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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41211-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Custody of:

BENJAMIN MATTHEW HOLT, A minor child,

MICHAEL J. HOLT,

Respondent\Cross-Appellant,

vs.

LAURIE L. HOLT

Appellant\Cross-Respondent.

ANSWER TO AMICUS CURIAE BRIEF OF LEGAL VOICE,
CENTER FOR CHILDREN & YOUTH JUSTICE, AND THE
GUARDIAN AD LITEM JEAN WALLER

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Appellant/cross-respondent Laurie Holt submits this answer to the brief of Amici Curiae brief filed by Legal Voice, Center for Children & Youth Justice, and Guardian Ad Litem Jean Waller (collectively, Amici).

A. This Court Should Not Consider An Issue Raised Only By Amicus.

Whether a child has a constitutional right to counsel in a *de facto* parentage action is not an issue that should be decided by this court in this case. Here, only the guardian ad litem, who is now Amicus in this court, sought appointment of counsel for the child in the trial court. (CP 249; Cross-App. Br. 46) Neither Michael nor Laurie sought appointment of counsel for Laurie's son in the trial court. Instead, Michael sought only the appointment of a guardian ad litem, which was granted. (CP 23, 101-05)

"The case must be made by the parties and its course and issues involved cannot be changed or added to by friends of the court." *City of Lakewood v. Koenig*, 160 Wn. App. 883, ¶ 4, fn. 2, 250 P.3d 113 (2011). This court should "decline to address issues raised only by amici." *Koenig*, 160 Wn. App. 883, ¶ 4, fn. 2.

B. A Child Does Not Have A Constitutional Right To Appointment Of Counsel In A Case Where A Third Party Seeks *De Facto* Parentage.

Even if this court could consider an issue raised only by Amici, a child who is the subject of a *de facto* parentage claim is not entitled to counsel as matter of right. There is a basis neither in law nor in fact to require appointment of counsel for Laurie's son Benjamin in Michael Holt's action to establish himself as a *de facto* parent.

1. Appointing Counsel For A Child Whose Fit Parent Can Represent The Child's Best Interests Would Violate Both Parent And Child's Rights.

Amici's proposal follows a familiar path, seeking "to effect changes in substantive law by advocating for increased procedural rights of children. In particular, when advocates are displeased with certain substantive principles used to decide children's issues, they turn to the apparently more neutral procedural claim of a 'child's right to be heard.'" Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation, and Child Protection Proceedings*, 29 Loy. U. Chi. L.J. 299, 344 (Winter 1998). In this case, however, appointing counsel for a child whose fit parent can represent the child's best interests would violate both parent and child's rights. Because there is no allegation that Laurie

is not a fit parent, the courts are constitutionally compelled to presume that Laurie is acting in her child's best interests in defending against Michael's *de facto* parentage action. ***Troxel v. Granville***, 530 U.S. 57, 68, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

While Michael has questioned Laurie's parental choices, he has never alleged that Laurie is unfit. It is presumed that a child's fit parent will act in her child's best interests. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." ***Parham v. J. R.***, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979), *quoted in Troxel*, 530 U.S. at 68. Blanket appointment of counsel for any child in a *de facto* parentage action, regardless of age and maturity, is not constitutionally required, and instead would violate the parent's right to make decisions for her child.

Amici argue that a child should be appointed counsel because "children lack the experience, judgment, knowledge and resources to effectively assert their rights." (Amici Br. 16) But as

the U.S. Supreme Court has recognized, “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.” ***Bellotti v. Baird***, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797, *reh’g denied*, 444 U.S. 887 (1979). How do Amici expect an inexperienced and unknowledgeable child to direct counsel who is appointed on his behalf? A child’s immaturity is the reason why his parent has the authority to represent his interests.

Further, “providing children with aggressive lawyers who will attempt to tilt the outcome of the case in the direction of the child’s wishes will make it less likely, not more likely, that the ‘correct’ legal result be reached.” Guggenheim, 29 Loy. U. Chi. L.J. at 344. Appointing counsel, especially for young children, could in fact be harmful, forcing the child to make decisions that will inevitably pit the child against either his parent or against an adult who presumably has held some role in the child’s life.

Our courts have recognized that “litigation can be harmful to children.” ***Parentage of Jannot***, 149 Wn.2d 123, 127, 65 P.3d 664 (2003). Why then would it be appropriate, much less

constitutionally required, to place a child in the middle of the battleground? Injecting the child as a party to the proceedings by appointing counsel would only serve to add yet another unnecessary stranger to the family second-guessing a child's fit parent's decisions.

2. A Child Is Not Entitled As A Matter Of Right To Counsel In Statutory Paternity Or Termination Actions. No Different Rule Should Apply In A Common Law *De Facto* Parent Case.

In arguing that a child is entitled to counsel in a *de facto* parentage action, Amici assert that 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.” (Amici Br. 15) But a child is not entitled to counsel as a matter of right in a paternity action. Under the Uniform Parentage Act, the child is not a necessary party in a paternity action. RCW 26.26.555 (2). Even if a child is made a party, the court is not required to appoint counsel. RCW 26.26.555. Instead, only “if the court finds that the interests of a minor child [] are not adequately represented, the court shall appoint a *guardian ad litem* to represent the child,” not counsel. RCW 26.26.555(2) (emphasis added).

Amici also argue that counsel must be appointed for a child in a *de facto* parentage action because the child has a “fundamental interest in maintaining relationships with his family unit.” (Amici Br. 13) But even in cases where a child’s relationship with a *legal* parent may be terminated, the child is not entitled to appointment of counsel as a matter of right. Instead, “if the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court *may* appoint an attorney to represent the child’s position.” RCW 13.34.100(6)(f) (emphasis added).¹ See also ***King v. King***, 162 Wn.2d 378, 392, ¶ 26, 174 P.3d 659 (2007) (“the federal Constitution does not require appointment of counsel in every parental termination proceeding”), citing ***Lassiter v. Dep’t of Soc. Servs. of Durham County, N.C.***, 452 U.S. 18, 31, 101 S.Ct. 2153, 68 L.Ed.2d 640, *reh’g denied*, 453 U.S. 927 (1981). There is no basis for this court to hold that Benjamin, who is eleven, is entitled as matter of right to an attorney

¹ The state Supreme Court is currently considering the question whether a child who is the subject of a parental termination proceeding has a constitutional right to appointment of counsel in ***Termination of D.R. and A.R.***, Cause No. 84132-2, and ***Dependency of M.S.R. and T.S.R.***, Cause No. 85729-6.

in a common law *de facto* parentage action when he would not be entitled to counsel in a statutory action that could have the consequence of establishing or terminating his relationship with a legal parent.

C. Conclusion.

The trial court was not required to appoint counsel for the child in this *de facto* parentage action. The mother is not unfit, and adequately represents the child's best interests.

Dated this 16th day of June, 2011.

SMITH GOODFRIEND P.S.

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STATE OF WASHINGTON
DEPUTY

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 16, 2011, I arranged for service of the foregoing Answer to Amicus Curiae Brief of Legal Voice, Center for Children & Youth Justice and the Guardian Ad Litem Jean Waller, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of June, 2011.



 Tara D. Friesen