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No. 41211-0-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**MICHAEL J. HOLT,  
Respondent/Cross-Appellant,**

v.

**LAURIE L. HOLT,  
Appellant/Cross-Respondent.**

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**BRIEF OF AMICI CURIAE LEGAL VOICE, CENTER FOR  
CHILDREN & YOUTH JUSTICE, AND GUARDIAN AD LITEM  
JEAN WALLER**

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## I. INTRODUCTION

A child has a fundamental right to maintain family relationships. According to a half century of social science research, children who lose the adults with whom they form attachments may suffer irreparable damage into adolescence and even into adulthood. To prevent this harm, or at least minimize its impact, strong policy and due process protections dictate that when a court is determining who a child's parent is, that child should be appointed legal representation to help him or her navigate the complexities of the legal system and ensure that the child's stated interests are heard and considered.

This is a case about an 11-year-old boy at risk of having a court decide that his dad is not his parent. To B.H., Michael Holt is unquestionably his father, and parents like Michael are not replaceable. Michael has been a central part of B.H.'s life since the day he was born. B.H. shares Michael's last name, calls Michael "Dad," benefits from child support that Michael has always paid (despite having no legal obligation to do so), lives with Michael on weekends, and has been raised by Michael in a manner indistinguishable from B.H.'s half-brother, C.H. (Michael's biological son). In short, Michael has "fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role" in

B.H.'s life.<sup>1</sup> Yet because Michael also served briefly as B.H.'s stepparent, B.H. is at risk of losing his relationship with his father.

A *de facto* parent in Washington stands in legal parity to a biological parent and is entitled to the parental privileges that are determined to be in the best interests of the child.<sup>2</sup> To be held to be a *de facto* parent, a petitioner must satisfy a stringent multi-part test.<sup>3</sup> Although satisfying this test depends on the actions of the petitioner and the biological parent,<sup>4</sup> courts must consider the effect on the child, who, after all, is at the center of the dispute, has the most at stake, and has a fundamental right to a stable and healthy family life.<sup>5</sup>

What matters to a child of B.H.'s age are not the legal nuances of "parentage," but rather, the legal consequence of those nuances: Will B.H. have the right to continue his relationship with his father for the next

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<sup>1</sup> See *In re Parentage of L.B.*, 155 Wn.2d 679, 708, 122 P.3d 161 (2005) (discussing application of *de facto* parentage doctrine).

<sup>2</sup> See *id.* at 708-09.

<sup>3</sup> See *id.* at 708 (petitioners must show "(1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature"; "recognition of a *de facto* parent is 'limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life.'").

<sup>4</sup> See *id.* For brevity and because it is applicable to the facts in this case, *amici* refers to "biological parent" but notes that adoptive parents have equal rights under the law.

<sup>5</sup> See *In re Custody of Shields*, 157 Wn.2d 126, 151-54, 136 P.3d 117 (2006) (Bridge, J., concurring) ("[I]f and when the time comes to define what role the child must play in a decision about his or her life, the contours of that role will be informed by the recognition of some degree of constitutional protection the child holds to stable and healthy family relationships.").

seven years of his life? Of all the parties in this lawsuit, the answer to this question most affects the person who is not a party—the 11-year-old child who needs to be heard above the din of litigation between the people he loves. To deny B.H. his voice, to deny him his right to continue the relationship he has with this father and brother, to deny him the right to recognize who his father is, is to deny him the two things that any child on the brink of adolescence both needs and struggles to find: stability and an identity.

Courts in *de facto* parentage cases must recognize that children suffer harm when they lose a parent, biological or not, and have a constitutional right to maintain family relationships with those persons who comprise their family unit. To prevent this harm and protect this right, children in *de facto* parentage cases should be appointed counsel.

## **II. IDENTITY AND INTEREST OF AMICI**

The identity and interest of *amici* are set forth in the Motion for Leave to File Amici Curiae Brief, filed herewith.

## **III. STATEMENT OF THE CASE**

*Amici* adopt Michael Holt's statement of the case.

#### IV. ARGUMENT

##### A. Children Suffer Irreparable Harm When They Lose the Persons Who Parent Them.

Children's overall well-being and growth are closely linked to their stable and continuous relationships with their parents and familial units, whether these relationships are biological or not. In cases like this, when a child has been raised from birth by a parent who is not legally recognized, the court must consider the effect on a child such as B.H. if he abruptly loses contact with the only father he has ever known. B.H.'s emotional health and the well-being of many children with similarly non-traditional families are in jeopardy if the law is unable to recognize Michael Holt as B.H.'s *de facto* parent.

Over the past half century, a rich body of scholarship in the field of "attachment theory" has confirmed the prevalence of psychological and environmental—rather than merely biological—factors in the bonding of children to their primary caregivers.<sup>6</sup> Infants and young children bond with parental figures through the receipt of love and affection, and through the provision for their physical needs and comfort. The level and quality of commitment a parental figure makes in a child's life in turn profoundly

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<sup>6</sup> Jerrold R. Brandell & Shoshana Ringel, *Attachment and Dynamic Practice: An Integrative Guide of Social Workers and Other Clinicians* xi–xii (Columbia Univ. Press 2007).

influences both the child's attachment to that parent and the stability of the child's development.<sup>7</sup> What is most important to a child is that his or her immediate needs are met and he or she feels physically and emotionally secure. A child may form parental bonds with any person consistently fulfilling these needs, regardless of biological kinship or the lack of any legally recognized parental status. B.H. and Michael Holt have formed such a critical and loving bond, with the consent and encouragement of B.H.'s mother. Michael cut the umbilical cord when B.H. was born, was the first person to hold the infant son, and has been present in B.H.'s life ever since as a constant and caring parent.

During childhood and adolescence, a phase B.H. is about to enter, maintenance of these formative parental relationships remains important. Indeed, there exists "near consensus for the principle that a child's healthy growth depends in large part upon the continuity of his [or her] personal relationships."<sup>8</sup> As such, scholars have increasingly recognized that a child's, such as B.H.'s, "need for continuity in intimate relationships demands that the state provide the opportunity to maintain important

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<sup>7</sup> Mary Ainsworth & Wall S. Walters, *Patterns of Attachment* 255-60 (Lawrence Erlbaum 1978).

<sup>8</sup> Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 Va. L. Rev. 879, 902 (1984).

familial relationships with more than one parent or set of parents."<sup>9</sup> Through childhood and adolescence, the same constancies of support and nurturing (manifested in the attendance of PTA meetings and Little League games, for example, or guidance through social problems) are essential to the healthy development of any child, including B.H. Michael Holt has been actively involved in B.H.'s upbringing, from helping with B.H.'s schooling to coaching B.H.'s sports teams. Though not required by a court, Michael has also provided B.H. with consistent financial support, including paying child support and providing medical insurance. In short, B.H. has benefited from having a devoted and constant father in his life and should be allowed to continue to benefit from this relationship through adolescence.

When a child like B.H. has enjoyed the stable love and support of a parent, the loss of that parent—either through death or separation—is invariably traumatic.<sup>10</sup> Research has concluded that loss of an attachment figure damages a child's ability to "cope with adversity or to view [himself or herself] as deserving support [and] creates a feeling of

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<sup>9</sup> *Id.* at 882.

<sup>10</sup> There exists "a wealth of evidence . . . supporting [the] prediction that the loss of a primary attachment figure produces significant psychological harm." See Shelly A. Riggs, *Response to Troxel v. Granville: Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 Fam. Ct. Rev. 39, 42 (2003)

hopelessness/helplessness that predisposes children to adult depression."<sup>11</sup> What is more, the systemic nature of familial relationships may compound the child's loss, *particularly* when the loss of the parent is due to enforced separation. In cases like B.H.'s, loss of access to a parent will also entail the loss of access to the parent's family and embedded social network (including grandparents, aunts, uncles, cousins, friends, etc.). The consequences of such a loss are widespread. B.H. is integrated into the extended Holt family, celebrating holidays and vacationing with them. In particular, he is close with his grandmother, Michael's mother, who has watched B.H. after school for years. B.H.'s enforced separation from his father, as well as his father's family, would be devastating.

Furthermore, enforced separation also affects the dynamics of those relationships that remain ostensibly intact. In particular, sibling relationships may be adversely affected when one brother or sister is denied access to a parent with whom another brother or sister lives.<sup>12</sup> Children with positive attachments to their siblings experience more opportunities for cognitive development, increased social functioning, and

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<sup>11</sup> Brianna Coffino, *The Role of Childhood Parent Figure Loss in the Etiology of Adult Depression: Findings From a Prospective Longitudinal Study*, 11 *Attachment & Human Dev.* 445, 445-46 (2009).

<sup>12</sup> See David M. Shumaker et al., *The Forgotten Bonds: The Assessment and Contemplation of Sibling Attachment in Divorce and Parental Separation*, *Fam. Ct. Rev.* 46, 51 (2011).

elevated self-esteem.<sup>13</sup> As with parent-child relationships, sibling relationships are as much socially as biologically constructed. The enforced disruption of a parent-child relationship can thus also disrupt the relationship between biological and non-biological siblings who have always viewed themselves as "the same" in the eyes of their parent(s). Here, B.H. and his half-brother C.H. are extremely close, and it deeply affects both boys when they are separated.

Disruption of parent-child bonds, whether biological or not, can also cause a child like B.H. long-term emotional harm and affect his development. When a child has formed an attachment to a parental figure, "the forcible interruption of the relationship . . . is reacted to by the child with emotional distress and a setback of ongoing development."<sup>14</sup> Prolonged or permanent separation from a parental figure can seriously injure and fragment a child's sense of self.<sup>15</sup> Children who endure such separations are also likely to suffer "setbacks in the quality of their next attachments, which will be less trustful."<sup>16</sup> Thus, adults who themselves suffered from disruptions of continuity with attachment figures as children

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<sup>13</sup> See *id.* at 49 (citing P. L. East & K. S. Rook, *Compensatory Patterns of Support among Children's Peer Relationships: A Test Using School Friends, Nonschool Friends, and Siblings*, 28 *Dev. Psych.* 163 (1992); N. Howe & H.S. Ross, *Socialization, Perspective-Taking, and the Sibling Relationship*, 26 *Dev. Psych.* 160 (1990); T. E. Smith, *Academic Achievement and Teaching Younger Siblings*, 53 *Social Psych. Quarterly* 352 (1990)).

<sup>14</sup> See Joseph Goldstein et al., *Beyond the Best Interests of the Child* 27 (1979 ed.).

<sup>15</sup> See Riggs, *supra* note 10, at 41.

<sup>16</sup> Goldstein et al., *supra* note 14 at 33.

may treat their children in the same manner.<sup>17</sup> This emotional harm can be particularly severe when it results from a complicated legal proceeding that the child does not understand.<sup>18</sup>

From B.H.'s perspective, parental status is not a legal construct, but rather an experience of everyday reality. If an adult has unquestionably served as a constant and committed parental figure throughout a child's life, if the child in turn loves this parent, and if the child also has a close sibling who is the parent's biological offspring, how can the law possibly justify the loss of this parent in that child's eyes?

**B. Children Have a Constitutional Right to Maintain Family Relationships with the People Who Comprise Their Family Unit.**

In B.H.'s world, Michael Holt is his dad. The two of them have developed a deep and bonded parent-child relationship that merits constitutional protection. Although B.H.'s mother is entitled to a constitutionally protected relationship with her son, this right is neither absolute nor exclusive, and B.H. separately possesses a liberty interest in his relationship with his *de facto* father and familial unit.

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<sup>17</sup> *Id.* at 34; see also Douglas Davies, *Child Development: A Practitioner's Guide* 1, 29 (1999) ("[W]orking models of attachment tend to persist throughout life and . . . are particularly activated by parenthood, thus setting the stage for transmission of attachment patterns across generations.").

<sup>18</sup> See Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 Temp. Pol. & Civ. Rts. L. Rev. 663, 676-67 (2006).

The relationship between the parent and the child is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court.<sup>19</sup> A parent's right to the "companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants . . . , absent a powerful countervailing interest, protection."<sup>20</sup> The U.S. Constitution "protects the sanctity of the family."<sup>21</sup> Accordingly, the U.S. Constitution places significant substantive and procedural limits on state interference with the family relationship.<sup>22</sup>

In addition to *parents'* long-recognized fundamental interest in the care and custody of their children,<sup>23</sup> courts in Washington and throughout the nation acknowledge that *children* also possess substantial and protected rights in their family relationships.<sup>24</sup> Indeed, the Washington Supreme Court has recognized that "[i]t would be ironic to find issues of parent-child ties are of constitutional dimension when the parents' rights

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<sup>19</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>20</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>21</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

<sup>22</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley*, 405 U.S. 645.

<sup>23</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Santosky*, 455 U.S. at 753; *In re Custody of Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998), *aff'd sub nom. Troxel*, 530 U.S. 57.

<sup>24</sup> See, e.g., *Burke v. Cnty. of Alameda*, 586 F.3d 725 (9th Cir. 2009); *Brokaw v. Mercer Cnty.*, 235 F.3d 1000 (7th Cir. 2000); *Whisman ex rel. Whisman v. Rinehart*, 119 F.3d 1303 (8th Cir. 1997); *Morgan v. Powell*, 659 A.2d 1243 (Del. Fam. Ct. 1994); *Paquette v. Paquette*, 499 A.2d 23 (Vt. 1985); *Moore v. Burdman*, 84 Wn.2d 408, 411, 526 P.2d 893 (1974) ("A corollary interest [of a parent in the custody and control of his minor child] is that of the child in having the affection and care of his parents.").

are involved but not when the child's are at stake."<sup>25</sup>

The importance of family "stems from the emotional attachments that derive from the intimacy of daily association."<sup>26</sup> As the Court of Appeals for the Second Circuit has noted, the right to preserve family integrity encompasses the reciprocal rights of both parents and children.<sup>27</sup> "It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent."<sup>28</sup>

A child's interest in familial bonds does not apply merely to relationships with biological parents; rather, the protections afforded under the Constitution must extend independently to children's relationships with their siblings and other adults with whom they have formed critical bonds.<sup>29</sup> Recognizing that a child's interest in his or her familial bonds is

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<sup>25</sup> *State v. Santos*, 104 Wn.2d 142, 143–44, 702 P.2d 1179 (1985); see also *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 524, 41 Cal. Ct. App. 4th 1483 (1996) (noting that "simple common sense" dictated that children's rights in their family relationships are "at least as fundamental and compelling as those of their parents").

<sup>26</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–44 (1977).

<sup>27</sup> *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (internal citations omitted).

<sup>28</sup> *Id.* (citations omitted).

<sup>29</sup> See *In re Marriage of Anderson*, 134 Wn. App. 506, 512, 141 P.3d 80 (2006) (citing *In re Shields*, 157 Wn.2d at 151 (Bridge, J., concurring)); cf. *Prince v. Massachusetts*, 321 U.S. 158, 159, 169 (1944) (treating relationship between a custodian and her niece as a constitutionally protected parent-child relationship). The reciprocal also holds true. For example, while relatives have no liberty interest in familial integrity or association with children by virtue of genetic link alone, relatives who have "a long-standing custodial relationship" with children such that together they constitute an "existing family unit" do possess a liberty interest in familial integrity and association. *Osborne v. Cnty. of*

constitutionally protected, and that these bonds stem not just from biology but also from the intimacies of long-lasting relationships, "it logically follows that a child has a constitutionally protected interest in whatever relationship comprises his or her family unit."<sup>30</sup>

Indeed, "a parent's interests in a child must be balanced against . . . the child's own complementary interest in preserving relationships that serve [his or] her welfare and protection."<sup>31</sup> Moreover, the Washington Supreme Court has consistently stated that when considering the welfare of the child against the rights of the parent, it is the welfare of the child that is "more weighty."<sup>32</sup>

Accordingly, while recognizing that a parent has a "sacred right" to

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*Riverside*, 385 F. Supp. 2d 1048, 1053–55 (C.D. Cal. 2005) (citing *Moore v. City of E. Cleveland*, 431 U.S. 194, 499, 503–06 (1977)); see also *Prince v. Massachusetts*, 321 U.S. 158, 161, 165–67 (1944); *Miller v. California*, 355 F.3d 1172, 1176–77 (9th Cir. 2004); *Mullins v. Oregon*, 57 F.3d 789, 794 (9th Cir. 1995); *Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir. 1982). Because it is derived from the relationship with the child and not from biological ties, the liberty interest in familial integrity and association extends to any person who has a relationship with a child forged on the emotional attachments derived from the intimacy of daily association. See *Smith*, 431 U.S. at 843–44 ("No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."). Thus, the Constitution protects those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of a family. *Wooley v. City of Baton Rouge*, 211 F.3d 913, 921 (5th Cir. 2000).

<sup>30</sup> *In re Shields*, 157 Wn.2d at 152 (J. Bridge, concurring) (citing *Santos*, 104 Wn.2d at 143–44).

<sup>31</sup> *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

<sup>32</sup> See *In re Parentage of L.B.*, 155 Wn.2d 679, 698, 122 P.3d 161 (2005) (internal quotation marks and citations omitted); *Ex parte Day*, 189 Wash. 368, 382, 65 P.2d 1049 (1937); see also *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) ("Although . . . parental prerogatives are entitled to considerable legal deference . . . they are not absolute and must yield to fundamental rights of the child . . . ." (internal quotation marks and citations omitted)).

the care and custody of his or her child,<sup>33</sup> this right is not absolute when weighed against a child's right to form emotional attachments within his or her family unit.<sup>34</sup> The Washington Supreme Court has noted that, "although the family structure is a fundamental institution of our society, and parental prerogatives are entitled to considerable deference, they are not absolute and must yield to the fundamental rights of the child or the important interests of the State."<sup>35</sup> Thus, although, as a biological parent, B.H.'s mother has a constitutional right to raise her child, this right is not absolute and must yield to B.H.'s fundamental interest in maintaining relationships with his family unit. Michael is B.H.'s *de facto* parent and only living father, a constant and loving influence in his life. Their relationship was fostered by B.H.'s mother, who changed B.H.'s last name to Holt even after she had divorced Michael. This relationship, as well as B.H.'s relationship with his brother and extended family, should be legally recognized and afforded the constitutional protections that guard other

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<sup>33</sup> See *In re Sumey*, 94 Wn.2d at 762.

<sup>34</sup> See *In re Dependency of M.S.*, 98 Wn. App. 91, 988 P.2d 488 (1999).

<sup>35</sup> *State v. Koome*, 84 Wn.2d 901, 907, 530 P.2d 260 (1975). For example, when a third party can show actual detriment to a child's growth and development, even a fit custodial parent's right to custody of his or her child will yield to the child's right not be harmed. See *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 346, 227 P.3d 1284 (2010). Harm to a child includes both "physical or mental damage." See *Braam v. State*, 150 Wn.2d 689, 699, 81 P.3d 851 (2003). Thus, when a parent's decision to sever a parent-like relationship with a child could cause the child severe psychological harm, then a court may order visitation over the parent's objection in order to prevent the child from suffering such harm. Cf. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 62, 109 P.3d 405 (2005) (citing *In re Custody of Smith*, 137 Wn.2d 1, 21, 969 P.2d 21 (1998)).

fundamental liberty interests.

**C. The Failure to Appoint Children Counsel in *De Facto* Parentage Cases Deprives Them of Their Constitutional Guarantee of Due Process.**

When the outcome of a *de facto* parenting case means that a child like B.H. will lose his right to maintain a relationship with the only father (or only mother or any other parent) he has ever known, due process demands that the court appoint the child counsel and give the child the opportunity to be heard.<sup>36</sup>

The law has come a long way since children were treated as mere property and courts would enforce only the rights of the parents who owned that property. Although parental control and custody of children still is (and should continue to be) afforded great deference and protection by the courts, children have constitutional rights that, when violated, courts must also enforce. The U.S. Supreme Court has held that familial relationships are a protected liberty interest, subject to procedural due process.<sup>37</sup> Thus, before a court decides to sever a child's familial interest—

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<sup>36</sup> See U.S. Const. amend. XIV, § 2; Wash. Const. art. 1, § 3.

<sup>37</sup> *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 842–43 (1977).

for example, by ruling that an 11-year-old boy has no right to see the man he knows as his father—the court must afford the child due process.<sup>38</sup>

The Washington Supreme Court has already recognized that children have a fundamental right to know who their parents are<sup>39</sup> and that procedural due process requires that children be party to certain parentage actions.<sup>40</sup> "[N]o individual should be bound by a judgment affecting his or her interests where he [or she] has not been made a party to the action."<sup>41</sup> Thus, procedural due process requires that children be party to paternity actions.<sup>42</sup> The role and interest of a child in a *de facto* parentage action is substantively similar to his or her role and interest in a paternity action: the child seeks to maintain or establish a familial bond and protect himself or herself from an erroneous determination of parentage.<sup>43</sup> Although in this case, B.H. wants to protect his relationship with the only father he has known, *amici* can envision situations in which a child might feel equally strongly that a party in a *de facto* parentage case is *not* the child's parent.

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<sup>38</sup> When a state takes action to deprive an individual of a protected interest, then a court determines the process due based on the three-part balancing test created in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.* at 335.

<sup>39</sup> See *State v. Santos*, 204 Wn.2d 142, 147–48, 702 P.2d 1170 (1985) (holding that child's fundamental interest in knowing parentage entitles child to representation in paternity proceedings); *In re Parentage of Q.A.L.*, 146 Wn. App. 631, 636–37, 191 P.3d 934 (2008) (noting child's "constitutional right to participate in accurately determining his paternity").

<sup>40</sup> *Santos*, 204 Wn.2d at 146.

<sup>41</sup> *Id.* (quoting *Hayward v. Hansen*, 97 Wn.2d 614, 617, 647 P.2d 1030 (1982)).

<sup>42</sup> See *id.*

<sup>43</sup> *Id.* at 147 (citing Comment, *Paternity Determinations in Washington: Balancing the Interests of All Parties*, 8 U. Puget Sound L. Rev. 653, 660 (1985)).

Either way, children like B.H. are bound by trial court determinations of their parentage and, therefore, must have an opportunity to be heard "at a meaningful time and in a meaningful manner."<sup>44</sup>

Given that children "lack the experience, judgment, knowledge and resources to effectively assert their rights,"<sup>45</sup> allowing an 11-year-old child to join an action as a party is insufficient unless that child has an attorney to keep the child's confidences, act in the child's stated interests, and ensure that the child is heard. Although the interests of at least one of the parents may align with the interests of the child, appointment of counsel is necessary in parentage cases because of the potential conflicts that exist between the child and his or her parents.<sup>46</sup> Furthermore, given that the child is affected most by the outcome of parentage cases, a child should not be treated like mere property; rather a child should—and, *amici* contends, to satisfy due process, *must*—have independent counsel when an interest as fundamental as that child's right to know who his or her parents are is at stake.<sup>47</sup>

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<sup>44</sup> *Id.* at 142 (quoting *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973)).

<sup>45</sup> *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 146, 960 P.2d 919 (1998).

<sup>46</sup> *See Hayward*, 97 Wn.2d at 617.

<sup>47</sup> *See Santos*, 204 Wn.2d at 147–48 (holding that child's fundamental interest in knowing parentage entitles child to representation in paternity proceedings); *In re Parentage of Q.A.L.*, 146 Wn. App. 631, 636–37, 191 P.3d 934 (2008) (noting child's "constitutional right to participate in accurately determining his paternity").

The Washington Supreme Court strongly urges trial courts to appoint children counsel in cases such as this one.<sup>48</sup> *Amici* suggest something more: in any action that either creates or severs a parental relationship with a child, the child should be joined as a necessary party and represented by independent counsel.<sup>49</sup>

## V. CONCLUSION

As adult caregivers and family law courts struggle to apply legal standards to fact patterns that defy precedence, children like B.H. are put at risk of being reduced to an abstraction. Vulnerable, powerless, and troublingly voiceless, these children are too often unable to assert their fundamental constitutional rights when their health, stability, and family relationships are most at stake.

The risk of a child's fundamental rights going unasserted is especially grave in cases involving the *ad hoc* legal recognition or severance of a parental relationship. Against the high-intensity backdrop of a *de facto* parentage proceeding, a child feels overwhelmed by legal concepts and procedures he or she does not understand, yanked in different directions by well-meaning but aggrieved parents, and distressed about the uncertainty of a future that could result in the person the child spent a lifetime calling "Mom" or "Dad" no longer having the right to be

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<sup>48</sup> See *In re the Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005).

<sup>49</sup> Cf. *Hayward*, 97 Wn.2d at 617; *Santos*, 204 Wn.2d at 146.

in the child's life—and there is nothing the child can do.

Both Washington and federal case law confirm that a child has a fundamental right to maintain family relationships and know who his or her parents are. Courts violate these fundamental rights when they fail to give the child an opportunity to be heard and elect not to appoint the child independent counsel in *de facto* parentage cases. With children like B.H., an 11-year-old on the simultaneous brink of adolescence and loss of the only father he has ever known, the failure to give him a meaningful voice in court and to allow him to be heard regarding decisions that impact him more than anyone can result in irreparable harm to his emotional and developmental well-being. Therefore, courts must recognize the existence of the child's fundamental right to the relationship with the persons who comprise the child's family unit and appoint counsel to give the child the meaningful opportunity to express how and if the child chooses to exercise that right.

DATED: May 27, 2011

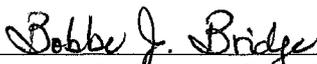
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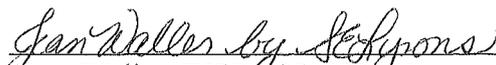
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