E.S. at one point during her case. *Amicus* CCYJ takes no position on the merits of the holding in *E.S.* now pending before the Court.

¹⁵ In *L.B.*, the Court did not reach the question of whether counsel was constitutionally required, but cited *Kenny A. v. Perdue*, 356 F.Supp.2d 1353, 1359-61 (N.D. Ga. 2005) for the proposition that it might be.

¹⁶ In *Lassiter v. Department of Social Services*, the U.S. Supreme Court decided that a case-by-case assessment is necessary to determine whether parents are entitled to legal counsel when threatened with termination of their parental rights. 452 U.S. 18, 31-32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981). *Lassiter* imposed a “presumption” against appointment of counsel in cases where physical liberty is not at stake, and applied the presumption after the balancing of interests required under *Mathews v. Eldridge*.¹⁶ See *id.* at 32-33. *Amici* agree with D.R. and A.R. that the presumption is inapplicable because physical liberty is at stake in TPR proceedings. Cf. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

if *Lassiter* meant to impose a presumption against the appointment of legal counsel for children, the developmental differences between child and adult litigants would overcome any such presumption. All of the questions a court might analyze to decide whether to appoint legal counsel for a parent (e.g. can the individual present evidence on their own?; can the individual participate actively?; can the individual understand and refute expert testimony?) will always be answered in the negative for children. Finally, Washington does not follow the *Lassiter* rule of determining on a case-by-case basis whether counsel is required for parents in dependency cases.¹⁷ *Luscier/Myricks* created an unqualified right to counsel in such cases, and focused the constitutional inquiry in Washington on the nature of the interests at stake, and the relative powers

¹⁷ See *In re Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974); RCW 13.34.070. It is also worth noting that *Lassiter* and its "presumption" have been widely rejected by other state legislatures and courts. The vast majority of states, like Washington, provide a right to counsel for parents in TPR proceedings. See Bruce Boyer, *Justice, Access to the Courts, and the right to Free Counsel for Indigent Parents: the Continued Scourge of Lassiter v. Department of Social Services*, 15 TEMP. POL. & CIV. RTS L. REV. 635 (2007). *Lassiter's* presumption has been criticized as "rest[ing] on a dubious reading of precedent." Barbara Shulman, *The Supreme Court's Mandate for Proof Beyond a Preponderance of the Evidence in Termination of Parental Rights*, 73 J. CRIM. L. & CRIMINOLOGY 1595 (1982) (quoting *The Supreme Court, 1980 Term, Lassiter v. Department of Social Services*, 95 HARV. L. REV. 93, 138 (1981)). Alaska and California have both rejected *Lassiter* under their state constitutions. See *In re K.L.J.*, 813 P.2d 276 (Ak. 1991); *In re Jay R.*, 150 Cal. App. 3d 251 (Cal. Ct. App. 1983). Justice Blackmun, in his dissent in *Lassiter*, wrote that the presumption was "not only illogical, but also marks a sharp departure from the due process analysis consistently applied heretofore." *Lassiter*, 452 U.S. at 49.

of the antagonists.¹⁸ See *Myricks*, 85 Wn.2d at 254. In so holding, this Court expressed special concern about state-filed proceedings involving vulnerable parties. See *id.* (explaining that “[t]he full panoply of the traditional weapons of the state are trained on the defendant-parent, who often lacks formal education”). Appointing legal counsel for children in TPR proceedings is fully consistent with these concerns, and the state’s discretionary approach to appointment of counsel for children in TPR proceedings is out of step with a child’s right to counsel in other contexts in Washington.

B. WASHINGTON’S DISCRETIONARY APPROACH TO APPOINTMENT OF COUNSEL DENIES CHILDREN A MEANINGFUL OPPORTUNITY TO BE HEARD IN TPR PROCEEDINGS.

The amount at stake for children who face being permanently deprived of a relationship with their biological family cannot be overstated. In a perfect world, a TPR proceeding would occur only when a safe and nurturing adoptive home awaits a child whose parents are clearly unfit. In reality, the children and families who are subject to state intervention present courts with the most complex and challenging situations

¹⁸ There is no doubt that even if *Lassiter* may have eroded the federal due process underpinnings of *Myricks/Luscier*, these decisions and their analyses are still binding precedent for state constitutional analysis in Washington. Post-*Lassiter* cases have reiterated their continuing precedential value. See *In re Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995)(holding that a right to appointed counsel applies when fundamental rights are at stake); *King v. King*, 162 Wn.2d 378, and n.3, 383-84, 174 P.3d 659 (2007)(referring to the *Myricks/Luscier* approach to appointment of counsel).

imaginable. Lawyers for children play a critical role in protecting the child's rights in these proceedings, but most children in Washington TPR proceedings do not have counsel.

1. Counsel for the Child Is Critically Important in Washington TPR Proceedings.

Amici agree with D.R. and A.R. that children need counsel in order to protect and assert their rights in Washington TPR proceedings. This is true not only because of the critical role a lawyer for a child plays in a TPR proceeding, but also because GALs and counsel for the parent and state are not effective substitutes for legal counsel for the child.

Providing Legal Advice and Counsel. Children in a TPR proceeding can count on no one other than their legal counsel to answer legal questions, protect their rights, and assert their position. The child's lawyer is the only person whose sole function is to advise, counsel, and advocate for the child. The lawyer for the child focuses only on the child's interests and impartially asserts the child's rights. RPC 1.7, Comment 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); RPC 1.2. Although a GAL may advocate for his view of the child's best interests, the GAL ultimately serves the court, not the child, and cannot give the child legal advice.

Gaining Trust through Confidentiality. The child's counsel is the only professional in a TPR proceeding who has a confidential relationship with the child. *See* RPC 1.6. We agree with other *amici* regarding the importance of this confidential relationship for children involved in TPR proceedings. *See* Brief of *Amici Curiae* National Youth Law Center et al. at 12. As lawyers for children, the experience of *Amici* is that clients frequently tell their lawyers things that they would not readily share with other professionals because of concerns about confidentiality. This information helps children's attorneys investigate and protect the client's interests and increases their ability to protect the child's safety.

Protecting Sibling Relationships. State law requires DSHS and the courts to protect sibling relationships. RCW 13.34.200(3)(2010) ("An order terminating the parent-child relationship shall include a statement addressing the status of the child's sibling relationships and the nature and extent of sibling placement, contact, or visits."); RCW 13.34.210 (2010) (following a TPR order and prior to adoption, "[t]he supervising agency shall take reasonable steps to ensure that the child maintains relationships with siblings as provided in RCW 13.34.130(3) and shall report to the court the status and extent of such relationships"). But an unrepresented child has no way to enforce these rights. Visits with siblings may be expensive to arrange and inconvenient for social workers, foster parents or

adoptive parents. Limited resources may even cause parents to compete with their children for visits. *See* RCW 13.34.130(4)(a)(ii) (2010) (“In no event shall parental visitation time be reduced in order to provide sibling visitation.”). Legal counsel for the child is necessary to make motions, review orders and ensure that crucial sibling relationships remain intact.

Advocating for the Child Pre-Trial. In *Amici’s* experience, a substantial amount of time can pass between the filing of petition to terminate a parent’s rights and trial on the merits.¹⁹ If the child has counsel, the lawyer can answer the petition, conduct discovery, make and respond to pretrial motions, as well as advocate on behalf of the child regarding important issues like visitation, sibling contact, placement, and safety leading up to trial. The lawyer can also counsel the client regarding his obligations under the preexisting dependency order.²⁰ Without legal counsel, the child has no one with the legal skills and training, or an undivided duty of loyalty to the child, to advise him and protect his rights.

Negotiating Alternatives to Termination. Because many TPR proceedings are resolved without a termination trial, the lawyer for the child plays an essential role in negotiations related to the case. In cases where the child is ultimately going to be placed with biological relatives,

¹⁹ See e.g. King County LJCR 4.3(c), which sets the trial date 150 days from the date of the petition.

²⁰ Violation of the dependency court order can lead to a motion for contempt against the child, even when the child did not have counsel when the dependency order was entered.

for example, the child's lawyer may serve as an intermediary between the parties to help avoid a high conflict termination trial and preserve family relationships. The attorney can also assist the child in pursuing alternatives to termination, such as a guardianship. While a parent's lawyer may also attempt to negotiate an alternative to termination, the child's lawyer will be the only person who can advise the child about what these alternatives mean, advocate for particular terms that are important to the child, and otherwise protect the child's interests.

Facilitating the Child's Participation at Trial. Without a lawyer, there is little chance that anyone will facilitate the child's participation in the TPR proceeding.²¹ The child may have an interest in testifying or may be subpoenaed by another party. In either case, the child needs a lawyer to help prepare for testimony, and to understand the impact testifying may have on the case. The child will also need legal counsel to make motions, present other evidence, and cross examine witnesses. The GAL, who is often not a lawyer, and may not be represented by legal counsel in the TPR proceeding, cannot substitute for counsel in this regard. Indeed, in

²¹ There is a growing emphasis on youth participation in child welfare proceedings as a means to improve outcomes and lead to fairer, more accurate court decisions. See Eric Pitchal, *Where Are All the Children? Increasing Youth Participation in Dependency Proceedings*, 12 U.C. DAVIS J. JUV. L. & POL'Y 233 (2008); Theo Liebman & Emily Madden, *Hear My Voice – Perspectives of Current and Former Foster Youth*, 48 FAM. CT. REV. 255 (2010); Laws of 2008, ch. 267, §12 (creating a pilot project in four counties to increase youth participation in dependency hearings).

cases where the GAL and child disagree, cross-examination of the GAL may be one of the most important roles a child's lawyer can play.

Appealing Adverse Decisions. Without a lawyer, a child cannot appeal a trial court's decision. In its response, the State cites *State v. Schermer*, 161 Wn.2d 927, 941, 169 P.3d 452 (2007), which is an excellent example of why legal counsel for the child is necessary. Brief of Respondent at 38. In *Schermer*, the parents filed a dependency petition asserting that they were unable to meet their son Henry's mental health and other needs. 161 Wn.2d at 934. The State successfully moved to dismiss the petition, convincing the trial court that Henry's parents were not "unfit" and that Henry was not presently in any danger. *See id.* at 937. The parents did not appeal the trial court's decision. Fortunately, Henry had a lawyer and filed an appeal. *See id.* at 938. Henry successfully appealed the trial court's ruling, arguing that a dependency finding could be based on a parent's inability to respond to a child's significant special needs, not merely the parent's "unfitness in the usual sense." *Id.* at 944. Henry's appeal underscores why appointment of legal counsel on a case-by-case basis is inadequate: there is no way the court can determine before the proceeding whether a child might later have an independent reason to appeal a TPR decision.

There Are No Effective Substitutes for Legal Counsel. While GALs play an important role in child welfare cases, they cannot substitute for counsel.²² The GAL reports to the court, and does not have duty of loyalty or confidentiality to the child. *See* RCW 13.34.105. The GAL, who is normally not a lawyer,²³ and may be a lay volunteer, presents her own opinion regarding the child's "best interest." The GAL's opinion is important, but it may also be shaped by her own set of values that may or may not align with the values of the child or the child's family. The GAL's role in a TPR proceeding is more akin to the role of a lay expert and underscores the child's need for independent legal counsel.

The State claims that a child's interests are protected by counsel for the parents and DSHS. *Amici* agree with D.R. and A.R.'s explanation of why the State's claim lacks merit. *See* Children's Joint Reply Brief, at 10-13. *Amici* have significant experience representing parents in TPR proceedings as well, and no parent's attorney, or attorney for DSHS,

²² The American Bar Association and National Association of Counsel for Children both recommend appointment of a client-directed lawyer and a GAL. *See* American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases* (1996); National Association of Counsel for Children, *NACC Recommendations for Representation of Children in Abuse and Neglect Cases* (2001). The U.S Department of Health and Human Services has issued guidelines explaining that appointment of both a GAL and a client-directed attorney for a child is the preferred approach in child protection cases. *See* LaShanda Taylor, *A Lawyer for Every Child: Client Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 610 (2009).

²³ *Amici* agree with the analysis of other amici regarding the inability of a GAL to fulfill the important role of counsel for the child in a TPR proceeding. *See* Brief of National Youth Law Center *et al.*, at 10-11.

would argue that she could also fully and ethically represent the child's interests in a TPR proceeding. Unfortunately, children in TPR proceedings are frequently caught between their parents and the state where neither party can adequately protect their interests. This is particularly problematic for the child leading up to a termination trial. Social workers, foster parents, group home staff, therapists, or visitation supervisors may be giving them information or opinions about what the future may hold and what is in their best interests. Their parents, relatives, or siblings may also be giving them conflicting information. When children do not have lawyers, there is no one giving them independent legal counsel and protecting their individual interests. The children are left out of the process while critical decisions are made that are not only potentially erroneous, but also not understood by the children who must live with them for the rest of their lives.

2. Under Washington Law, a Child May Have to Wait Years after the Termination to Obtain Legal Counsel.

A child who has waited more than three years for implementation of his permanency plan may seek reinstatement of his parent's previously terminated rights.²⁴ RCW 13.34.215. Appointment of legal counsel is

²⁴ To be eligible, a child must have not achieved his permanency plan within three years of the TPR proceeding. *See* RCW 13.34.215. The child must be at least 12 years old, although the court has discretion to appoint counsel for younger children too. *See id.*

mandatory for children eligible to seek reinstatement. *See id.* A lawyer is appointed even if there is still a GAL involved. *See id.* (discussing GAL's duty to inform child regarding his right to petition for reinstatement).

While this provision provides an important measure of protection for children who have languished in foster care, the impact of the provision is ironic and troubling. A child has a better chance of obtaining a lawyer after the child's relationship with her parent has been severed than prior to the TPR proceeding itself.

3. Current Appointment Practices in Washington Deny Due Process and Result in Justice by Geography.

Despite the important role of lawyers for children, appointment of counsel in dependency and TPR cases in Washington is inconsistent, and not based on any common set of standards.²⁵ This practice not only denies children due process, but undermines the integrity of the process because appointment of legal counsel depends largely on where the child lives, not the child's need for legal representation. A recent study by the Office of Civil Legal Aid found that in King and Benton-Franklin counties, children above age 12 (King) or 9 (Benton-Franklin) are almost always appointed

This provision was passed unanimously by both houses of the Washington legislature and given retroactive application. *See* RCW 13.34.215(14).

²⁵ Washington State Office of Civil Legal Aid, *Practices Relating to the Appointment of Counsel for Adolescents in Juvenile Court Dependency Proceedings in Washington State*, (2008). *Amicus* Washington Defender Association (WDA) has members across the state of Washington who represent children and parents in TPR proceedings. *See* Motion for Leave to File Brief Amici Curiae. The experience of WDA members is consistent with the OCLA report's conclusions.

counsel in dependency proceedings.²⁶ In many other counties, however, the same children are appointed counsel less than 33% of the time.²⁷ As one judge put it, “[t]here seem to be two models for adolescent representation: ‘almost always’ and ‘almost never.’”²⁸ The findings of this study are consistent with the experience of *Amici* across the state of Washington, and undermine the State’s position that appointment of counsel on a case-by-case basis is constitutionally acceptable.

Moreover, the study also indicates that “there is very little uniformity of practice and no universal standard” with regard to appointment of counsel.²⁹ As a result, a child in one county who requests a lawyer may be denied counsel, when in another county the same child would have been appointed a lawyer as a matter of course. This problem is a product of Washington’s flawed case-by-case approach to appointment of lawyers for children. Appointment depends on either (1) the child over 12 requesting legal counsel; (2) or the GAL or court determining legal counsel is necessary. *See* RCW 13.34.100(6). But even if the child is made aware of the right to request counsel, the court still has discretion to deny the child’s request. *See id.* In addition, it will be difficult for any child to understand how appointment of counsel will

²⁶ *See* Washington State Office of Civil Legal Aid, *supra* note 24 at 6.

²⁷ *See id.* at 6-7.

²⁸ *See id.* at 5.

²⁹ *Id.* at 9.

make a difference for her without a lawyer to advise her in the first place. While the GAL is required to report the child's wishes and make a recommendation about whether appointment of counsel is in the child's best interests, *see* RCW 13.34.150(g), GALs in Washington include non-lawyer, volunteer CASAs who are not equipped to make a determination about whether a child needs a lawyer to protect her legal rights. In addition, the court has to rely on information received from the parties, and cannot make an independent investigation into the child's need for legal counsel. The inability of the child, GAL or the Court to anticipate whether a child needs counsel prior to the start of a TPR proceeding is further evidence that a case-by-case approach is not constitutionally tenable.³⁰

V. CONCLUSION

Amici respectfully urge the Court to hold that all children who are the subject of a TPR proceeding are entitled to appointment of legal counsel in the TPR proceedings. There is no doubt children lack the ability to assert and protect their own interests in TPR proceedings, and denying children counsel under these circumstances is not only out of step with the majority of other states, it is also inconsistent with a child's right

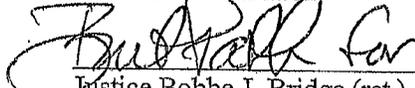
³⁰ *See King v. King*, 162 Wn.2d 378, 390 n.8, 174 P.3d 659 (2007)(rejecting a case by case approach to appointment of counsel in dissolution proceedings because it would be costly, time-consuming, and might require appointment of counsel in order to analyze and present the case for appointment).

to counsel in other contexts in Washington. Given the critical role of
counsel for the child, Washington's discretionary approach to appointment
of counsel for children in TPR proceedings is constitutionally untenable.

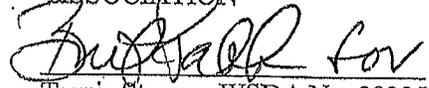
DATED this 28th day of December, 2010.

Respectfully submitted,

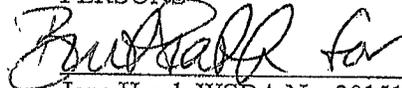
THE CENTER FOR CHILDREN
& YOUTH JUSTICE


Justice Bobbe J. Bridge (ret.),
WSBA No. 7113

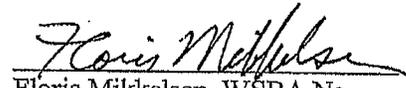
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10 DEC 28 PH 2: 01 **DECLARATION OF SERVICE**

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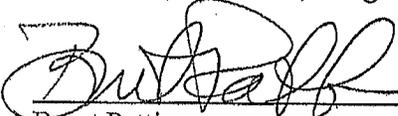
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