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NO. 85729-6

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

In Re Dependency of M.S.R. (D.O.B. 10/10/00) and T.S.R. (D.O.B.
10/10/00)

D.S.H.S., STATE OF WASHINGTON

Respondent,

v.

NYAKAT LUAK,

Appellant.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT LUAK

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ORIGINAL

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

A. SUPPLEMENTAL ARGUMENT IN REPLY..... 1

 1. BECAUSE CHILDREN CHANGE THE INPUTS UNDER
 THE FIRST AND SECOND *MATHEWS* FACTORS,
 LASSITER DOES NOT CONTROL2

 2. RCW 13.34.100(6) PROVIDES ONLY A LIMITED RIGHT
 TO NOTICE AND CONTAINS NO STANDARDS,
 INCREASING THE RISK OF ERROR UNDER THE
 SECOND *MATHEWS* FACTOR5

 3. THE CASA, THE REPRESENTED PARENT, AND THE
 REPRESENTED STATE DO NOT MITIGATE THE RISK
 OR PROTECT CHILDREN’S RIGHTS6

 a. The CASA is not required to determine or protect
 children’s actual interests7

 b. The other represented parties do not mitigate the risk
 of error or protect children’s rights 10

 4. DUE PROCESS REQUIRES COUNSEL FOR ALL
 CHILDREN IN TERMINATION OF PARENTAL RIGHTS
 PROCEEDINGS 12

 5. THE TERMINATION ORDER MUST BE REVERSED..... 14

B. CONCLUSION 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Custody of Shields</u> , 157 Wn.2d 126, 136 P.3d 117 (2006).....	2
<u>In re Dependency of Grove</u> , 127 Wn.2d 221, 897 P.2d 1252 (1995).....	13
<u>In re Marriage of King</u> , 162 Wn.2d 378, 174 P.3d 659 (2007)	5
<u>In re Welfare of Luscier</u> , 84 Wn.2d 135, 524 P.2d 906 (1974).....	2, 13
<u>In re Welfare of Myricks</u> , 85 Wn.2d 252, 533 P.2d 841 (1975)	4
<u>State v. Santos</u> , 104 Wn.2d 142, 702 P.2d 1179 (1985)	9
<u>State v. Sup. Court for King Cty.</u> , 59 Wn.2d 872, 371 P.2d 51 (1962).....	9

Washington Court of Appeals Decisions

<u>In re Welfare of J.M.</u> , 130 Wn. App. 912, 125 P.3d 245 (2005).....	14
<u>In re Welfare of T.B.</u> , 150 Wn. App. 599, 209 P.3d 497 (2009)	8

Decisions of Other States

<u>In re Guardianship of S.A.W.</u> , 856 P.2d 286, 1993 OK 95 (1993).....	10
<u>In re Hannah YY</u> , 854 N.Y.S.2d 797, 50 A.D.3d 1201 (App. Div. 2008).....	14
<u>In re J.M.B.</u> , 296 Ga. App. 786, 676 S.E.2d 9 (2009)	14
<u>In re Matter of D.</u> , 24 Or. App. 601, 547 P.2d 175 (1976).....	13
<u>In re Matter of M.D.Y.R.</u> , 177 Mont. 521, 582 P.2d 758 (1978).....	12, 13
<u>In re S.S.</u> , 90 P.3d 571 (Okla. Civ. App. 2004).....	14

<u>In re Termination of Kapcsos</u> , 468 Pa. 50, 360 A.2d 174 (1976).....	11
---	----

United States Supreme Court Decisions

<u>Bellotti v. Baird</u> , 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).....	5
--	---

<u>Brecht v. Abrahamson</u> , 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).....	14
---	----

<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	14
--	----

<u>In re Gault</u> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).....	4, 6, 10
--	----------

<u>Kent v. United States</u> , 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).....	9
---	---

<u>Lassiter v. Dep't of Social Servs.</u> , 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).....	2, 3, 4, 13
---	-------------

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

<u>Reno v. Flores</u> , 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).....	4
---	---

<u>Santosky v. Kramer</u> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).....	4, 7
--	------

Other Federal Decisions

<u>Kenny A. v. Perdue</u> , 356 F. Supp. 2d 1353 (N.D. Ga. 2005).....	3, 11
--	-------

Constitutional Provisions

Const. art. I, § 3.....	2
-------------------------	---

Statutes

23 Pa. Cons. Stat. Ann. § 2313.....	11
-------------------------------------	----

RCW 13.32A.170	9
RCW 13.32A.190	10
RCW 13.34.090	13
RCW 13.34.100	passim
RCW 13.34.105	8, 9
RCW 13.34.180	15
RCW 13.34.215	10
RCW 13.34.315	11
RCW 13.36.080	9
RCW 71.34.010	2
RCW 71.34.020	2
RCW 71.34.330	9
RCW 71.34.740	9

Other

ABA House of Delegates, Resolution 101A Adopting the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (August 2011).....	12
Children’s Representation Workgroup, Meaningful Representation for Children and Youth in Washington’s Child Welfare System, Standards of Practice, Voluntary Training and Caseload Limits in Response to HB 2735	12
Erik Pitchal, <u>Children’s Constitutional Right to Counsel in Dependency Cases</u> , 15 Temp. Pol. & Civ. Rts L. Rev. 663 (2005-2006).....	7
LaShanda Taylor, <u>A Lawyer for Every Child: Client-Directed Representation in Dependency Cases</u> , 47 Fam. Ct. Rev. 605 (2009).....	10

Laws of 2010, ch. 1809

Univ. of Wash. School of Social Work & Wash. State Center
for Court Research, Wash. State Court Appointed Special
Advocate Program Eval. Report (Jan. 2010).....9

A. SUPPLEMENTAL ARGUMENT IN REPLY

This case concerns the rights of twin boys in proceedings that permanently severed their legal, physical and social relationship with their mother, appellant Nyakat Luak. Though the Attorney General's Office and the Department of Health and Social Services (DSHS) endorse the provision of counsel for *all* children in termination proceedings, the State contends here that only some children have such a constitutional right. The State's argument suffers from several fundamental flaws. First, RCW 13.34.100(6) does not provide for counsel on a "case-by-case basis" as the State contends. Rather, the statute affords only a right to be notified that counsel may be requested, and even this limited "right" extends only to children 12 years old and older. Second, a Court-Appointed Special Advocate (CASA) or guardian ad litem (GAL) has no duty to protect or even ascertain children's own interests. Similarly, the State and parents, who have opposing legal goals, cannot adequately represent children's distinct interests.

Due process requires counsel for all children in termination proceedings. Accordingly, the termination order entered below must be reversed.

1. BECAUSE CHILDREN CHANGE THE INPUTS UNDER THE FIRST AND SECOND *MATHEWS* FACTORS, *LASSITER* DOES NOT CONTROL.

The State attempts to rely on Lassiter v. Dep't of Social Servs., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), by arguing children are identical to parents for due process purposes. But its argument fails, and Lassiter does not control.

Children's rights are different from parents' rights and thus fall outside Lassiter's framework.¹ Although children may not have an absolute right to autonomy or self-determination, they have "a constitutionally protected interest in whatever relationships comprise his or her family unit." In re Custody of Shields, 157 Wn.2d 126, 152, 136 P.3d 117 (2006) (Bridge, J., concurring). This interest is paramount because children's familial relationships also exercise legal control over them.² Children's interest in who comprises their family is different, therefore, from their parents' interest in the custody, care and control of their children.

¹ The State concedes that children have fundamental liberty interests at stake in termination of parental rights proceedings. Supp. Resp. Br. at 1, 9, 10. This Court has determined that, because of the fundamental interests at stake, Article I, Section 3 requires appointment of counsel for parents in termination proceedings. In re Welfare of Luscler, 84 Wn.2d 135, 139, 524 P.2d 906 (1974). Therefore, children in termination of parental rights proceedings should be afforded the same protection. See Supp. Op. Br. at 19-26.

² E.g., RCW 71.34.010 (ensuring parents can exercise care and control over children's mental health); RCW 71.34.020 (parents include adoptive parent and person or agency appointed as guardian or custodian).

Termination proceedings also place different interests at stake for children because children are at risk for “potential deprivation of physical liberty.” Lassiter, 452 U.S. at 31. The State argues that termination proceedings do not affect children’s physical liberty interests because such proceedings do not determine where a child will be placed and because children do not have an interest in avoiding foster care. Supp. Resp. Br. at 15. But this termination proceeding—like all such proceedings—determined whether the children would ever be placed back with their mother or conversely whether the State would gain full and permanent control over them. This control, which the State can exercise until the children are at least 18 years old, empowers the State to decide whether the children will be placed with the same foster family, in an institutional setting or in a pre-adoptive home as well as where they will reside, go to school and find their community. See CP 437 (termination order “divest[s] mother and children of all legal rights, powers, privileges, immunities, duties and obligations between each other”); Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga. 2005).

The severity of this pivotal moment demands the utmost protection of children’s rights. See Reno v. Flores, 507 U.S. 292,

315-18, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (O'Connor, J., concurring) (noting serious implications of removing children from their family and placing in government control); Santosky v. Kramer, 455 U.S. 745, 754 n.7, 759, 760 n.11, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (noting significance of determination in termination cases with "far-reaching" consequences for children).

The second Mathews v. Eldridge³ factor, risk of error and potential for mitigation, also yields different results where children are the stakeholders. Particularly, Washington's statutory procedural "protections" for children differ from protections for parents promulgated in North Carolina. See Lassiter, 452 U.S. at 28-29 (reciting statutory procedures).

Furthermore, children lack the education, experience and development to confront a courtroom of trained practitioners well-versed in legal code. Rather than comprise a basis to deny counsel, such childhood vulnerabilities support appointing legal advocates. Compare Supp. Resp. Br. at 19-20 with e.g., In re Welfare of Myricks, 85 Wn.2d 252, 254, 533 P.2d 841 (1975) (parents' vulnerabilities support appointment of counsel); In re Gault, 387 U.S. 1, 36-37, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

³ 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

Finally, absent counsel, M.S.R. and T.S.R. were denied any opportunity to participate in the proceedings. 7A-RP 990-91.⁴

2. RCW 13.34.100(6) PROVIDES ONLY A LIMITED RIGHT TO NOTICE AND CONTAINS NO STANDARDS, INCREASING THE RISK OF ERROR UNDER THE SECOND *MATHEWS* FACTOR.

While asserting that due process requires courts to decide in each case whether counsel is necessary, the State argues that a universal right to counsel is not required. Supp. Resp. Br. at 9, 22. The State's argument is not only wrong but is based on its mistaken belief that RCW 13.34.100(6) provides a "case-by-case" approach.⁵

The statute actually provides no more than an age-limited right to notice that counsel can be requested and an authorization for the court to appoint counsel without any standards, procedures or even requirement that the court consider appointing counsel at all. RCW 13.34.100(6)(a). Children like M.S.R. and T.S.R.—in fact, all children under 12 years of age—have no right to notice and no inquiry is made of them regarding appointment of counsel.

⁴ *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979), relied on by the State, involved *substantive* due process review of a statute requiring minors to obtain parental consent before having an abortion—a far different concern than raised here. Even if relevant, *Bellotti* supports appointing counsel in terminations because it upheld provisions encouraging minors to seek their parents' advice before making an important decision but required minors alternatively have the opportunity to argue directly to a court. 443 U.S. at 647.

⁵ Even if the statute did provide a case-by-case approach to appointing counsel, this Court has rejected that method. *In re Marriage of King*, 162 Wn.2d 378, 390 n.11, 174 P.3d 659 (2007).

For children younger than 12, the statute does not require the court or CASA to consider whether to appoint counsel. RCW 13.34.100(6)(f). Even if the CASA requests counsel, the court alone has discretion to appoint counsel and the statute provides no criteria and outlines no procedure under which such discretion is exercised. The decision need not even be placed on the record.⁶

Even if a 12-year-old child requests counsel, the statute states only that “the court *may* appoint an attorney to represent the child’s position.” RCW 13.34.100(6)(f) (emphasis added). It again provides no standards or procedures. See Gault, 387 U.S. at 18-21 (“unbridled discretion[,]” the absence of substantive standards and procedural rules, is “a poor substitute for principle and procedure”).

3. THE CASA, THE REPRESENTED PARENT, AND THE REPRESENTED STATE DO NOT MITIGATE THE RISK OR PROTECT CHILDREN’S RIGHTS.

The risk of erroneous deprivation in termination proceedings is high: courts are required to “employ imprecise substantive standards [such as ‘reasonable efforts,’ early integration, little likelihood of remedying deficiencies and ‘best interests’] that leave determinations unusually open to the subjective values of the

⁶ The CASA’s failure to request counsel here, though she believed the boys’ interests opposed her best interests determination, and the court’s failure to consider whether to appoint counsel for the children is not unique. See In re Termination of D.R. and A.R., No. 84132-2, Children’s Joint Opening Brief at 5-6.

judge”; participants are vulnerable to cultural and class bias; and the State has unlimited resources and access to caseworkers (and witnesses) as well as control over circumstances affecting the children (such as visits). Santosky, 455 U.S. at 762-64. RCW 13.34.100(6)’s age-limited right to mere notice of the opportunity to request counsel does not mitigate this risk of error. See Section A.2, supra; Supp. Op. Br. at 9-15. Likewise, the CASA, the State and the parents do not serve the children’s interests.

Preliminarily, termination proceedings need not be acrimonious, two-sided battles of diametrically opposed positions with children joining one or the other side. Instead, children’s counsel can advocate for alternatives such as mediation, open adoption, guardianship, third-party custody or a conditional return to dependency.⁷ Children possess discrete interests and evidence comprising a third point on the spectrum, which can only be represented by independent counsel.

- a. The CASA is not required to determine or protect children’s actual interests.

The State incorrectly describes the CASA’s obligations in

⁷ See Erik Pitchal, Children’s Constitutional Right to Counsel in Dependency Cases, 15 Temp. Pol. & Civ. Rts L. Rev. 663, 665 (2005-2006) (discussing case that settled after children’s counsel “served discovery demands and interrogatories on the agency and showed up at the hearing with two banker’s boxes of documents and lengthy notes for cross-examination”).

termination proceedings. Supp. Resp. Br. at 17. The CASA has no duty to determine children's stated interests or ask them about the proceedings. The CASA is merely required to "report to the court any views or positions [affirmatively] expressed by the child on issues pending before the court." RCW 13.34.105(1). Unless children volunteer positions about proceedings they may not understand, or unless they are explicitly asked by the CASA, the court is never informed of children's desires and interests.⁸

For example, M.S.R. and T.S.R.'s CASA did not discuss their interests and desires with them, though she speculated they wanted to be reunified with their mother. 3A-RP 379; 7A-RP 988. Similarly, in In re Termination of D.R. and A.R., the children's CASA never met with one child and did not inquire of the other about her feelings for her mother or interest in visits and termination. No. 84132-2, Children's Joint Opening Brief at 5-6; accord In re Welfare of T.B., 150 Wn. App. 599, 617-18, 209 P.3d 497 (2009) (Armstrong, J., dissenting) (guardian ad litem met with one child once, though conversation lacked substance, and the other twice

⁸ Nor does a singular statement as to whether a child desires reunification protect that child's stated interests because the CASA does not represent, advocate for or explain the interest. Contrary to the State's assertion, because the CASA is not required to express children's views, Washington's position on the U.S. Summary Chart is unchanged. See Supp. Resp. Br. at 22.

but both a year before termination hearing).

Rather than focus on the children's interests, the CASA makes a "best interests" determination and reports it to the court. RCW 13.34.105(1), (2) (CASA is an "officer of the court" that advocates for and represents children's best interests, not their stated interests).⁹ Significantly, in all but 11 percent of cases in Washington, the CASA's determination aligns with the State.¹⁰

CASAs also fail to satisfy due process because they are not trained attorneys, the hallmark of our due process protections. Kent v. United States, 383 U.S. 541, 561, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966) ("The right to representation by counsel is . . . the essence of justice."); Laws of 2010, ch. 180, § 1 (findings noting attorneys "have different skills and obligations than [CASAs]").¹¹

⁹ The State attempts to minimize the holding in State v. Santos, 104 Wn.2d 142, 702 P.2d 1179 (1985), by arguing the child's interest in maintaining and establishing family bonds was deemed satisfied by a guardian ad litem. Supp. Resp. Br. at 14. However, the Santos Court explicitly stated that a guardian "who in fact protects the child's interests" satisfied due process in that context. 104 Wn.2d at 147. RCW 13.34.100(6) requires the guardian neither to protect the child's actual interests nor to determine what those interests are.

¹⁰ Univ. of Wash. School of Social Work & Wash. State Center for Court Research, Wash. State Court Appointed Special Advocate Program Eval. Report 48-49 (Jan. 2010), attached as App. B to Supp. Op. Br.

¹¹ The State's assertion that children's interests are adequately protected in other civil proceedings by appointment of a GAL relies on authority to the contrary. Supp. Resp. Br. at 17 n.10 (citing to RCW 13.36.080, which allows for appointment of guardian *or attorney*; State v. Sup. Court for King Cty., 59 Wn.2d 872, 371 P.2d 51 (1962), holding a child in involuntary commitment proceedings must be provided with an attorney as well as a guardian as provided in RCW 71.34.330 & RCW 71.34.740(6)(a); RCW 13.32A.170(1), which authorizes an

- b. The other represented parties do not mitigate the risk of error or protect children's rights.

The State and the parents whose rights are subject to termination also do not adequately protect the children's interests. Cf. Gault, 387 U.S. at 34-36 (parents, probation officers and court insufficient to protect child's interests in delinquency proceedings). The State is the initiator of the termination petition and thus has already staked its claim to one extreme end of the spectrum. The State also must consider administrative costs and requirements, systemic needs and the needs of dependent children as a whole. E.g., LaShanda Taylor, A Lawyer for Every Child: Client-Directed Representation in Dependency Cases, 47 Fam. Ct. Rev. 605, 614 (2009). Ultimately, the State's attorney's client is the State, not the child. Thus, children's interests are secondary at best. See In re Guardianship of S.A.W., 856 P.2d 286, 289, 1993 OK 95 (1993) (if "not represented by independent counsel, the child is caught in the middle while each attorney argues from his client's viewpoint").

Likewise, parents must prioritize their own interests in order to keep the family unified. However, in doing so, the parent cannot

attorney and/or a GAL; and RCW 13.32A.190(1), which requires an attorney and/or a GAL). Meanwhile, the same children who are denied counsel during termination proceedings are entitled to counsel when they later seek reinstatement of their terminated parents' rights. RCW 13.34.215(3).

also advocate for their children's interests, such as sibling contact if termination is ordered. Moreover, the very nature of the proceedings, which allege the parent's unfitness to care for their children, suggests an "inherent conflict of interests" between parents and children. Kenny A., 356 F. Supp. 2d at 1359. Parents are also in an involuntary but poor position to protect their children's stated interests, and present evidence in support, because during the dependency contact with their children has been limited and they have no right of access to the children's placement and limited access to decisions affecting their care.¹²

Accordingly, the State's reliance on a 1976 Pennsylvania decision, In re Termination of Kapcsos, for the proposition that children's interests are usually represented by the contending parties is unsupportable. See Resp. Br. at 11, 16.¹³ Kapcsos is also distinguishable because in Pennsylvania the courts in "contested dependency hearings, as in termination hearings, . . . must determine whether the natural parent or the Commonwealth truly represents the child." 468 Pa. 50, 360 A.2d 174, 178 (1976).

¹² RCW 13.34.315 (granting DSHS authority over routine and emergency medical treatment); Exhibit 2 ¶¶ 5.4, 5.6 (dependency and disposition order authorizing DSHS involvement in medical care and other needs).

¹³ Kapcsos has been superseded by statute in Pennsylvania, which requires all children be appointed counsel in contested termination proceedings. 23 Pa. Cons. Stat. Ann. § 2313(a).

In Washington, the court is not required to make such a determination. See RCW 13.34.100(6).

4. DUE PROCESS REQUIRES COUNSEL FOR ALL CHILDREN IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS.

The State's position here opposes its advocacy for a universal right to counsel.¹⁴ The Attorney General's Office and DSHS's endorsement that "All children subject to dependency or termination of parental rights court proceedings should have legal representation as long as the court jurisdiction continues" shows they recognize counsel for all children is effective, necessary and financially and administratively feasible.¹⁵

The State fails to otherwise demonstrate due process does not require universal appointment of counsel. The State's reliance on In re Matter of M.D.Y.R., 177 Mont. 521, 582 P.2d 758 (1978), is misplaced. The M.D.Y.R. Court's holding as to *children* derives

¹⁴ See Children's Representation Workgroup, Meaningful Representation for Children and Youth in Washington's Child Welfare System, Standards of Practice, Voluntary Training and Caseload Limits in Response to HB 2735, attached as App. A to Supp. Op. Br. The Children's Representation Workgroup report was adopted by this Court's Commission on Children in Foster Care, which includes the Assistant Secretary of the Department of Social and Health Services and a representative from the Attorney General's Office.

¹⁵ The American Bar Association recently reiterated its support for this view by adopting a model act requiring appointment of counsel for all children in termination proceedings and setting forth standards for such attorneys. ABA House of Delegates, Resolution 101A Adopting the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings (August 2011), attached as Appendix 1.

from the conclusion that a *parent* is not per se entitled to counsel in termination proceedings. Washington already grants parents such a per se right. Luscier, 84 Wn.2d at 139; RCW 13.34.090. The case also does not rely on a Mathews due process analysis.¹⁶

Under Mathews, enhanced procedural protections must be provided where the interests at stake are significant, the current procedures do not adequately mitigate error, and the government's interest in preventing additional procedures is low.¹⁷ 424 U.S. at 335, 349 (also requiring enhanced procedures where balance of factors counsel in favor). Here, all three conditions are satisfied.

Due process, moreover, demands counsel at least here, where the CASA did not ask the nine-year-old children what their interests were, the children desired reunification—the opposite view of the represented CASA and State—and their mother fought for

¹⁶ In re Matter of D. also was not decided under Mathews. 24 Or. App. 601, 609, 547 P.2d 175 (1976); see Supp. Resp. Br. at 23 n.16. The State further discounts its own pre-Lassiter authorities, In re D. and M.D.Y.R., by arguing sentences later that case law relied upon in Ms. Luak's supplemental brief should be distinguished solely because it "was decided prior to Lassiter." Supp. Resp. Br. at 23 & n.16, 24. The State also entirely ignores that this Court reaffirmed its pre-Lassiter case law in In re Dependency of Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (constitutional right to counsel exists where "fundamental liberty interest, similar to the parent-child relationship is at risk").

¹⁷ With regard to governmental interest see Supp. Op. Br. at 16-18. The State's cited cases, Bellevue Sch. Dist. v. E.S. and Mathews, only support considering fiscal impact where it is large and the other factors are slight. Supp. Resp. Br. at 21-22. The State fails to show the fiscal impact here would be large.

her children to be heard. Only legal counsel could have effectively posited the children's interests before the court.

5. THE TERMINATION ORDER MUST BE REVERSED

The error here requires reversal. Structural error analysis applies where counsel is constitutionally required but denied. Chapman v. California, 386 U.S. 18, 23 & n.8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ("some constitutional rights [such as the right to counsel are] so basic to a fair trial that their infraction can never be treated as harmless error"). Contrary to the State's contention, the denial of counsel in this context "infects the entire trial process" precisely as it does in a criminal trial. Brecht v. Abrahamson, 507 U.S. 619, 629-30, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).¹⁸ It is irrelevant that the termination trial lasted 13 days and included 22 witnesses and 56 exhibits, because that says nothing about what the trial would have looked like (or whether it would have even been necessary) if attorneys represented M.S.R. and T.S.R. Compare Supp. Resp. Br. at 7 with In re Welfare of J.M., 130 Wn. App. 912, 925, 125 P.3d 245 (2005) ("We can only speculate as to

¹⁸ Accord In re J.M.B., 296 Ga. App. 786, 790-91, 676 S.E.2d 9 (2009) (failure to appoint counsel in termination context constitutes structural error); In re S.S., 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (same); In re Hannah YY, 854 N.Y.S.2d 797, 798-99, 50 A.D.3d 1201 (App. Div. 2008) (denial of counsel in dependency proceedings requires automatic reversal).

what weaknesses in the State's case or strengths in [the parent]'s case might have been revealed by competent counsel.”).

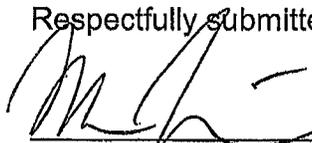
Nonetheless, Ms. Luak need not rely on structural error. The failure to appoint counsel for M.S.R. and T.S.R. was prejudicial because the CASA's best interests determination conflicted with the children's own interests. 7A-RP 988. Despite Ms. Luak's attempts, the court received no argument, evidence, cross-examination, motions or settlement proposals from the children's perspective.

B. CONCLUSION

Because termination orders are final and irrevocable, due process requires the utmost protection of stakeholders. M.S.R. and T.S.R. had much at stake in the proceedings below, yet their interests were not represented. As set forth in Ms. Luak's Opening Brief, the State also failed to meet its burden under RCW 13.34.180. The order terminating her parental rights should be reversed on one or more of these alternative bases.

DATED this 29th day of August, 2011.

Respectfully submitted,



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Washington Appellate Project
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APPENDIX 1

AMERICAN BAR ASSOCIATION
SECTION OF LITIGATION

SECTION OF FAMILY LAW
CRIMINAL JUSTICE SECTION
COMMISSION ON HOMELESSNESS AND POVERTY
COMMISSION ON YOUTH AT RISK
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
1 STEERING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE
2 JUDICIAL DIVISION
3 PHILADELPHIA BAR ASSOCIATION
4 LOS ANGELES COUNTY BAR ASSOCIATION
5 LOUISIANA STATE BAR ASSOCIATION
6 YOUNG LAWYERS DIVISION
7 INDIVIDUAL RIGHTS AND RESPONSIBILITIES
8 GOVERNMENT AND PUBLIC SECTOR LAWYERS

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

9 **RESOLVED**, That the American Bar Association adopts the *Model Act Governing the*
10 *Representation of Children in Abuse, Neglect, and Dependency Proceedings*, dated August,
11 2011.

1 **ABA Model Act Governing the Representation of Children in**
2 **Abuse, Neglect, and Dependency Proceedings**¹
3

4 **SECTION 1. DEFINITIONS. In this [act]:**

5 (a) “Abuse and neglect proceeding” means a court proceeding under [cite state
6 statute] for protection of a child from abuse or neglect or a court proceeding under [cite
7 state statute] in which termination of parental rights is at issue.² These proceedings
8 include:

- 9 (1) abuse;
10 (2) neglect;
11 (3) dependency;
12 (4) child in voluntary placement in state care;
13 (5) termination of parental rights;
14 (6) permanency hearings; and
15 (7) post termination of parental rights through adoption or other
16 permanency proceeding.

17 (b) A child is:

- 18 (1) an individual under the age of 18; or
19 (2) an individual under the age of 22 who remains under the jurisdiction of
20 the juvenile court.

21 (c) “Child’s lawyer” (or “lawyer for children”) means a lawyer who provides legal
22 services for a child and who owes the same duties, including undivided loyalty,
23 confidentiality and competent representation, to the child as is due an adult client, subject
24 to Section 7 of this Act.³

25 (d) “Best interest advocate” means an individual, not functioning or intended to
26 function as the child’s lawyer, appointed by the court to assist the court in determining the
27 best interests of the child.

¹ This Model Act was drafted under the auspices of the ABA Section of Litigation Children’s Rights Litigation Committee with the assistance of the Bar-Youth Empowerment Program of the ABA Center on Children and the Law and First Star. The Act incorporates some language from the provisions of the NCCUSL Representation of Children in Abuse, Neglect, and Custody Proceedings Act.

² NCCUSL, 2006 *Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings*, Sec. 2(2) [Hereinafter NCCUSL Act]

³ *Id.*, Sec. 2(6); American Bar Association, *Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, Part I, Sec A-1, 29 Fam. L. Q. 375 (1995). The standards were formally adopted by the ABA House of Delegates in 1996. [Hereinafter ABA Standards].

101A

28 (e) "Developmental level" is a measure of the ability to communicate and
29 understand others, taking into account such factors as age, mental capacity, level of
30 education, cultural background, and degree of language acquisition.⁴
31

32 *Legislative Note: States should implement a mechanism to bring children into court*
33 *when they have been voluntarily placed into state care, if such procedures do not already exist.*
34 *Court action should be triggered after a specific number of days in voluntary care (not fewer*
35 *than 30 days, but not more than 90 days).*
36

37 *Commentary:*
38

39 Under the Act, a "child's lawyer" is a client-directed lawyer in a traditional attorney-client
40 relationship with the child. A "best interests advocate" does not function as the child's lawyer
41 and is not bound by the child's expressed wishes in determining what to advocate, although the
42 best interests advocate should consider those wishes.
43

44 The best interest advocate may be a lawyer or a lay person, such as a court-appointed special
45 advocate, or CASA. The best interests advocate assists the court in determining the best
46 interests of a child and will therefore perform many of the functions formerly attributable to
47 guardians *ad litem*, but best interests advocates are not to function as the child's lawyer. A
48 lawyer appointed as a best interest advocate shall function as otherwise set forth in state law.
49

50 SECTION 2. APPLICABILITY AND RELATIONSHIP TO OTHER LAW.

51 (a) This [act] applies to an abuse and neglect proceeding pending or commenced on
52 or after [the effective date of this act].
53

54 (b) The child in these proceedings is a party.
55

56 SECTION 3. APPOINTMENT IN ABUSE OR NEGLECT PROCEEDING.

57 (a) The court shall appoint a child's lawyer for each child who is the subject of a
58 petition in an abuse and neglect proceeding. The appointment of a child's lawyer must be
59 made as soon as practicable to ensure effective representation of the child and, in any
60 event, before the first court hearing.

61 (b) In addition to the appointment of a child's lawyer, the court may appoint a best
62 interest advocate to assist the court in determining the child's best interests.

63 (c) The court may appoint one child's lawyer to represent siblings if there is no
64 conflict of interest as defined under the applicable rules of professional conduct.⁵ The

⁴ ABA Standards, Part I, Sec A-3.

⁵ NCCUSL Act, Sec. 4(c); *see also* ABA Standards, Part I, Sec B-1

65 court may appoint additional counsel to represent individual siblings at a child's lawyer's
66 request due to a conflict of interest between or among the siblings.

67 (d) The applicable rules of professional conduct and any law governing the
68 obligations of lawyers to their clients shall apply to such appointed lawyers for children.

69 (e) The appointed child's lawyer shall represent the child at all stages of the
70 proceedings, unless otherwise discharged by order of court.⁶

71 (f) A child's right to counsel may not be waived at any court proceeding.

72

73 *Commentary:*

74

75 This act recognizes the right of every child to have quality legal representation and a voice in
76 any abuse, neglect, dependency, or termination of parental rights proceeding, regardless of
77 developmental level. Nothing in this Act precludes a child from retaining a lawyer. States
78 should provide a lawyer to a child who has been placed into state custody through a voluntary
79 placement arrangement. The fact that the child is in the state's custody through the parent's
80 voluntary decision should not diminish the child's entitlement to a lawyer.

81

82 A best interest advocate does not replace the appointment of a lawyer for the child. A best
83 interest advocate serves to provide guidance to the court with respect to the child's best interest
84 and does not establish a lawyer-client relationship with the child. Nothing in this Act restricts a
85 court's ability to appoint a best interest advocate in any proceeding. Because this Act deals
86 specifically with lawyers for children, it will not further address the role of the best interest
87 advocate.

88

89 The child is entitled to conflict-free representation and the applicable rules of professional
90 conduct must be applied in the same manner as they would be applied for lawyers for adults. A
91 lawyer representing siblings should maintain the same lawyer-client relationship with respect to
92 each child.

93

94 SECTION 4. QUALIFICATIONS OF THE CHILD'S LAWYER.

95 (a) The court shall appoint as the child's lawyer an individual who is qualified
96 through training and experience, according to standards established by [insert reference to
97 source of standards].

98 (b) Lawyers for children shall receive initial training and annual continuing legal
99 education that is specific to child welfare law. Lawyers for children shall be familiar with
100 all relevant federal, state, and local applicable laws.

101 (c) Lawyers for children shall not be appointed to new cases when their present

⁶ ABA Standards, Sec D-13; F-1-5; *see generally* La. Sup. Ct. R. XXXIII, Standard 1; *see generally* Ariz. R. Proc. Juv. Ct. R. 39(b).

101A

102 caseload exceeds more than a reasonable number given the jurisdiction, the percent of the
103 lawyer's practice spent on abuse and neglect cases, the complexity of the case, and other
104 relevant factors.

105

106 *Legislative Note: States that adopt training standards and standards of practice for*
107 *children's lawyers should include the bracketed portion of this section and insert a reference to*
108 *the state laws, court rules, or administrative guidelines containing those standards.⁷*

109 *Jurisdictions are urged to specify a case limit at the time of passage of this Act.*

110

111 *Commentary:*

112

113 States should establish minimum training requirements for lawyers who represent children. Such
114 training should focus on applicable law, skills needed to develop a meaningful lawyer-client
115 relationship with child-clients, techniques to assess capacity in children, as well as the many
116 interdisciplinary issues that arise in child welfare cases.

117

118 The lawyer needs to spend enough time on each abuse and neglect case to establish a lawyer-
119 client relationship and zealously advocate for the client. A lawyer's caseload must allow
120 realistic performance of functions assigned to the lawyer under the [Act]. The amount of time
121 and the number of children a lawyer can represent effectively will differ based on a number of
122 factors, including type of case, the demands of the jurisdiction, whether the lawyer is affiliated
123 with a children's law office, whether the lawyer is assisted by investigators or other child welfare
124 professionals, and the percent of the lawyer's practice spent on abuse and neglect cases. States
125 are encouraged to conduct caseload analyses to determine guidelines for lawyers representing
126 children in abuse and neglect cases.

127

128 SECTION 5. ORDER OF APPOINTMENT.

129 (a) Subject to subsection (b), an order of appointment of a child's lawyer shall be in
130 writing and on the record, identify the lawyer who will act in that capacity, and clearly set
131 forth the terms of the appointment, including the reasons for the appointment, rights of
132 access as provided under Section 8, and applicable terms of compensation as provided
133 under Section 12.

134 (b) In an order of appointment issued under subsection (a), the court may identify a
135 private organization, law school clinical program or governmental program through which
136 a child's lawyer will be provided. The organization or program shall designate the lawyer
137 who will act in that capacity and notify the parties and the court of the name of the
138 assigned lawyer as soon as practicable.⁸ Additionally, the organization or program shall
139 notify the parties and the court of any changes in the individual assignment.

140

⁷ ABA Standards, Part II, Sec L-1-2.

⁸ NCCUSL Act, Sec. 9

141 **SECTION 6. DURATION OF APPOINTMENT.**

142 **Unless otherwise provided by a court order, an appointment of a child's lawyer in**
143 **an abuse and neglect proceeding continues in effect until the lawyer is discharged by court**
144 **order or the case is dismissed.⁹ The appointment includes all stages thereof, from removal**
145 **from the home or initial appointment through all available appellate proceedings. With**
146 **the permission of the court, the lawyer may arrange for supplemental or separate counsel**
147 **to handle proceedings at an appellate stage.¹⁰**

148 *Commentary:*

149 As long as the child remains in state custody, even if the state custody is long-term or permanent,
150 the child should retain the right to counsel so that the child's lawyer can deal with the issues that
151 may arise while the child is in custody but the case is not before the court.

152

153 **SECTION 7. DUTIES OF CHILD'S LAWYER AND SCOPE OF**
154 **REPRESENTATION.**

155 **(a) A child's lawyer shall participate in any proceeding concerning the child with**
156 **the same rights and obligations as any other lawyer for a party to the proceeding.**

157 **(b) The duties of a child's lawyer include, but are not limited to:**

158 **(1) taking all steps reasonably necessary to represent the client in the**
159 **proceeding, including but not limited to: interviewing and counseling the client, preparing**
160 **a case theory and strategy, preparing for and participating in negotiations and hearings,**
161 **drafting and submitting motions, memoranda and orders, and such other steps as**
162 **established by the applicable standards of practice for lawyers acting on behalf of children**
163 **in this jurisdiction;**

164 **(2) reviewing and accepting or declining, after consultation with the client,**
165 **any proposed stipulation for an order affecting the child and explaining to the court the**
166 **basis for any opposition;**

167 **(3) taking action the lawyer considers appropriate to expedite the proceeding**
168 **and the resolution of contested issues;**

169 **(4) where appropriate, after consultation with the client, discussing the**
170 **possibility of settlement or the use of alternative forms of dispute resolution and**
171 **participating in such processes to the extent permitted under the law of this state;¹¹**

172 **(5) meeting with the child prior to each hearing and for at least one in-person**
173 **meeting every quarter;**

⁹ *Id.*, Sec. 10(a)

¹⁰ ABA Standards, Part I, Sec D-13; F-1-5; *see generally* La. Sup. Ct. R. XXXIII, Standard 1.; *see generally* Ariz. R. Proc. Juv. Ct. R. 39(b).

¹¹ NCCUSL Act, Sec. 11 Alternative A..

101A

174 (6) where appropriate and consistent with both confidentiality and the child's
175 legal interests, consulting with the best interests advocate;

176 (7) prior to every hearing, investigating and taking necessary legal action
177 regarding the child's medical, mental health, social, education, and overall well-being;

178 (8) visiting the home, residence, or any prospective residence of the child,
179 including each time the placement is changed;

180 (9) seeking court orders or taking any other necessary steps in accordance
181 with the child's direction to ensure that the child's health, mental health, educational,
182 developmental, cultural and placement needs are met; and

183 (10) representing the child in all proceedings affecting the issues before the
184 court, including hearings on appeal or referring the child's case to the appropriate
185 appellate counsel as provided for by/mandated by [insert local rule/law etc.].

186
187 *Commentary:*

188
189 The national standards mentioned in (b)(1) include the *ABA Standards of Practice for Lawyers*
190 *who Represent Children in Abuse and Neglect Cases*.

191
192 In order to comply with the duties outlined in this section, lawyers must have caseloads that
193 allow realistic performance of these functions.

194
195 The child's lawyer may request authority from the court to pursue issues on behalf of the child,
196 administratively or judicially, even if those issues do not specifically arise from the court
197 appointment.¹² Such ancillary matters include special education, school discipline hearings,
198 mental health treatment, delinquency or criminal issues, status offender matters, guardianship,
199 adoption, paternity, probate, immigration matters, medical care coverage, SSI eligibility, youth
200 transitioning out of care issues, postsecondary education opportunity qualification, and tort
201 actions for injury, as appropriate.¹³ The lawyer should make every effort to ensure that the child
202 is represented by legal counsel in all ancillary legal proceedings, either personally, when the
203 lawyer is competent to do so, or through referral or collaboration. Having one lawyer represent
204 the child across multiple proceedings is valuable because the lawyer is better able to understand
205 and fully appreciate the various issues as they arise and how those issues may affect other
206 proceedings.

207
208 (c) When the child is capable of directing the representation by expressing his or her
209 objectives, the child's lawyer shall maintain a normal client-lawyer relationship with the
210 child in accordance with the rules of professional conduct. In a developmentally
211 appropriate manner, the lawyer shall elicit the child's wishes and advise the child as to

¹² ABA Standards, Part I, Section D-12.

¹³ *Id.*

212 options.

213

214 *Commentary:*

215

216 The lawyer-client relationship for the child's lawyer is fundamentally indistinguishable from the
 217 lawyer-client relationship in any other situation and includes duties of client direction,¹⁴
 218 confidentiality,¹⁵ diligence,¹⁶ competence,¹⁷ loyalty,¹⁸ communication,¹⁹ and the duty to provide
 219 independent advice.²⁰ Client direction requires the lawyer to abide by the client's decision about
 220 the objectives of the representation. In order for the child to have an independent voice in abuse
 221 and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed
 222 wishes.²¹ Moreover, providing the child with an independent and client-directed lawyer ensures
 223 that the child's legal rights and interests are adequately protected.

224

225 The child's lawyer needs to explain his or her role to the client and, if applicable, explain in what
 226 strictly limited circumstances the lawyer cannot advocate for the client's expressed wishes and in
 227 what circumstances the lawyer may be required to reveal confidential information. This
 228 explanation should occur during the first meeting so the client understands the terms of the
 229 relationship.

230

231 In addition to explaining the role of the child's lawyer, the lawyer should explain the legal
 232 process to the child in a developmentally appropriate manner as required by Rule 1.4 of the ABA
 233 Model Rules of Professional Conduct or its equivalent.²² This explanation can and will change
 234 based on age, cognitive ability, and emotional maturity of the child. The lawyer needs to take the
 235 time to explain thoroughly and in a way that allows and encourages the child to ask questions
 236 and that ensures the child's understanding. The lawyer should also facilitate the child's
 237 participation in the proceeding (See Section 9).

238

239 In order to determine the objectives of the representation of the child, the child's lawyer should
 240 develop a relationship with the client. The lawyer should achieve a thorough knowledge of the
 241 child's circumstances and needs. The lawyer should visit the child in the child's home, school,
 242 or other appropriate place where the child is comfortable. The lawyer should observe the child's
 243 interactions with parents, foster parents, and other caregivers. The lawyer should maintain
 244 regular and ongoing contact with the child throughout the case.

245

246 The child's lawyer helps to make the child's wishes and voice heard but is not merely the child's

¹⁴ ABA Model Rules of Professional Responsibility (hereinafter M.R.) 1.2

¹⁵ M.R. 1.6

¹⁶ M.R. 1.3

¹⁷ M.R. 1.1

¹⁸ M.R. 1.7

¹⁹ M.R. 1.4

²⁰ M.R. 2.1

²¹ ABA Standards, commentary A-1

²² M.R. 1.4

101A

247 mouthpiece. As with any lawyer, a child's lawyer is both an advocate and a counselor for the
248 client. Without unduly influencing the child, the lawyer should advise the child by providing
249 options and information to assist the child in making decisions. The lawyer should explain the
250 practical effects of taking various positions, the likelihood that a court will accept particular
251 arguments, and the impact of such decisions on the child, other family members, and future legal
252 proceedings.²³ The lawyer should investigate the relevant facts, interview persons with
253 significant knowledge of the child's history, review relevant records, and work with others in the
254 case.

255

256 **(d) The child's lawyer shall determine whether the child has diminished capacity**
257 **pursuant to the Model Rules of Professional Conduct. {STATES MAY CONSIDER**
258 **INSERTING THE FOLLOWING TWO SENTENCES:} [Under this subsection a child**
259 **shall be presumed to be capable of directing representation at the age of _____. The**
260 **presumption of diminished capacity is rebutted if, in the sole discretion of the lawyer, the**
261 **child is deemed capable of directing representation.] In making the determination, the**
262 **lawyer should consult the child and may consult other individuals or entities that can**
263 **provide the child's lawyer with the information and assistance necessary to determine the**
264 **child's ability to direct the representation.**

265 **When a child client has diminished capacity, the child's lawyer shall make a good**
266 **faith effort to determine the child's needs and wishes. The lawyer shall, as far as**
267 **reasonably possible, maintain a normal client-lawyer relationship with the client and fulfill**
268 **the duties as outlined in Section 7(b) of this Act. During a temporary period or on a**
269 **particular issue where a normal client-lawyer relationship is not reasonably possible to**
270 **maintain, the child's lawyer shall make a substituted judgment determination. A**
271 **substituted judgment determination includes determining what the child would decide if he**
272 **or she were capable of making an adequately considered decision, and representing the**
273 **child in accordance with that determination. The lawyer should take direction from the**
274 **child as the child develops the capacity to direct the lawyer. The lawyer shall advise the**
275 **court of the determination of capacity and any subsequent change in that determination.**
276

277

278 *Commentary:*

279

280 A determination of incapacity may be incremental and issue-specific, thus enabling the child's
281 lawyer to continue to function as a client-directed lawyer as to major questions in the
282 proceeding. Determination of diminished capacity requires ongoing re-assessment. A child may
283 be able to direct the lawyer with respect to a particular issue at one time but not another.
284 Similarly, a child may be able to determine some positions in the case, but not others. For
285 guidance in assessing diminished capacity, see the commentary to Section (e). The lawyer shall
286 advise the court of the determination of capacity and any subsequent change in that

²³ M.R. 2.1

287 determination.

288

289 In making a substituted judgment determination, the child's lawyer may wish to seek guidance
290 from appropriate professionals and others with knowledge of the child, including the advice of
291 an expert. A substituted judgment determination is not the same as determining the child's best
292 interests; determination of a child's best interests remains solely the province of the court.
293 Rather, it involves determining what the child would decide if he or she were able to make an
294 adequately considered decision.²⁴ A lawyer should determine the child's position based on
295 objective facts and information, not personal beliefs. To assess the needs and interests of *this*
296 child, the lawyer should observe the child in his or her environment, and consult with experts.²⁵
297

298 In formulating a substituted judgment position, the child's lawyer's advocacy should be child-
299 centered, research-informed, permanency-driven, and holistic.²⁶ The child's needs and interests,
300 not the adults' or professionals' interests, must be the center of all advocacy. For example,
301 lawyers representing very young children must truly *see* the world through the child's eyes and
302 formulate their approach from that perspective, gathering information and gaining insight into
303 the child's experiences to inform advocacy related to placement, services, treatment and
304 permanency.²⁷ The child's lawyer should be proactive and seek out opportunities to observe and
305 interact with the very young child client. It is also essential that lawyers for very young children
306 have a firm working knowledge of child development and special entitlements for children under
307 age five.²⁸
308

309 When determining a substituted judgment position, the lawyer shall take into consideration the
310 child's legal interests based on objective criteria as set forth in the laws applicable to the
311 proceeding, the goal of expeditious resolution of the case and the use of the least restrictive or
312 detrimental alternatives available. The child's lawyer should seek to speed the legal process,
313 while also maintaining the child's critical relationships.
314

315 The child's lawyer should not confuse inability to express a preference with unwillingness to
316 express a preference. If an otherwise competent child chooses not to express a preference on a
317 particular matter, the child's lawyer should determine if the child wishes the lawyer to take no
318 position in the proceeding, or if the child wishes the lawyer or someone else to make the decision
319 for him or her. In either case, the lawyer is bound to follow the client's direction. A child may
320 be able to direct the lawyer with respect to a particular issue at one time but not at another. A
321 child may be able to determine some positions in the case but not others.

²⁴ Massachusetts Committee For Public Counsel Services, *Performance Standards Governing The Representation Of Children And Parents in Child Welfare Cases*, Chapter Four: Performance Standards and Complaint Procedures 4-1, Section 1.6(c) (2004).

²⁵ Candice L. Maze, JD, *Advocating for Very Young Children in Dependency Proceedings: The Hallmarks of Effective, Ethical Representation*, ABA Center on Children and the Law, October, 2010.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

101A

322

323 (e) When the child's lawyer reasonably believes that the client has diminished
324 capacity, is at risk of substantial physical, financial or other harm unless action is taken,
325 and cannot adequately act in the client's own interest, the lawyer may take reasonably
326 necessary protective action, including consulting with individuals or entities that have the
327 ability to take action to protect the client and, in appropriate cases, seeking the
328 appointment of a best interest advocate or investigator to make an independent
329 recommendation to the court with respect to the best interests of the child.

330 When taking protective action, the lawyer is impliedly authorized under Model Rule
331 1.6(a) to reveal information about the child, but only to the extent reasonably necessary to
332 protect the child's interests.²⁹ Information relating to the representation of a child with
333 diminished capacity is protected by Rule 1.6 and Rule 1.14 of the ABA Model Rules of
334 Professional Conduct. [OR ENTER STATE RULE CITATION]

335

336 *Commentary:*

337

338 Consistent with Rule 1.14, ABA Model Rules of Professional Conduct (2004), the child's lawyer
339 should determine whether the child has sufficient maturity to understand and form an attorney-
340 client relationship and whether the child is capable of making reasoned judgments and engaging
341 in meaningful communication. It is the responsibility of the child's lawyer to determine
342 whether the child suffers from diminished capacity. This decision shall be made after sufficient
343 contact and regular communication with the client. Determination about capacity should be
344 grounded in insights from child development science and should focus on the child's decision-
345 making process rather than the child's choices themselves. Lawyers should be careful not to
346 conclude that the child suffers diminished capacity from a client's insistence upon a course of
347 action that the lawyer considers unwise or at variance with lawyer's view.³⁰

348

349 When determining the child's capacity the lawyer should elicit the child's expressed wishes in a
350 developmentally appropriate manner. The lawyer should not expect the child to convey
351 information in the same way as an adult client. A child's age is not determinative of diminished
352 capacity. For example, even very young children are regarded as having opinions that are
353 entitled to weight in legal proceedings concerning their custody.³¹

354

355 Criteria for determining diminished capacity include the child's developmental stage, cognitive
356 ability, emotional and mental development, ability to communicate, ability to understand
357 consequences, consistency of the child's decisions, strength of wishes and the opinions of others,
358 including social workers, therapists, teachers, family members or a hired expert.³² To assist in

²⁹ M.R. 1.14(c)

³⁰ Restatement (Third) of the Law Governing Lawyers Sec. 24 c. c (2000).

³¹ M.R. 1.14 cmt. 1

³² M.R. 1.14, cmt. 1

359 the assessment, the lawyer should ask questions in developmentally appropriate language to
360 determine whether the child understands the nature and purpose of the proceeding and the risks
361 and benefits of a desired position.³³ A child may have the ability to make certain decisions, but
362 not others. A child with diminished capacity often has the ability to understand, deliberate upon,
363 and reach conclusions about matters affecting the child's own well-being such as sibling visits,
364 kinship visits and school choice and should continue to direct counsel in those areas in which he
365 or she does have capacity. The lawyer should continue to assess the child's capacity as it may
366 change over time.

367

368 When the lawyer determines that the child has diminished capacity, the child is at risk of
369 substantial harm, the child cannot adequately act in his or her own interest, and the use of the
370 lawyer's counseling role is unsuccessful, the lawyer may take protective action. Substantial harm
371 includes physical, sexual and psychological harm. Protective action includes consultation with
372 family members, or professionals who work with the child. Lawyers may also utilize a period of
373 reconsideration to allow for an improvement or clarification of circumstances or to allow for an
374 improvement in the child's capacity.³⁴ This rule reminds lawyers that, among other things, they
375 should ultimately be guided by the wishes and values of the child to the extent they can be
376 determined.³⁵

377

378 "Information relating to the representation is protected by Model Rule 1.6. Therefore, unless
379 authorized to do so, the lawyer may not disclose such information. When taking protective
380 action pursuant to this section, the lawyer is impliedly authorized to make necessary disclosures,
381 even when the client directs the lawyer to the contrary."³⁶ However the lawyer should make
382 every effort to avoid disclosures if at all possible. Where disclosures are unavoidable, the lawyer
383 must limit the disclosures as much as possible. Prior to any consultation, the lawyer should
384 consider the impact on the client's position, and whether the individual is a party who might use
385 the information to further his or her own interests. "At the very least, the lawyer should
386 determine whether it is likely that the person or entity consulted with will act adversely to the
387 client's interests before discussing matters related to the client."³⁷ If any disclosure by the
388 lawyer will have a negative impact on the client's case or the lawyer-client relationship, the
389 lawyer must consider whether representation can continue and whether the lawyer-client
390 relationship can be re-established. "The lawyer's position in such cases is an unavoidably
391 difficult one."³⁸

392

393 A request made for the appointment of a best interest advocate to make an independent
394 recommendation to the court with respect to the best interests of the child should be reserved for

³³ Anne Graffam Walker, Ph.D. *Handbook on Questioning Children: A Linguistic Perspective* 2nd Edition ABA Center on Children and the Law Copyright 1999 by ABA.

³⁴ M.R. 1.14 cmt. 5

³⁵ M.R. 1.14 cmt. 5

³⁶ M.R. 1.14, cmt. 8

³⁷ M.R. 1.14, cmt. 8

³⁸ M.R. 1.14, cmt 8

101A

395 extreme cases, i.e. where the child is at risk of substantial physical harm, cannot act in his or her
396 own interest and all protective action remedies have been exhausted. Requesting the judge to
397 appoint a best interest advocate may undermine the relationship the lawyer has established with
398 the child. It also potentially compromises confidential information the child may have revealed
399 to the lawyer. The lawyer cannot ever become the best interest advocate, in part due to
400 confidential information that the lawyer receives in the course of representation. Nothing in this
401 section restricts a court from independently appointing a best interest advocate when it deems the
402 appointment appropriate.

403

404 SECTION 8. ACCESS TO CHILD AND INFORMATION RELATING TO THE 405 CHILD.

406 (a) Subject to subsections (b) and (c), when the court appoints the child's lawyer, it
407 shall issue an order, with notice to all parties, authorizing the child's lawyer to have access
408 to:

409 (1) the child; and

410 (2) confidential information regarding the child, including the child's
411 educational, medical, and mental health records, social services agency files, court records
412 including court files involving allegations of abuse or neglect of the child, any delinquency
413 records involving the child, and other information relevant to the issues in the proceeding,
414 and reports that form the basis of any recommendation made to the court.

415 (b) A child's record that is privileged or confidential under law other than this [act]
416 may be released to a child's lawyer appointed under this [act] only in accordance with that
417 law, including any requirements in that law for notice and opportunity to object to release
418 of records. Nothing in this act shall diminish or otherwise change the attorney-client
419 privilege of the child, nor shall the child have any lesser rights than any other party in
420 regard to this or any other evidentiary privilege. Information that is privileged under the
421 lawyer-client relationship may not be disclosed except as otherwise permitted by law of this
422 state other than this [act].

423 (c) An order issued pursuant to subsection (a) shall require that a child's lawyer
424 maintain the confidentiality of information released pursuant to Model Rule 1.6. The court
425 may impose any other condition or limitation on an order of access which is required by
426 law, rules of professional conduct, the child's needs, or the circumstances of the
427 proceeding.

428 (d) The custodian of any record regarding the child shall provide access to the
429 record to an individual authorized access by order issued pursuant to subsection (a).

430 (e) Subject to subsection (b), an order issued pursuant to subsection (a) takes effect
431 upon issuance.³⁹

³⁹ NCCUSL Act, Sec. 15

432

433

SECTION 9. PARTICIPATION IN PROCEEDINGS.

434

435

(a) Each child who is the subject of an abuse and neglect proceeding has the right to attend and fully participate in all hearings related to his or her case.

436

437

(b) Each child shall receive notice from the child welfare agency worker and the child's lawyer of his or her right to attend the court hearings.

438

439

440

441

(c) If the child is not present at the hearing, the court shall determine whether the child was properly notified of his or her right to attend the hearing, whether the child wished to attend the hearing, whether the child had the means (transportation) to attend, and the reasons for the non-appearance.

442

443

(d) If the child wished to attend and was not transported to court the matter shall be continued.

444

445

446

(e) The child's presence shall only be excused after the lawyer for the child has consulted with the child and, with informed consent, the child has waived his or her right to attend.

447

(f) A child's lawyer appointed under this [act] is entitled to:

448

449

(1) receive a copy of each pleading or other record filed with the court in the proceeding;

450

451

452

(2) receive notice of and attend each hearing in the proceeding [and participate and receive copies of all records in any appeal that may be filed in the proceeding];

453

454

(3) receive notice of and participate in any case staffing or case management conference regarding the child in an abuse and neglect proceeding; and

455

456

457

(4) receive notice of any intent to change the child's placement. In the case of an emergency change, the lawyer shall receive notice as soon as possible but no later than 48 hours following the change of placement.

458

459

460

(g) A child's lawyer appointed under this [act] may not engage in ex parte contact with the court except as authorized by the applicable rules of professional conduct, court order, or other law.

461

462

463

(h) Subject to court approval, a party may call any best interest advocate as a witness for the purpose of cross-examination regarding the advocate's report, even if the advocate is not listed as a witness by a party.

464

465

466

(i) In a jury trial, disclosure to the jury of the contents of a best interest advocate's report is subject to this state's rules of evidence.⁴⁰

⁴⁰ NCCUSL Act, Sec. 16

101A

467 *Commentary:*

468

469 Courts need to provide the child with notification of each hearing. The Court should enforce the
470 child's right to attend and fully participate in all hearings related to his or her abuse and neglect
471 proceeding.⁴¹ Having the child in court emphasizes for the judge and all parties that this hearing
472 is about the child. Factors to consider regarding the child's presence at court and participation in
473 the proceedings include: whether the child wants to attend, the child's age, the child's
474 developmental ability, the child's emotional maturity, the purpose of the hearing and whether the
475 child would be severely traumatized by such attendance.

476

477 Lawyers should consider the following options in determining how to provide the most
478 meaningful experience for the child to participate: allowing the child to be present throughout
479 the entire hearing, presenting the child's testimony in chambers adhering to all applicable rules
480 of evidence, arranging for the child to visit the courtroom in advance, video or teleconferencing
481 the child into the hearing, allowing the child to be present only when the child's input is
482 required, excluding the child during harmful testimony, and presenting the child's statements in
483 court adhering to all applicable rules of evidence.

484

485 Courts should reasonably accommodate the child to ensure the hearing is a meaningful
486 experience for the child. The court should consider: scheduling hearing dates and times when the
487 child is available and least likely to disrupt the child's routine, setting specific hearing times to
488 prevent the child from having to wait, making courtroom waiting areas child friendly, and
489 ensuring the child will be transported to and from each hearing.

490

491 The lawyer for the child plays an important role in the child's court participation. The lawyer
492 shall ensure that the child is properly prepared for the hearing. The lawyer should meet the child
493 in advance to let the child know what to expect at the hearing, who will be present, what their
494 roles are, what will be discussed, and what decisions will be made. If the child would like to
495 address the court, the lawyer should counsel with the child on what to say and how to say it.
496 After the hearing, the lawyer should explain the judge's ruling and allow the child to ask
497 questions about the proceeding.

498

499 Because of the wide range of roles assumed by best interest advocates in different jurisdictions,
500 the question of whether a best interest advocate may be called as a witness should be left to the
501 discretion of the court.

502

503 **SECTION 10. LAWYER WORK PRODUCT AND TESTIMONY.**

504 **(a) Except as authorized by [insert reference to this state's rules of professional**
505 **conduct] or court rule, a child's lawyer may not:**

⁴¹ American Bar Association Youth Transitioning from Foster Care August 2007; American Bar Association Foster Care Reform Act August 2005

- 506 (1) be compelled to produce work product developed during the
507 appointment;
- 508 (2) be required to disclose the source of information obtained as a result of
509 the appointment;
- 510 (3) introduce into evidence any report or analysis prepared by the child's
511 lawyer; or
- 512 (4) provide any testimony that is subject to the attorney-client privilege or
513 any other testimony unless ordered by the court.

514
515 *Commentary:*

516
517 Nothing in this act shall diminish or otherwise change the lawyer-work product or attorney-client
518 privilege protection for the child, nor shall the child have any lesser rights than any other party
519 with respect to these protections.

520 If a state requires lawyers to report abuse or neglect under a mandated reporting statute, the state
521 should list that statute under this section.

522

523 **SECTION 11. CHILD'S RIGHT OF ACTION.**

524 (a) The child's lawyer may be liable for malpractice to the same extent as a lawyer
525 for any other client.

526 (b) Only the child has a right of action for money damages against the child's
527 lawyer for inaction or action taken in the capacity of child's lawyer.

528

529 **SECTION 12. FEES AND EXPENSES IN ABUSE OR NEGLECT**
530 **PROCEEDINGS.**

531 (a) In an abuse or neglect proceeding, a child's lawyer appointed pursuant to this
532 [act] is entitled to reasonable and timely fees and expenses in an amount set by [court or
533 state agency to be paid from (authorized public funds)].⁴²

534 (b) To receive payment under this section, the payee shall complete and submit a
535 written claim for payment, whether interim or final, justifying the fees and expenses
536 charged.

537 (c) If after a hearing the court determines that a party whose conduct gave rise to a
538 finding of abuse or neglect is able to defray all or part of the fees and expenses set pursuant
539 to subsection (a), the court shall enter a judgment in favor of [the state, state agency, or

⁴²N.C. Gen. Stat. Ann. § 7B-603.

101A

540 political subdivision] against the party in an amount the court determines is reasonable.⁴³

541

542

SECTION 13. EFFECTIVE DATE. This [act] takes effect on _____.

⁴³ NCCUSL Act, Sec. 19.

Report

“The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.” IJA/ABA, *Juvenile Justice Standards, Standards Relating to Counsel for Private Parties*, Std. 1.1, at 11 (1980)(emphasis added).

Courts in abuse and neglect cases dramatically shape a child’s entire future in that the court decides where a child lives, with whom the child will live and whether the child’s parental rights will be terminated. No other legal proceeding that pertains to children has such a major effect on their lives. While the outcome of an abuse and neglect case has drastic implications for both the parents and the children involved, only children’s physical liberty is threatened. An abuse and neglect case that results in removal of the child from the home may immediately or ultimately result in the child being thrust into an array of confusing and frightening situations wherein the State moves the child from placement to placement with total strangers, puts the child in a group home, commits the child to an institution, or even locks the child up in detention for running away or otherwise violating a court order. Our notion of basic civil rights, and ABA Policy and Standards, demand that children and youth have a trained legal advocate to speak on their behalf and to protect their legal rights. There would be no question about legal representation for a child who was facing a month in juvenile detention, so why is there an issue for a child in an abuse and neglect case, where State intervention may last up to 18 years? The trauma faced by children in these proceedings has been recognized by at least one federal court which held that foster children have a constitutional right to adequate legal representation.¹

Despite the gravity of these cases, the extent to which a child is entitled to legal representation varies not only from state to state, but from case to case, and all too often, from hearing to hearing. The root of these inconsistencies lies in the lack of a mandate for legal representation for children in abuse and neglect cases, and the lack of uniform standards for the legal representation of children, coupled with the lack of sufficient training necessary for attorneys to provide adequate representation to their child clients.

In 1996 the ABA adopted the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (hereinafter “ABA Abuse and Neglect Standards”) calling for a lawyer for every child subject to abuse and neglect proceedings.² The ABA Abuse and Neglect standards state that “All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court jurisdiction continue.” In 2005, the ABA unanimously passed policy that calls upon Congress, the States, and territories to ensure that “all dependent youth . . . be

¹ *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (2005).

² American Bar Association, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996) at preface.

101A

on equal footing with other parties in the dependency proceeding and have the right to quality legal representation, not simply an appointed lay guardian *ad litem* or lay volunteer advocate with no legal training, acting on their behalf in this court process.”

The proposed *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (hereinafter “Model Act”) focuses on the representation of children in abuse and neglect cases to ensure that states have a model of ethical representation for children that is consistent with the ABA Abuse and Neglect Standards,³ ABA Policy, and the ABA Model Rules of Professional Conduct (hereinafter “ABA Model Rules”).

Although many states require that a lawyer be appointed for a child in an abuse and neglect proceeding, some require that the child’s lawyer be “client directed” and others require the lawyer to act as a guardian *ad litem* whereby the attorney is charged with the duty of protecting and serving the “best interests” of the child. Often there is not “careful delineation of the distinctions between the ethical responsibilities of a lawyer to the client and the professional obligations of the lay guardian *ad litem* as a best interests witness for the court.”⁴ The states’ use of different statutory language and mandated roles for child representation has led to much confusion within the field.

The proposed Model Act conforms to the clearly stated preference in the ABA Abuse and Neglect Standards for a client-directed lawyer for each child. Similarly, the proposed Model Act is consistent with the ABA Model Rules. The Model Act states that the child’s lawyer should form an attorney-client relationship which is “fundamentally indistinguishable from the attorney-client relationship in any other situation and which includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to advise.”⁵

Consonant with the ABA Model Rules, the drafters of the Model Act started from the premise that all child clients have the capacity to form an attorney-client relationship. An attorney must enter into representation of a child treating the child client as he or she would any other client to every extent possible. The attorney should give the child frank advice on what he or she thinks is the best legal remedy to achieve the child’s expressed wishes. This decision should not be based on the attorney’s mores or personal opinions; rather it should focus on the attorney’s knowledge of the situation, the law, options

³ American Bar Association, *ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases* (1996) The Standards can be found at <http://www.abanet.org/leadership/2006/annual/onehundredfourteen.doc>

⁴ *Uniform Representation of Children in Abuse and Neglect, and Custody Proceedings Act* (hereinafter “NCCUSL Act”), National Conference of Commissioners of Uniform State Law. Prefatory Note (2007); the text of the final act can be found at http://www.law.upenn.edu/bll/archives/ulc/varocda/2007_final.htm. See Atwood, *supra* note 1, at 188-91; Howard A. Davidson, *Child Protection Policy and Practice at Century’s End*, 33 FAM. L. Q. 765, 768-69 (1999). For information about different state practices see *Representing Children Worldwide 2005* (www.law.yale.edu/rcw) or *A Child’s Right to Counsel. First Star’s National Report Card on Legal Representation for Children 2007*.

⁵ ABA Model Act, Commentary to Section 7(c) which refers to ABA Model Rules 1.2, 1.6, 1.3, 1.1, 1.7, 1.4 and 2.1.

available and the child's wishes. The proposed Model Act also provides specific guidance for lawyers charged with representing those child clients with diminished capacity. Some children (including infants, pre-verbal children, and children who are mentally or developmentally challenged) do not have the capacity to form a lawyer-client relationship. These child clients should be considered the exception, not the rule, and the structure of representation for children as a whole should be based upon a theory of competence and capacity.

Providing children in abuse and neglect cases with a client-directed 'traditional' lawyer is consistent with the thinking of national children's law experts. A conference on the representation of children was held at Fordham Law School in 1995 entitled *Ethical Issues in the Legal Representation of Children*. The conference examined the principles set out in the then-proposed (later adopted) ABA Abuse and Neglect Standards and conferees clearly recommended that lawyers for children should act as lawyers, not as guardians *ad litem*.⁶ The co-sponsors and participants at the Fordham conference included national children's law organizations and many ABA entities.⁷

Ten years later in 2006, children's law experts gathered again at a conference at the University of Nevada, Las Vegas (UNLV), to review the state of legal representation of children. Like the Fordham Conference, the UNLV participants produced a set of recommendations.⁸ The UNLV Recommendations encourage lawyers to seek to empower children by helping them develop decision-making capacity. Regarding the role of the lawyer, the UNLV Recommendations strongly support client-directed representation for children capable of making considered decisions.⁹ Again, the list of co-sponsors and participants included nationally respected children's law organizations and many ABA entities.¹⁰

⁶ *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996) (Fordham Recommendations) (attorney must follow child's expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint).

⁷ Co-sponsors included the Administration for Children, Youth and Families, U.S. Department of Health and Human Services; ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility, ABA Section of Criminal Justice, Juvenile Justice Committee; ABA Section of Family Law; ABA Section of Individual Rights and Responsibilities; ABA Section of Litigation Task Force on Children; ABA Steering Committee on the Unmet Legal Needs of Children; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; Stein Center for Ethics and Public Interest Law, Fordham University School of Law.

⁸ See *Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L. J. 592-687 (2006) (UNLV Recommendations).

⁹ As stated in the Recommendations, "[c]hildren's attorneys should take their direction from the client and should not substitute for the child's wishes the attorney's own judgment of what is best for children or for that child." *Id.* at 609.

¹⁰ Co-sponsors of UNLV included the ABA Center on Children and the Law, Young Lawyers Division; ABA Center for Professional Responsibility; ABA Child Custody and Adoption Pro Bono Project; ABA Section of Family Law; ABA Section of Litigation; Home at Last, Children's Law Center of Los Angeles; Juvenile Law Center; National Association of Counsel for Children; National Center for Youth Law; National Council of Juvenile and Family Court Judges; National Juvenile Defender Center; Stein Center

101A

Consistent with the ABA Abuse and Neglect Standards, ABA policy, and the recommendations of national children's law experts, Section 3 of this Model Act mandates that an attorney, acting in a traditional role, should be appointed for every child who is the subject of an abuse or neglect proceeding.¹¹ Attorneys can identify legal issues regarding their child clients, use their legal skills to ensure the protection of their clients' rights and needs, and advocate for their clients. The Model Act requires lawyers to complete a thorough and independent investigation and participate fully in all stages of the litigation. Lawyers for children, as lawyers for any client, have a role as a counselor to their clients and should assist their clients in exploring the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members, and future legal proceedings.¹²

Lawyers for children allow children to be participants in the proceedings that affect their lives and safety. Children who are represented by a lawyer often feel the process is fairer because they had a chance to participate and to be heard. Consequently, children are more likely to accept the court's decision because of their own involvement in the process.

Requiring lawyers to represent children in abuse and neglect cases is also consistent with federal law. The Child Abuse Prevention and Treatment Act (CAPTA) requires the appointment of a "guardian *ad litem*" for a child as a condition of receiving federal funds for child abuse prevention and treatment programs. Providing a child with a lawyer is consistent with the requirements of CAPTA. No state with a lawyer model has been held out of compliance with CAPTA and Health and Human Services (HHS) has issued guidance suggesting that appointing counsel for a child promotes the child's "best interest" consistent with CAPTA.¹³

The Model Act also provides lawyers guidance when representing children with diminished capacity, which includes young children. Like all children in these proceedings, young children are entitled to proceedings that fully examine and address their needs, including *inter alia* their physical, behavioral, and developmental health and well-being, their education and early-learning needs, their need for family permanency and stability, and their need to be safe from harm. The Model Act also allows states to set an age of capacity if they so choose.

The Model Act allows and welcomes "best interest advocates" in child welfare cases. A best interest advocate is defined as "an individual, not functioning or intended to function

for Law and Ethics, Fordham University School of Law; Support Center for Child Advocates; and Youth Law Center.

¹¹ Federal law has long authorized the discretionary appointment of counsel for Indian children subject to the Indian Child Welfare Act. *See* 25 U.S.C. § 1912(b) (2000).

¹² Model Act, Commentary for Section (7)(c)(1).

¹³ U.S. Department of HHS Children's Bureau, *Adoption 2002: The President's Initiative on Adoption and Permanence for Children*, Commentary to Guideline 15A

as the child's lawyer, appointed by the court to assist in determining the best interests of the child."¹⁴ The advisor may be a court-appointed special advocate (CASA), a guardian *ad litem* or other person who has received training specific to the best interest of the child. The Act endorses and in no way restricts the widespread use of CASAs to fulfill the role of court appointed advisor.¹⁵

A state's law regarding abuse and neglect proceedings should be designed to provide children involved in an abuse and neglect case with a well-trained, high quality lawyer who is well-compensated and whose caseload allows for effective representation. Lawyers for children are essential for ensuring that the child's legal rights are protected. "Unless children are allowed by lawyers to set the objectives of their cases, they would not only be effectively deprived of a number of constitutional rights, they would be denied procedures that are fundamental to the rule of law."¹⁶

Children in dependency court proceedings are often taken from their parents, their siblings and extended families, their schools, and everything that is familiar to them. Children and youth deserve a voice when important and life-altering decisions are being made about them. They deserve to have their opinions heard, valued and considered. They have interests that are often distinct or are opposed to those of the state and their parents in dependency proceedings and, as the ABA has recognized many times, they deserve ethical legal representation.

In preparing this Model Act, the drafters have taken into consideration the enormous contributions of various organizations and advocates in defining standards of representation, most notably that of the American Bar Association (ABA), the National Association of Counsel for Children (NACC), the Uniform Law Commission (ULC), participants in the Representing Children in Families UNLV Conference, and the states themselves. In addition, drafters have sought input from the ABA Standing Committee on Ethics, various sections within the ABA, and more than 30 children's law centers around the country who represent children every day.

¹⁴ Model Act, Section 1.

¹⁵ The Court Appointed Special Advocate is a lay volunteer who advocates as a non-lawyer on behalf of a child in child abuse and neglect proceedings. Volunteers are screened and trained at the local level, but all CASA programs that are affiliated with the National Court Appointed Special Advocate Association must comply with the standards issued by that organization. See www.nationalcasa.org. In addition, many states have established their own standards to ensure that the volunteers representing children are competent and possess relevant training and experience. See generally Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 JOURNAL OF CENTER FOR CHILDREN AND THE COURTS 63 (1999). The Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice is authorized to enter into cooperative agreements with the National CASA Association to expand CASA programs nationally. See 42 U.S.C.A. § 13013 (2005 & Supp. 2006). One of the key strengths of the CASA program is that a CASA volunteer generally represents only one child at a time. Moreover, an attorney for the child working in tandem with a CASA volunteer can provide a powerful "team" approach in juvenile court. In addition, CASA volunteers may have access to the CASA program's own legal representative for legal advice.

¹⁶ Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 Fordham L.Rev. 1399, 1423-24 (1996).

101A

Respectfully Submitted,
Hilarie Bass, Chair
Section of Litigation
August, 2011

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE M.S.R. AND T.S.R.
MINOR CHILDREN

N.L.,

APPELLANT.

NO. 85729-6

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | |
|---|---|
| <input checked="" type="checkbox"/> SUSAN LLORENS, AAG
OFFICE OF THE ATTORNEY GENERAL
DSHS DIVISION
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188 | <input checked="" type="checkbox"/> U.S. MAIL
<input type="checkbox"/> HAND DELIVERY
<input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> ALLYSON ZIPP, AAG
PETER GONICK, AAG
OFFICE OF THE ATTORNEY GENERAL
DSHS DIVISION
800 FIFTH AVENUE, SUITE 2000
SEATTLE, WA 98104-3188 | <input checked="" type="checkbox"/> U.S. MAIL
<input type="checkbox"/> HAND DELIVERY
<input type="checkbox"/> _____ |
| <input checked="" type="checkbox"/> NYAKAT LUAK
1200 S 18 TH ST APT 3
RENTON, WA 98055 | <input checked="" type="checkbox"/> U.S. MAIL
<input type="checkbox"/> HAND DELIVERY
<input type="checkbox"/> _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF AUGUST, 2011.

X _____


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