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SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE TERMINATION OF M.S.R. (D.O.B. 10/10/2000)  
and T.S.R. (D.O.B. 10/10/2000)

DEPARTMENT OF SOCIAL AND HEALTH SERVICES,  
STATE OF WASHINGTON,

Respondent,

v.

NYAKAT LUAK,

Appellant.

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RESPONSE BRIEF OF DSHS IN OPPOSITION  
TO BRIEFS OF AMICI CURIAE

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## I. INTRODUCTION

Amici's briefs emphasize policy arguments to support a blanket rule that counsel must be appointed for every child in every proceeding to terminate parental rights. Amici seek their blanket rule without regard to the circumstances and interests of the child, and without regard to whether the child's interests are adequately advanced by represented parties to the proceeding and the child's guardian ad litem.

Washington's lawmakers have made a different public policy choice. The Legislature's policy choice provides for the appointment of counsel when the trial court concludes that the child requires independent legal representation and requires children 12 and older to be informed of their right to request counsel. In this respect, Washington's statute provides for counsel when the child's interests are not adequately represented by other parties to the proceeding or the child's guardian ad litem, but does not require counsel to be appointed when they are.

While this is not the preferred policy choice of amici, the Legislature's choice comports with due process requirements of the federal and state constitutions, and it is the Legislature's decision to make. Rather than focusing on competing policy contentions, the Court should apply well-settled constitutional principles and hold that Washington's

statute authorizing appointment of counsel for children in proceedings to terminate parental rights satisfies the due process rights of children.

## II. ARGUMENT

### A. Amici's Policy Arguments Are Appropriate For Consideration By The Legislature, Not The Court

The policy arguments of amici fail to focus on the issue raised by Ms. Luak—whether there is a constitutional right to a stated interests attorney for every child in every hearing to terminate parental rights.<sup>1</sup> Instead, the arguments describe policy reasons why, in amici's view, appointment of counsel for all dependent children in various phases of the foster care system would be beneficial for children and society. *E.g.*, Br. of Mockingbird Soc'y at 4-5, 11-15 (arguing that the lack of an attorney contributes to foster children's feelings of powerlessness and victimhood and anti-social behavior, and that it is in the financial interest of the State to provide support and services for children, including appointed counsel); Br. of Washington State Psychological Ass'n at 4-10, 15-16 (arguing that provision of counsel is a matter of "public interest," in a child's best interest, and ultimately benefits society).

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<sup>1</sup>There are two dominant models for the role of counsel for children in termination proceedings--to represent the child's stated interest, in other words the child's personal choice, or to represent the child's best interest. Ms. Luak and amici endorse the stated interest model. Luak Supplemental Brief at 13; Br. of Mockingbird Soc'y at 1 (describing need for counsel to advocate for children's "express interests and wishes"); Br. of ACLU of WA at 16 (function of child's lawyer is to advocate for the child's position).

In addition, the studies and articles cited by amici are not limited to considering public policy reasons for representation of children in termination proceedings, and instead offer policy arguments concerning representation of dependent children in a wider array of contexts, or otherwise are inapposite. At most, the studies provide information that policymakers such as the Legislature could critically evaluate and use in considering legislation to address this issue.

For example, amicus Washington State Psychological Association argues that research shows legal representation of children in dependency and termination hearings leads to faster resolution of cases and increased awareness by children about their legal rights.<sup>2</sup> Br. of Washington State Psychological Ass'n at 5, 7 (citing Lucy Johnston-Walsh, et al., *Assessing the Quality of Child Advocacy in Dependency Proceeding in Pennsylvania* (Oct. 2010), [http://www.jlc.org/images/uploads/Assessing\\_Quality\\_of\\_Child\\_Advocacy.pdf](http://www.jlc.org/images/uploads/Assessing_Quality_of_Child_Advocacy.pdf) (last visited Sept. 24, 2011)). The document

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<sup>2</sup> The Washington State Psychological Association mistakenly suggests that the efforts of Court Appointed Special Advocates (CASAs) on behalf of children are ineffective or even harmful. Br. of Washington Psychological Ass'n at 11 (citing Caliber Assocs., *Evaluation of CASA Representation: Research Summary* (Jan. 20, 2004), [http://nc.casaforchildren.org/files/public/community/programs/Statistics/caliber\\_casa\\_study\\_summary.pdf](http://nc.casaforchildren.org/files/public/community/programs/Statistics/caliber_casa_study_summary.pdf) (last visited Sept. 24, 2011) (*Research Summary*)). In fact, the study cited warns against relying on its results, because children assigned CASAs were not randomly selected, but instead involved more severe cases. *Research Summary* at 2, iv-v. The results of this study are also contradicted by the findings of numerous academic articles and an audit by the United States Department of Justice Office of the Inspector General. See Court Appointed Special Advocates for Children, *Evidence of Effectiveness*, [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5332511/k.7D2A/Evidence\\_of\\_Effectiveness.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5332511/k.7D2A/Evidence_of_Effectiveness.htm) (last visited Sept. 24, 2011).

cited is not a psychological study, but the results of a survey of lawyers and social workers in Pennsylvania. *Id.* at 1. The survey does not even attempt to compare outcomes between represented and non-represented children in dependencies and hearings to terminate parental rights. Rather, the report primarily focuses on what model of attorney representation to use and perceived flaws in the Pennsylvania foster care system, which already required appointment of counsel for children. *Id.* at 2-3. Thus, rather than informing the issue presented to this Court, the cited report serves as a cautionary tale to those who believe that universal appointment of counsel for children will solve the challenges faced by the foster care system.

Similarly, another study cited by several amici to support an argument that appointment of counsel to children leads to beneficial outcomes is inapposite. *E.g.*, Br. of Mockingbird Soc’y at 14 n.20 (citing Andrew E. Zinn & Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County* (Chicago: Chapin Hall Center for Children at the University of Chicago 2008)) (Palm Beach Study). The Palm Beach study is of limited usefulness here. First, it examined the effect of providing attorneys in both dependencies and hearings to terminate parental rights, while this case is limited to termination hearings. Palm Beach Study at 1. This distinction is

particularly significant, given the Study's recognition of "the apparent impact of case plan design on the timing of permanency." *Id.* at 31. Case plan design, or permanency planning, occurs in the context of the dependency proceeding, not the termination proceeding. Moreover, the Palm Beach Study does not support the argument that appointed counsel protects a child's interest in family integrity. The results showed an increase in terminations of parental rights and that the children's attorneys were more likely to seek earlier petitions for termination of parental rights. *Id.* at 2, 9-11, 32. Indeed, the study noted complaints by social workers that attorneys for the children were less willing to give parents a chance to improve in order to reunify the family, particularly with younger children. *Id.*

Amici's policy arguments largely demonstrate that the question of when and how dependent children should be represented in child welfare proceedings is the subject of considerable debate, and as discussed in Section B below, considerable variation among the states. *See, e.g.,* Randi Mandelbaum, *Revisiting The Question Of Whether Young Children In*

*Child Protection Proceedings Should Be Represented By Lawyers*, 32 Loy. U. Chi. L.J. 1 (2000)<sup>3</sup>.

As some amici or the sources they cite discuss, opinions and policies regarding attorney representation of children in foster care are receiving substantial attention in Washington and nationwide. *E.g.*, Br. of Children & Youth Advocacy Clinic at 7-8 (noting Washington Supreme Court Commission on Children in Foster Care, at behest of Washington Legislature, has adopted recommendations regarding caseload and performance standards for lawyers representing children in dependencies and hearings to terminate parental rights)<sup>4</sup>; Br. of KidsVoice<sup>5</sup> at 9-10 (noting that the American Bar Association has passed a Model Act on

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<sup>3</sup> The article demonstrates the unsettled nature of this issue as a policy question. The author of this article ultimately concludes that children should have attorneys to represent them in dependency and termination proceedings, but does not analyze whether such representation is a constitutional right. Mandelbaum, 32 Loy. U. Chi. L.J. at 89-90.

<sup>4</sup> These standards are applicable when attorneys are appointed for children in parental rights termination proceedings. *See* "Meaningful Legal Representation for Children and Youth in Washington's Child Welfare System: Standards of Practice, Voluntary Training, and Caseload Limits in Response to HB 2735" (Report) Executive Summary, at 3 (standards designed to be applicable "any time that an attorney is appointed to represent a child") available at [http://www.naccchildlaw.org/resource/resmgr/news\\_items/meaningful\\_legal\\_representat.pdf](http://www.naccchildlaw.org/resource/resmgr/news_items/meaningful_legal_representat.pdf) (last visited Oct. 3, 2011). In light of the intended scope of the Report, and indeed its explicit language, the Department respectfully disagrees that the Report "clearly recommended that all children in dependency and TPR proceedings have a right to legal representation," as Amici KidsVoice claims, or that its adoption connotes the Commission, the Department, or the Attorney General's Office having taken such a position. Br. of KidsVoice at 12 (emphasis in original); Luak Supplemental Reply Br. at 1.

<sup>5</sup> KidsVoice filed a joint amicus curiae brief with The National Center for Youth Law, First Star, The National Association of Counsel for Children, Children's Law Center of California, The Children's Advocacy Institute, Juvenile Law Center, and Professors Michael Dale and Theodor Liebmann. For convenience, the Department refers only to amicus curiae KidsVoice.

child representation in abuse, neglect, and dependency proceedings); Br. of Washington State Psychological Ass'n at 12 (citing study finding that "a consensus about how lawyers should represent children is beginning to emerge"); Br. of ACLU of WA<sup>6</sup> at 19 n.24 (noting the "growing emphasis on youth participation in child welfare proceedings . . .").

Indeed, since the 2009 hearing to terminate parental rights in this case, the Washington Legislature has also amended the statute governing guardians ad litem and appointment of attorneys, requiring children age 12 and over to be advised of their right to request an attorney and requiring courts to attempt to match special-needs children with guardians ad litem with specific training. Laws of 2010, ch. 180, § 2.

Regardless of the on-going and evolving public policy debates regarding representation of children in various child welfare proceedings, these studies do not provide legal analysis supporting the remarkable constitutional claim made by Ms. Luak – that due process requires appointment of counsel for every child in every termination proceeding.

The important public policy issues raised by the amici are, therefore, more appropriately addressed to the Legislature, which has the

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<sup>6</sup> American Civil Liberties Union of Washington ("ACLU of WA") filed a joint amicus curiae brief with TeamChild, Washington Defender Association, Society of Counsel Representing Accused Persons, and The Defender Association. For convenience, the Department refers only to amicus curiae ACLU of WA.

ability to assess these changing attitudes and policies regarding representation of children. This Court, however, faces a constitutional issue that is resolved by well-settled constitutional analysis, examining whether due process mandates universal appointment of children's counsel at state expense, beyond the discretionary appointment already provided by Washington's statute.

**B. Other States' Legislative Choices Regarding Counsel For Children In Hearings To Terminate Parental Rights Do Not Establish A Constitutional Right To Counsel In Washington**

Like counsel for Ms. Luak, amici KidsVoice suggests that Washington is "out of step with the laws and policies of a majority of the states". Br. of KidsVoice at 3. First, of course, the legislative choices of other states do not determine whether there is a constitutional right to appointed counsel for all children in all proceedings to terminate parental rights in Washington.

Second, the statistics that amici KidsVoice provides are at odds with its conclusion. Although amici and Ms. Luak assert that stated interest attorneys are required to satisfy children's due process rights in termination proceedings, amici KidsVoice identifies just eighteen states that provide children with stated interest attorneys. Br. of KidsVoice at 4 n.7. Moreover, KidsVoice identifies ten other states plus the District of Columbia that provide children with guardians ad litem who are attorneys.

Br. of KidsVoice at 4 n.6. However, because guardians ad litem advocate for children's best interests – rather than their stated interests – these states fail to provide what Ms. Luak and amici contend due process requires. Thus, only a minority of states have, by statute, adopted the stated interest attorney model of advocating for children's interests in parental rights termination proceedings. Washington thus stands with the majority of states in this legislative debate.

Third, examining other states' legislative policy choices with respect to representation of children in child welfare proceedings reveals a wide range of models, befitting the nature of the issue as a legislative choice. The *National Report Card*, which cites to the statutory provisions of each state, shows a variety of state approaches to such hearings. See generally First Star & Children's Advocacy Institute, *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children* (2d ed. 2009) (hereinafter "*National Report Card*"), at 24-135.

Virtually every state, including Washington, provides for the appointment of an adult to communicate the stated interests of the child to the court and to advocate for the best interests of the child, usually called a

guardian ad litem.<sup>7</sup> *Id.* Some states require that the guardian ad litem be an attorney, in which role the attorney advocates for the best interest of the child rather than the child's stated interest. *E.g., id.* at 24, 38, 112 (discussing statutes of Alabama, Colorado, and South Dakota). Some states, like Washington, do not require that the guardian ad litem be an attorney, but provide for the discretionary appointment of counsel for the child, the guardian ad litem, or both. *E.g., id.* at 42, 46, 56 (discussing statutes of Delaware, Florida, and Illinois). Some states appoint an attorney as a guardian ad litem, but provide for discretionary appointment of a second attorney to advocate for the stated interest of the child. *E.g., id.* at 60, 62 (discussing statutes of Iowa and Kansas). Some states require appointed counsel only for children of a certain age. *E.g., id.* at 76, 132 (discussing statutes of Minnesota and Wisconsin). Yet another model involves appointing an attorney specifically to advocate for the stated interests of the child, the approach that Ms. Luak and amici contend is constitutionally required. *E.g., id.* at 90 (discussing New Jersey statute). The variety of models described in the *National Report Card* shows that Washington is not an outlier with respect to considering the interests of

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<sup>7</sup> Many states, including Washington, allow for a volunteer Court Appointed Special Advocate (CASA) to fulfill the role of guardian ad litem. The CASA program was pioneered by King County Superior Court Judge David Soukup in 1977 and has since grown into a network of over 955 CASA and guardian ad litem programs in 49 states. *See* [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About\\_Us\\_\\_CASA\\_for\\_Children.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm) (last visited Sept. 22, 2011).

children in hearings to terminate parental rights, it is just one point on the wide spectrum of approaches used by state legislatures.

Washington's approach is also consistent with international law. In Washington, every child is appointed a guardian ad litem, who is required to report to the court what the child's *stated interest* is and recommend to the court what is in the child's *best interest*.<sup>8</sup> RCW 13.34.105(1)(b), (f). This approach fully comports with the various international treaties on children's rights described by amici KidsVoice. Br. of KidsVoice at 14-18.

These treaties require that children be provided with the opportunity to be heard, either directly or through a representative, in a manner appropriately tailored to the child's age, maturity, and ability to communicate. For example, the United Nations Convention on the Rights of the Child provides that signatories "shall assure to a child who is capable of forming his or her own views, the right to express those views freely," that the child's views are to be given "due weight in accordance with the age and maturity of the child," and that, for that purpose, the child shall be provided with "the opportunity to be heard . . . either directly or through a representative . . . ." Convention on Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989) article 12, *available at*

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<sup>8</sup> A guardian ad litem must be appointed for the child, unless the court, for good cause, finds appointment unnecessary. RCW 13.34.100(1).

<http://www2.ohchr.org/english/law/crc.htm> (last visited Sept. 22, 2011).<sup>9</sup>

Congress has not yet ratified the Convention and the United States is not a signatory to the treaty. Moreover, contrary to any implication that international treaties require the appointment of attorneys for children in termination proceedings, the Department is aware of no authority that interprets these treaties to have such a requirement, and KidsVoice cites none.

**C. Washington's Procedures For Termination Of Parental Rights Satisfy Due Process**

Washington provides substantial procedural protections for children's interests in termination of parental rights proceedings. *See* Supplemental Brief Of Respondent Department Of Social And Health Services (Suppl. Resp. Br.) at 4-6. In short, the allegation of parental unfitness is subject to a full evidentiary hearing in which attorneys represent both sides of the adversarial dispute over parental unfitness, unfitness must be proved by clear, cogent, and convincing evidence, and a guardian ad litem advocates the child's best interests and communicates

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<sup>9</sup> *See, also*, African Charter on the Rights and Welfare of the Child, Article 4(2) OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999, (stating where child "is capable of communicating his or her own views," an opportunity shall be provided for those views "to be heard either directly or through an impartial representative") available at [http://www.africa-union.org/official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHLD.pdf](http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHLD.pdf), (last visited Sept. 22, 2011); *accord*, South Asian Association for Regional Cooperation "Convention on Regional arrangements for the Promotion of Child Welfare in South Asia", Art. IV(4), available at [www.saarc-sec.org/userfiles/conv-children.pdf](http://www.saarc-sec.org/userfiles/conv-children.pdf), (last visited Sept. 22, 2011).

the child's stated interests to the court. *See* RCW 13.34.090 (parent's statutory right to counsel); RCW 13.34.190 (criteria for parental rights termination); RCW 13.34.105 (role of guardian ad litem). Additionally, RCW 13.34.100 authorizes the appointment of counsel for children when doing so is deemed necessary in the sound discretion of the trial court. Washington's termination procedures, including RCW 13.34.100, more than satisfy constitutional due process.<sup>10</sup>

In a case addressing the exact type of hearing here, the United States Supreme Court held that due process did not require appointment of counsel to parents in every case, only that counsel be appointed on a case-by-case basis. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). The extraordinary remedy of requiring the appointment of counsel in every case had been applied only when a person's physical liberty was threatened. *Id.* at 25. The Court thus found a presumption that due process does not require the appointment of counsel at public expense unless physical liberty is threatened, and that this presumption must be balanced against the three-

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<sup>10</sup> The Department does not concede, as amici claim, that due process requires the appointment of counsel for children in some cases. *See, e.g.*, Br. of Columbia Legal Servs. at 5. Rather, because Washington's statute provides for the discretionary appointment of counsel, it meets the minimum requirements of due process. Whether the statute exceeds those minimum requirements may be of academic interest, but is not necessary to decide this case.

factor *Mathews* test when examining what process is due.<sup>11</sup> *Lassiter*, 452 U.S. at 27. Applying the *Mathews* factors, the Court concluded that appointment of counsel might be required in an individual case where a parent's interests were at their strongest, the State's interests were at their weakest, and the risk of error was at its peak. *Lassiter*, 452 U.S. at 31.

As a threshold point, *Lassiter* disposes of amici's argument that this Court should find an extraordinary blanket right to counsel for every child. Directly contrary to amici's arguments, the *Lassiter* Court left appointment of counsel "to be answered in the first instance by the trial court, subject, of course, to appellate review." *Id.* at 32. Amici's silence regarding *Lassiter* does not change the fact that, while *Lassiter* considered parent's rights and this case involves children, *Lassiter* governs the result. *Lassiter* established a benchmark with respect to due process in hearings to terminate parental rights. As set forth at length in the Department's prior pleadings, in a termination proceeding children's interests are no greater than parent's, while the risk of error present in the *Lassiter* proceeding was far greater than is present in Washington. Thus, comparison to *Lassiter* demonstrates that, for the reasons stated therein, a trial court's discretion to appoint counsel for children on a case-by-case basis in hearings to terminate parental rights satisfies due process.

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<sup>11</sup> *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Amici attempt to avoid *Lassiter* by rearguing the *Mathews* balancing test. However, revisiting the *Mathews* test supports no greater right to counsel for a child than for a parent. The Department has already addressed in detail the three *Mathews* factors, and confines the following additional argument to responding to contentions by amici. See Suppl. Resp. Br. at 13-23.

**1. The private interest at stake does not extend to a comprehensive appraisal of the foster care system**

The first *Mathews* factor is “the private interest that will be affected by the official action.” *Mathews*, 424 U.S. at 335. The child’s interest affected in a parental rights termination proceeding is specifically the legal relationship between parent and child. For purposes of *Mathews*, amici do not show that children’s interests in a termination proceeding exceed the interests of parents.

To begin, a child’s physical liberty is not at stake in a hearing to terminate parental rights. As explained in the Department’s response brief, a termination proceeding does not determine a child’s placement. Regardless of outcome, the child’s dependency continues, and the child is not returned to the parent unless and until the reasons for the dependency no longer exist. Suppl. Resp. Br. at 4-5, 15. Moreover, a child does not have a physical liberty interest in avoiding foster care. As the United

States Supreme Court has recognized, “‘juveniles, unlike adults, are always in some form of custody,’ and where the custody of the parent or legal guardian fails, the government may (indeed we have said *must*) either exercise custody itself or appoint someone else to do so.” *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (citation omitted) (quoting *Schall v. Martin*, 467 U.S. 253, 265, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984)).

Likewise, amici’s extensive critique of the foster care system is inopposite to this procedural due process claim for counsel in termination proceedings. *See, e.g.*, Br. of Columbia Legal Servs. at 6-14 (cataloging findings from *Braam* Settlement Monitoring Report #10). This Court has described a foster child’s substantive due process right to be “free from unreasonable risks of harm and a right to reasonable safety.” *Braam v. State*, 150 Wn.2d 689, 700, 81 P.3d 851 (2003). The Department disagrees with any implication of amici that a child is placed in unreasonable risk of harm in the foster care system. Even if this were accurate – which it is not – a child would not be protected by providing the child with counsel in a hearing to terminate parental rights. The termination proceeding does not determine placement of the child nor the services available to children. Rather, the hearing determines only whether to terminate parental rights.

Finally, evaluation of a child's interest at stake in a termination proceeding does not encompass all aspects of that child's life from entry of the termination decision until the child reaches majority. *See, e.g.*, Br. of Columbia Legal Servs. at 5 (termination order "commits a child fully to the State's care from the termination until the child is adopted or ages out of the system"); Br. of ACLU of WA at 4 (stating termination "places the government in charge of all aspects of the child's life"). The focus for *Mathews* purposes is properly on what is specifically at stake in the particular proceeding, not on potential subsequent consequences of that decision. *See, e.g., Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 705-06, 257 P.3d 570 (2011) (fact that initial truancy hearing must precede contempt hearing does not establish that physical liberty interest is at stake at initial hearing for purposes of analyzing first *Mathews* factor).

**2. As termination proceedings involve no significant risk of error, providing children with stated interest attorneys is a solution without a problem**

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. Thus, the second factor involves a comparison of probable outcomes, in which the Court considers the value of the *additional* procedural protection. *Mathews*, 424 U.S. at 343-49. Here, the Court

must evaluate what is the risk that the current termination process will produce an erroneous result, and how much appointing stated interest attorneys for all children subject to such proceedings would reduce that risk. Although amici voice various concerns, they fail to demonstrate any pervasive risk of erroneous decision under the current procedures that is of such magnitude it demands to be served by universal appointment of counsel. *See Hardee v. Dep't of Soc. & Health Servs.*, 172 Wn.2d 1, 256 P.3d 339, 345 (2011) (under the second *Mathews* factor, "the current procedures must suffer from inadequacies that make erroneous deprivations readily foreseeable.")

An erroneous result in a termination proceeding is wrongly terminating or failing to terminate parental rights. The existing procedural protections provided by Washington statutes and court rules minimize the risk an erroneous decision will occur. Attorneys represent the parent and the state in their adversarial dispute over whether the parent is proven unfit under the statutory termination criteria by clear, cogent, and convincing evidence. RCW 13.34.090; RCW 13.34.190. A guardian ad litem protects the child's interests, advocating for the child's best interest, and communicating to the court the child's stated interest. RCW 13.34.105(1). Additionally, if the judge determines that the child needs independent representation, RCW 13.34.100(6) authorizes the appointment of counsel.

These procedural protections guarantee that the risk of an erroneous termination decision is very low.

Amici argue that there is a significant risk of error under the current procedures because the court may be deprived of “relevant and critical information” regarding the child’s perspective and desires. *See, e.g.,* Br. of Mockingbird Soc’y at 9-10. Amici offer no authority for the notion that a child’s perspective and desires are constitutionally cognizable, and the Department is not aware of any. Nonetheless, amici’s conclusion appears to be that without an attorney advocating the child’s stated interest to the court, the result of the termination proceeding is inherently erroneous. This argument fails for at least three reasons.

First, as a threshold matter, the argument ignores how the guardian ad litem, the other parties, and the judge may elicit relevant and critical information regarding the child, including the child’s perspective. It also ignores situations in which the child’s perspective and desires could contribute little – or nothing – to the termination decision, for example when the child is an infant. Second, this Court’s child welfare decisions do not confer commanding, much less constitutional, weight to a child’s stated interest in custody determinations. For example, in *In re the Custody of Shields*, 157 Wn.2d 126, 136 P.3d 117 (2006), the Court reversed a custody decision placing an adolescent with his step-mother

rather than his biological mother. The Court observed that the trial court had put “extraordinary weight on [the youth’s] preference,” and had cited “no authority for the proposition that, in the context of child custody disputes, a child knows his or her own best interests or a child’s preference overcomes the constitutional presumption that a fit parent acts in his or her child’s best interests.” *Id.* at 129. Third, if a circumstance arose in which the court determined that the child’s stated interest required an independent legal advocate, RCW 13.34.100(6) allows the judge to appoint counsel.

Amici also point to children’s vulnerability and limited ability to understand complex legal proceedings as reasons to appoint them attorneys. *See, e.g.*, Br. of ACLU of WA at 10-12. Children are appointed with guardians ad litem for these very reasons, in recognition that they need protection and may be unable to make decisions in their own best interest. By contrast, blanket appointment of attorneys for children would force all children to grapple with making a choice about whether to continue their relationship with their parents, without regard to their maturity, the inherent emotional pressure involved in stating a position, or their capacity to understand the ramifications of such a choice. As the Legislature has recognized by requiring children age 12 and older to be advised of their right to request counsel, there is a substantial

difference between a child capable of understanding and articulating his or her interests, and an infant or other child incapable of such articulation. *See* RCW 13.34.100(6). Placing the decision of whether to appoint counsel for a child in the discretion of the trial judge allows for appropriate consideration of the particular facts and circumstances of each child.

Amici also criticize the statute, claiming RCW 13.34.100(6) “fails to provide *any* criteria or guidance to the courts” on when to appoint counsel. Br. of Columbia Legal Servs. at 18. Relying on a 2008 study, Columbia Legal Services claims the absence of criteria results in variations in appointment practices around the state.<sup>12</sup> Br. of Columbia Legal Servs. at 17-19. Amici’s argument is misplaced, as it goes far beyond Ms. Luak’s theory that universal appointment is required. Pursuant to that theory, the statute cannot be saved by any amount of criteria or guidance. Furthermore, if the Court determined that the statute lacked guidance in a constitutionally cognizable sense, the proper remedy would be to save the statute by providing a constitutional gloss, not to declare a universal right to counsel at state expense for all children in all termination proceedings.

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<sup>12</sup> Obviously, a 2008 study cannot reflect appointment practices under the current statute, amended in 2010 to provide children 12 and older with notice of their right to request counsel.

Finally, amici describe various functions children's counsel could effectively perform, and cases in which they assertedly "make[] the system work better." Br. of ACLU of WA at 13. Of course, the constitutional test for whether the state must provide attorneys to every child in every hearing to terminate parental rights isn't whether there are things that an attorney could do, or even whether there are some circumstances in which an attorney would make the system work better.<sup>13</sup> Rather, the constitutional test focuses on the "minimally tolerable" standards required by the Constitution. *See Lassiter*, 452 U.S. at 33.

Many of amici's arguments assume that the represented child will be willing and capable of expressing his or her interests. *E.g.*, Br. of Mockingbird Soc'y at 4-10 (arguing that children must be given "voice" and have their express interests advocated); Br. of ACLU of WA at 16-20 (arguing that attorneys can provide counsel, gain trust through confidentiality, facilitate the child's participation at trial, and focus solely on the child's stated interests as distinguished from a guardian ad litem who advocates for the child's best interests). These arguments do not establish the value of an attorney for children too young to express their

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<sup>13</sup> Several amici refer to anecdotes in their briefing to support their arguments. *E.g.*, Br. of ACLU of WA at 13-16; Br. of Mockingbird Soc'y at 6-7. These anecdotes are outside the record, offer no proof as to whether they are representative of termination proceedings generally, and largely do not address whether the termination of parental rights at issue was correctly decided at the time of the hearing, if they address hearings to terminate parental rights at all. The Court should disregard them.

stated interests. Nonetheless, amici argue that blanket appointment of counsel for all children in all termination proceedings is constitutionally required.

Consistent with many amici's attempt to broaden the scope of this Court's inquiry beyond the case before it, many of the functions amici would have counsel perform assume that the scope of appointment would extend to issues arising in the child's dependency and would not be limited to termination. *See, e.g.*, Br. of ACLU of WA at 17 (suggesting child's attorney could advocate regarding "visitation, sibling contact, placement, and safety", and counsel child regarding "obligations set by a preexisting dependency order"); Br. of Columbia Legal Srv's at 14 (describing "failure to appoint legal counsel to dependent children" as significant contributor to areas in which protection of children's legal rights are lagging). As previously discussed, such issues are not part of the termination proceeding, and are not before the Court.

**3. The government's interest does not weigh in favor of universal appointment of counsel for children**

The third *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Universal appointment of counsel for children in

termination proceedings would entail a fiscal and administrative burden. Amici Mockingbird acknowledges as much, saying “[p]roviding legal representation will require a financial investment on the part of the State,” but claims that the money would be well spent. Br. of Mockingbird Soc’y at 15. For example, amici speculate that providing foster youth with “a legal voice” may reduce the likelihood that they will wind up homeless, unemployed, hospitalized, or incarcerated as adults. *Id.* at 11-13. As with many of the various amici’s other offerings, this is a public policy argument best suited to consideration by the Legislature.

Returning to the benchmark provided by *Lassiter*, the fiscal and administrative burdens are even greater if attorneys are required for every child in every hearing to terminate parental rights, than they are with respect to parents. While providing attorneys to parents results in the appointment of one, or at most two, attorneys, providing an attorney for each child could result in as many additional attorneys being appointed as the number of children involved. Appointing children’s attorneys not only imposes an additional fiscal burden, it may also slow the process. As with the first two *Mathews* factors, this third factor weighs even less heavily in favor of providing counsel for a child than it does for a parent.

### III. CONCLUSION

Amici offer no sound constitutional reason for the extraordinary due process claim that the state must appoint and supply counsel for every child in every termination hearing. As parents have no absolute, constitutional right to counsel in hearings to terminate parental rights, it follows even more strongly that children have no such right.

The Department respectfully requests the Court reject Ms. Luak's challenge to the constitutionality of Washington's termination proceedings and affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 3rd day of October, 2011.

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## DECLARATION OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Response Brief of DSHS in Opposition to Briefs of Amici Curiae to be served on the following via electronic transmittal:

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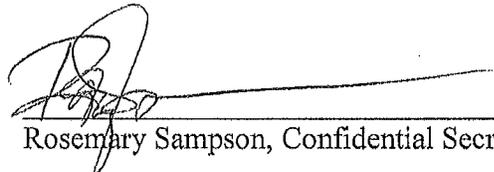
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DATED this 3rd day of October, 2011.

  
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