

CHILDREN'S FAST TRACK APPEAL
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 7 WAP 2020

IN RE: P.G.F. :
APPEAL OF: K.F., NATURAL FATHER : No. 580 WDA 2018

BRIEF OF JUVENILE LAW CENTER, COMMUNITY LEGAL SERVICES
INC., AND 16 NATIONAL, STATE, AND LOCAL ORGANIZATIONS AND
INDIVIDUALS WHO ARE EXPERTS IN THE FIELDS OF CHILD WELFARE,
PUBLIC POLICY, AND LAW AS *AMICUS CURIAE* IN SUPPORT OF
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE LEGAL INTERESTS AT STAKE FOR A CHILD IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING ARE OF GREAT LEGAL SIGNIFICANCE AND ARE DISTINCT FROM THE CHILD’S CUSTODIAL PREFERENCES.....	3
A. The Interests At Stake In A Termination Of Parental Rights Proceeding Are Of Constitutional Magnitude And Require Significant Protection	3
B. Children Must Have A Voice In Termination Proceedings	4
C. Counsel For Children In TPR Proceedings Is Required To Actively Advance The Child’s Legal Interests	9
II. TO FULFILL THE ROLE OF COUNSEL IN A TPR PROCEEDING, THE ATTORNEY MUST COUNSEL THE CHILD IN AN AGE-APPROPRIATE WAY AND MUST ASCERTAIN AND ADVANCE THE CHILD’S PREFERRED OUTCOME	11
A. Ascertaining The Child’s Preferred Outcome On The Petition To Terminate Parental Rights Includes Counseling The Child About The Circumstances Surrounding The Petition And Its Consequences	12
B. The Child’s Preference To Maintain Or Sever The Legal Relationship With The Parent Is Distinct From A Child’s Custodial Preference.....	16
CONCLUSION.....	19
APPENDIX A.....	A1

TABLE OF AUTHORITIES

Page(s)

Cases

<i>In re Adoption of C.J.A.</i> , 204 A.3d 496 (Pa. Super. Ct. 2019).....	8
<i>In re Adoption of D.M.C.</i> , 192 A.3d 1207 (Pa. Super. Ct. 2018).....	7, 14, 15, 16
<i>In re Adoption of G.L.L.</i> , 124 A.3d 344 (Pa. Super. 2018)	15
<i>In re Adoption of J.J.</i> , 515 A.2d 883 (Pa. 1986).....	4
<i>In re Adoption of J.L.</i> , 769 A.2d 1182 (Pa. Super. Ct. 2001).....	10
<i>In re Adoption of K.G.M.</i> , 845 A.2d 861 (Pa. Super. Ct. 2004).....	3
<i>In re Adoption of L.B.M.</i> , 161 A.3d 172 (Pa. 2017).....	<i>passim</i>
<i>In re Adoption of M.D.Q.</i> , 192 A.3d 1201 (Pa. Super. Ct. 2018).....	7, 18, 19
<i>In re Adoption of S.P.</i> , 47 A.3d 817 (Pa. 2012).....	4
<i>In re B.J.Z.</i> , 207 A.3d 914 (Pa. Super. Ct. 2019).....	7
<i>In re C.P.</i> , 901 A.2d 516 (Pa. Super. Ct. 2006).....	4
<i>In re Coast</i> , 561 A.2d 762 (Pa. Super. Ct. 1989) (Tamilia, J., concurring and dissenting)	3

<i>In re D.N.G.</i> , Nos. 480 EDA 2019 & 481 EDA 2019, 2020 WL 1226501, at *4 (Pa. Super. Ct. March 13, 2020)	11
<i>In re K.R.</i> , 200 A.3d 969 (Pa. Super. Ct. 2018).....	12, 13
<i>Lassiter v. Dep’t of Social Servs. Durham Cty. N.C.</i> , 452 U.S. 18 (1981) (Blackmun, J., dissenting).....	10
<i>In re P.G.F.</i> , No. 1284 WDA 2019, 2020 WL 579038 (Pa. Super. Ct. Jan. 27, 2020)	<i>passim</i>
<i>In re Q.R.D.</i> , 214 A.3d 233 (Pa. Super. Ct. 2019).....	8
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	3
<i>In re T.S.M.</i> , 71 A.3d 251 (Pa. 2013).....	10
<i>Kenny A. ex rel Winn v. Perdue</i> , 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga 2005)	4
Statutes	
23 Pa.C.S.A. § 2313	10
23 Pa.C.S.A. §§ 2731, et seq.....	15
23 Pa.C.S.A. § 2734	15
23 Pa.C.S.A. § 2739	15
42 Pa.C.S.A. § 6351	5
42 U.S.C.A. § 675	6
Other Authorities	
55 Pa.Code § 3130.61	6

Andrew Hoffman, <i>The Role of Child’s Counsel in State Intervention Proceedings</i> , 3 CONN. PUB. INT. L.J. 326 (2004).....	9
Donald N. Duquette, <i>Two Distinct Roles/Bright Line Test</i> , 6 NEV. L.J. 1240 (2006).....	5
John Anzelc, et al., <i>Comment on the Committee’s Model Act Governing Representation of Children in Abuse and Neglect Proceedings</i> , 12 MICH. CHILD WELFARE L. J. 4 (2009).....	5
Katherine Hunt Federle, <i>Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment</i> , 37 FORDHAM URB. L.J. 93 (2009).....	9
MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS, § 7(c), pp.7-8 (AM. BAR ASS’N 2011), https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf	13, 14, 16
MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS’N 1983)	5
Pa.R.P.C. 1.14	8
Pa.R.P.C. 1.4	14, 16
U.S. DEP’T OF HEALTH & HUMAN SERVICES, CHILDREN’S BUREAU CHILD WELFARE OUTCOMES 2013–2017, https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/pennsylvania.html	4

STATEMENT OF INTEREST OF AMICI CURIAE¹

Juvenile Law Center and Community Legal Services, Inc. file this brief of *amici curiae* on behalf of experts in the fields of child welfare, public policy, and law (collectively “*amici*”)². *Amici* are national, state, and local organizations and individuals committed to protecting and enforcing the civil and human rights of children, parents, and families. *Amici* have substantial expertise as well as a special interest in the needs and rights of court-involved children and their meaningful access to justice, including the right to counsel.

SUMMARY OF ARGUMENT

Counsel plays a paramount role in our adversarial legal system, especially in termination of parental rights cases where family structures are permanently altered. Section 2313 of the Adoption Act requires that “The court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents.” 23 Pa.C.S.A. § 2313(a). This statute unambiguously requires that children in termination of parental rights cases have counsel, who represents the child’s legal interests and who is “client-directed”. *In re Adoption of L.B.M.*, 161 A.3d 172, 180 (Pa. 2017).

To fulfill the role of counsel under Section 2313, the attorney for the child

¹ Pursuant to Rule 531, no counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief, nor authored the brief in whole or in part.

² Additional information about each *amicus* is attached as Appendix “A.”

must ascertain and advance the child's preferred outcome with regard to the termination petition. *Id.* Importantly, this is distinct from determining the child's preferences as to custody and with whom the child wishes to reside. Courts have ruled that even young children express a preferred outcome in termination of parental rights hearings. *Id.*; *In re B.J.Z.*, 207 A.3d 914, 919 (Pa. Super. Ct. 2019). Counsel must also ensure the child understands the proceedings and consequences of the termination decision on the child's future and familial relationships. *See In re Adoption of D.M.C.*, 192 A.3d 1207, 1211, 1213.

In the instant situation, counsel for P.G.F.'s legal interest, Attorney Rose, failed to ascertain whether P.G.F. had a preferred outcome regarding the petition to terminate his father's parental rights. Furthermore, Attorney Rose failed to inform P.G.F. of the circumstances surrounding the TPR petition and explain who P.G.F.'s biological father was and what it meant to sever his rights to him. The record does not reflect that P.G.F. was unable to understand the proceedings or otherwise express a preferred outcome. *In re P.G.F.*, No. 1284 WDA 2019, 2020 WL 579038, at *8 n.1 (Pa. Super. Ct. Jan. 27, 2020) (Bowes, J. dissenting). Absent this evidence, Attorney Rose violated her duties as counsel under Section 2313 which deprived P.G.F. of having a voice in the permanent decisions made about the legal relationship with his father.

ARGUMENT

I. THE LEGAL INTERESTS AT STAKE FOR A CHILD IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING ARE OF GREAT LEGAL SIGNIFICANCE AND ARE DISTINCT FROM THE CHILD'S CUSTODIAL PREFERENCES

A. The Interests At Stake In A Termination Of Parental Rights Proceeding Are Of Constitutional Magnitude And Require Significant Protection

Terminating parental rights is a serious decision inflicting a grievous loss on families that is equivalent to the “death sentence” for a parent-child relationship. *In re Coast*, 561 A.2d 762, 778 (Pa. Super. Ct. 1989) (Tamilia, J., concurring and dissenting); *see also Santosky v. Kramer*, 455 U.S. 745, 768-69 (1982) (holding that the commanding private interest at stake in a termination hearing requires application of the clear and convincing evidence standard). Both parents and children “share an interest in avoiding erroneous termination,” even if ultimately their interests diverge. *Santosky*, 455 U.S. at 760, 765. *See also In re Adoption of K.G.M.*, 845 A.2d 861, 864 (Pa. Super. Ct. 2004) (“Not only are [father’s] rights at stake here, but [the child’s] right to a relationship with her father is also at stake.” (alterations in original) (quoting *In re Adoption of Stickley*, 638 A.2d 976, 980 (1994))).

For a child, the risk of an erroneous termination includes not only the loss of his parents, but his extended family members and his siblings. Though termination of parental rights (TPR) frees a child for adoption, adoption is by no means the

guaranteed result. As of 2017, 2,087 Pennsylvania children whose parental rights had been terminated were still waiting for adoption. U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILDREN'S BUREAU CHILD WELFARE OUTCOMES 2013–2017, <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/pennsylvania.html>.

Pennsylvania law recognizes that TPR impacts a child's legal interests, future, and well-being. *In re Adoption of L.B.M.*, 161 A.3d 172, 183 (Pa. 2017). Before a court may terminate parental rights, it must consider whether termination will serve the child's best interest. *In re Adoption of J.J.*, 515 A.2d 883, 892 (Pa. 1986); *In re Adoption of S.P.*, 47 A.3d 817, 820 (Pa. 2012). This best-interest determination is a separate question from the parents' capacity or willingness to care for their child. *In re C.P.*, 901 A.2d 516, 520 (Pa. Super. Ct. 2006). By recognizing the child's welfare as a distinct and mandatory consideration, the General Assembly acknowledged the grave impact that the TPR decision may have on a child. *See also Kenny A. ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga 2005) (discussing the impact of TPR on children's health, safety, family, and physical liberty).

B. Children Must Have A Voice In Termination Proceedings

Giving children a voice in termination proceedings is essential. Child welfare experts agree that it is important that children have a voice in this decision and that even young children should have an opportunity to be heard. “[C]hildren as young as five or six years of age . . . are regarded as having opinions that are entitled to

weight in legal proceedings concerning their custody.”³ MODEL RULES OF PROF’L CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS’N 1983). Children’s opinions are best presented by client-directed counsel: many advocates consider that children as young as seven can appropriately and responsibly maintain a traditional attorney-client relationship and will benefit from one. *See, e.g.,* Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1247-48 (2006); John Anzelc, et al., *Comment on the Committee’s Model Act Governing Representation of Children in Abuse and Neglect Proceedings*, 12 MICH. CHILD WELFARE L. J. 4 (2009) (reviewing developmental science studies to find that, at approximately age seven, a child begins to have greater decision-making ability due to increased problem-solving abilities and greater understanding of the importance of a broader social sphere).

Permanency planning determines the course of a child welfare case and necessarily includes the possibility of terminating parental rights.⁴ Federal and state law require that courts consult youth in determining the permanency plan. *See* 42 Pa.C.S.A. § 6351(e)(1) (“In any permanency hearing held with respect to the child,

³ P.G.F.’s counsel, Attorney Rose, testified that P.G.F. was able to express a preference at the time of the interview. *In re P.G.F.*, No. 1284 WDA 2019, 2020 WL 579038, at *8 (Pa. Super. Ct. Jan. 27, 2020) (Bowes, J. dissenting).

⁴ Although this does not involve a termination of parental rights sought by a county CYS agency to free a child for adoption through the child welfare system, a decision confirming the duties required of counsel for children in termination proceedings will greatly impact future child welfare cases where permanency hearings are part of the process where key decisions about things like TPR and adoption are made.

the court shall consult with the child regarding the child's permanency plan, including the child's desired permanency goal, in a manner appropriate to the child's age and maturity."); *see also* 42 U.S.C.A. § 675(1)(B) ("With respect to a child who has attained 14 years of age, the plan developed for the child in accordance with this paragraph, and any revision or addition to the plan, shall be developed in consultation with the child."); 55 Pa.Code § 3130.61(d) (The child must be provided "the opportunity to participate in the development and amendment of the service plan if the opportunity does not jeopardize the child's safety."). There is no logical basis for distinguishing between the importance of the child's voice in a goal change proceeding and its importance in proceedings potentially severing their relationships with their families. Terminating parental rights forecloses entirely the option that a youth may maintain a legal relationship with his parents and extended family. In this case, it means that the child will no longer have a relationship with his father and his paternal relatives. To adequately protect that interest and relationship, this Court has required that the child have legal counsel that takes the child's direction and protects the legal interests at the heart of termination proceedings. *In re Adoption of L.B.M.*, 161 A.3d at 180 ("[W]hen a child's relationship with his or her birth family could be severed permanently and against the wishes of the parents, the legislature made the policy judgment, as is evident from the plain, unambiguous language of the statute, that a lawyer who represents the child's legal interests, and who is directed by the

child, is a necessity.”). The statutory mandate of 23 Pa.C.S. § 2313(a) that children have client-directed counsel evinces an understanding that children’s interests at termination are uniquely theirs. A child’s legal position may converge or diverge from that of their parents. Children are therefore entitled to an “advocate who owes loyalty *only* to the child.” *Id.* at 180, n.12 (quoting *In re Adoption of Hess*, 562 A.2d 1375, 1381 (Pa. Super. Ct. 1989)).

The appointment of counsel, as contemplated by the legislature and this Court, ensures that children have a voice in termination proceedings. Several panels of the Pennsylvania Superior Court generally have held that even young children can express a preferred outcome in TPR hearings. *See In re Adoption of D.M.C.*, 192 A.3d 1207, 1212-13 (Pa. Super. Ct. 2018) (finding that counsel for a four and a half-year-old child should have had a discussion with the child to determine if he had a preferred outcome for a TPR hearing); *In re B.J.Z.*, 207 A.3d 914, 919 (Pa. Super. Ct. 2019) (allowing children ages 7 and 9 to express their preferred outcome in TPR dependency proceedings). In *In re Adoption of M.D.Q.*, the Pennsylvania Superior Court found that the attorney appointed to represent the children did not adequately fulfill her role as counsel where the children (ages six and eight) were “old enough to provide at least some input as to their preferred outcomes” and their counsel failed to express those preferences to the court, or advance them throughout the termination proceedings. 192 A.3d 1201, 1205-06 (Pa. Super. Ct. 2018).

Further, the Pennsylvania Rules of Professional Conduct specifically recognize that children even younger than P.G.F. have “opinions that are entitled to weight” regarding their legal proceedings. *See* Pa.R.P.C. 1.14, cmt. 1. Pennsylvania law excuses counsel from ascertaining, relaying, and advancing a child’s preferred outcome *only* if there is evidence on the record to support a finding that a child is unable to express, *In re Q.R.D.*, 214 A.3d 233, 240 (Pa. Super. Ct. 2019), or does not have a preferred outcome, *In re Adoption of C.J.A.*, 204 A.3d 496, 502 (Pa. Super. Ct. 2019).

P.G.F. was six and a half years old at the time of the TPR hearing and was capable of expressing his opinion regarding the outcome. *In re P.G.F.*, No. 1284 WDA 2019, 2020 WL 579038, at *8 (Pa. Super. Ct. Jan. 27, 2020) (Bowes, J. dissenting). Unlike the attorneys in the *Q.R.D.* and *C.J.A.* cases, Attorney Rose did not aver, and the record does not reflect, that P.G.F. was unable to understand the proceedings or otherwise unable to state his preferences. In fact, Attorney Rose stated on the record that P.G.F. *was* capable of expressing a preference when she interviewed him, and the trial court did not make any finding indicating otherwise. *Id.* at *8 n.1 (Bowes, J. dissenting) (“In contrast to the facts of *In re C.J.A.*, the certified record bears out that the maturity and emotional conditions of P.G.F. did not create a comparable obstacle to counsel’s ability to ascertain the child’s preference. In fact, as highlighted in the body of my dissent, Attorney Rose

specifically confirmed that P.G.F. was capable of expressing a preference when she interviewed him.” (citing N.T., 8/7/19, at 16)). Thus, to fulfill her role as counsel, Attorney Rose was required to ascertain whether P.G.F. was in favor of maintaining or severing Father’s parental rights and to actively advance that position on behalf of her client.

C. Counsel For Children In TPR Proceedings Is Required To Actively Advance The Child’s Legal Interests

Counsel serves an indispensable role in our adversarial legal system, which relies upon an impartial judge and zealous advocates to pursue facts and make a reasoned, informed decision based upon that fact-finding process. Andrew Hoffman, *The Role of Child’s Counsel in State Intervention Proceedings*, 3 CONN. PUB. INT. L.J. 326, 333 (2004); Katherine Hunt Federle, *Lawyering in Juvenile Court: Lessons from a Civil Gideon Experiment*, 37 FORDHAM URB. L.J. 93, 110 (2009) (“The American conception of justice is not simply encapsulated in the notion of Due Process, but is encapsulated in a notion of Due Process defined in terms of adversarial presentation.’ Because the American legal system is adversarial, counsel fills an indispensable role in ensuring that individual claimants are represented and that the requisites of due process are met.” (quoting Geoffrey C. Hazard, Jr., *After Legal Aid Is Abolished*, 2 J. INST. FOR STUDY LEGAL ETHICS 375, 379, 382 (1999))).

Counsel for the child is particularly crucial in child welfare proceedings where the State seeks to terminate a parent/child relationship, usually against the will of

that parent. *See also Lassiter v. Dep't of Social Servs. Durham Cty. N.C.*, 452 U.S. 18, 43-44 (1981) (Blackmun, J., dissenting) (recognizing the adversarial nature of TPR); *In re T.S.M.*, 71 A.3d 251, 259 (Pa. 2013) (explaining that TPR demands an adversarial approach to child welfare not necessarily found when other permanent placements are pursued). The State is represented by counsel who offers evidence and testimony to be used against the parent. *Lassiter*, 452 U.S. at 43-44. The parent is also represented by counsel who provides counter-evidence and testimony. 23 Pa.C.S.A. § 2313. In TPR hearings, counsel for children is even more essential given the paramount interest of family unity at stake. *See In re Adoption of L.B.M.*, 161 A.3d at 183; *see also supra* Part I.A.

Highlighting the importance of counsel in the TPR context, Section 2313(a) of the Adoption Act provides that “[t]he court shall appoint counsel to represent the child in an involuntary termination proceeding when the proceeding is being contested by one or both of the parents.” 23 Pa.C.S.A. § 2313(a). Pennsylvania courts have affirmed that the purpose of this provision is “to protect the interests of the child” because they may “diverge from the interests of the other parties to the proceedings.” *In re Adoption of J.L.*, 769 A.2d 1182, 1185 (Pa. Super. Ct. 2001). In *L.B.M.*, this Court ruled that 23 Pa.C.S. § 2313(a) unambiguously “requires the appointment of counsel who serves the child’s legal interests in contested, involuntary TPR proceedings” and “who is directed by the child.” 161 A.3d at 180.

This Court highlighted that “appointment of client-directed counsel optimizes the protection of the child’s needs and welfare, which form the ultimate issue that the trial court must resolve before granting the TPR.” *Id.* The appointment of counsel for a child in a TPR case allows the child to have a voice in the maintenance or severance of family ties that result from the court’s decision.

II. TO FULFILL THE ROLE OF COUNSEL IN A TPR PROCEEDING, THE ATTORNEY MUST COUNSEL THE CHILD IN AN AGE-APPROPRIATE WAY AND MUST ASCERTAIN AND ADVANCE THE CHILD’S PREFERRED OUTCOME

For counsel to fulfill their role pursuant to Section 2313(a) of the Adoption Act and adequately protect the child’s legal interests, counsel must accurately ascertain the child’s preferred outcome. This Court has established that counsel, as contemplated by the legislature, must represent and advance the “child’s legal interests, which are synonymous with the child’s preferred outcome.” *In re Adoption of L.B.M.*, 161 A.3d at 174, 180; *see also In re D.N.G.*, Nos. 480 EDA 2019 & 481 EDA 2019, 2020 WL 1226501, at *4 (Pa. Super. Ct. March 13, 2020) (holding that “[w]hile legal representation . . . necessarily involves talking to the child client and reporting the child’s preferences to the court, it is in no way limited to those two actions. To the contrary . . . [counsel is] required to advocate on behalf of [the child] and provide zealous client-directed representation of [the child]’s legal interests.”).

To ascertain a child’s preferred outcome in a TPR proceeding, counsel must help the child understand the proceedings and the consequences of the court’s

determination on the child’s future and familial relationships. This counseling function should aim to determine whether or not the child is in favor of permanently severing the child’s legal relationship with the parent(s)—the core inquiry of the legal interests at stake in a TPR proceeding,—and is distinct from ascertaining where and with whom the child prefers to reside.⁵

A. Ascertaining The Child’s Preferred Outcome On The Petition To Terminate Parental Rights Includes Counseling The Child About The Circumstances Surrounding The Petition And Its Consequences

For an attorney to fulfill the role of counsel and advance the child’s wishes, the attorney must counsel the child in an age-appropriate manner to allow the child to make an informed decision regarding the child’s position. This is a process that takes special skill, but is within the expected competency of attorneys for children and is central to protecting the child’s rights in the termination process.

In *In re K.R.*, the Pennsylvania Superior Court reiterated that effective

⁵ In some circumstances, a child’s custodial preferences may align with their preferred outcome in a TPR proceeding. For example, a child residing in foster care who expresses a preference to live with their parent necessarily opposes TPR. However, a child residing in foster care who expresses a preference to reside with their foster parent is not necessarily in favor of TPR. *Amici* caution against framing a child’s legal interests in a TPR proceeding in terms of where the child wants to live, whether the child is happy in the home where they currently reside, or with whom the child shares the closest relationship. Rather, counsel must ascertain whether the child prefers to maintain or sever the relationship with the parent in order to determine the child’s legal interests in a TPR proceeding. Here, TPR would not in any way jeopardize P.G.F.’s continued relationship with Mother, Husband, or Husband’s family. Thus, the fact that P.G.F. “became upset when considering the possibility of not living with Mother and Husband,” *In re P.G.F.*, 2020 WL 579038, at *4 (citing Remand Hearing at 6, 8-9, 16), is not relevant to the question of whether or not he favored termination of Father’s parental rights.

representation of a child requires, “at a bare minimum, attempting to ascertain the client’s position and advocating in a manner designed to effectuate that position.” 200 A.3d 969, 986 (Pa. Super. Ct. 2018). Section 7(c) of the ABA Model Act governing dependency proceedings adopts this approach and provides that counsel for a child should elicit the child’s preferred outcome. *See* MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, AND DEPENDENCY PROCEEDINGS, § 7(c), pp.7-8 (AM. BAR ASS’N 2011) [hereinafter ABA MODEL ACT], https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf (“When the child is capable of directing the representation by expressing his or her objectives, the child’s lawyer shall maintain a normal client-lawyer relationship with the child in accordance with the rules of professional conduct. In a developmentally appropriate manner, the lawyer shall elicit the child’s wishes and advise the child as to options.”). Further, the comment to that Section states that:

The lawyer-client relationship for the child’s lawyer is fundamentally indistinguishable from the lawyer-client relationship in any other situation and includes duties of client direction, confidentiality, diligence, competence, loyalty, communication, and the duty to provide independent advice. Client direction requires the lawyer to abide by the client’s decision about the objectives of the representation. In order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child’s counseled and expressed wishes. Moreover, providing the child with an independent and client-directed lawyer ensures that the child’s legal rights and interests are adequately protected.

ABA MODEL ACT § 7(c) cmt. at p.8 (internal citation omitted). The requirement that counsel ensure children are provided adequate information to determine their position is also reflected in the ABA Model Act.

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

ABA MODEL ACT § 7(c) cmt. at p.8 (internal citation omitted).

Pennsylvania adopted this approach in its Rules of Professional Conduct, which states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Pa.R.P.C. 1.4(b). The comment to that rule further explains that “[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.” Pa.R.P.C. 1.4 cmt. 5.

Pennsylvania courts have held that to fulfill their duty, counsel must ensure that the child understands the legal rights at stake in TPR proceedings, so the child can determine their position on the outcome. *See In re Adoption of D.M.C.*, 192 A.3d at 1211, 1213. In an age-appropriate way, the attorney must ensure that the child

knows how severing the legal relationship between the child and child's biological parents will impact their current life and their future. *Id.* at 1211-13. This includes the impact on the various relationships that the child has, including with extended family and siblings.

When the court is not satisfied that the child has been presented the information needed to express an opinion on the question of TPR, counsel has not fulfilled their role. *See In re Adoption of D.M.C.*, 192 A.3d at 1211, 1213. In *D.M.C.*, counsel advocated in favor of TPR, and advised the court that D.M.C. preferred adoption, but desired to remain in contact with his mother. *Id.* at 1210-1211. However, the Superior Court held that counsel's failure to ensure the child understood that "adoption would mean, absent a post-adoption contact agreement (PACA),^[6] that his relationship with Mother would be legally and permanently severed" and that a PACA was "by no means guaranteed" meant that counsel had not provided D.M.C. with the necessary information to make an informed decision.

⁶The Adoption Act provides parents and the prospective adoptive resource the option to enter into a legally enforceable agreement allowing for ongoing post-adoption contact between the child and the parent(s). *See* 23 Pa.C.S.A. §§ 2731, et seq. However, such agreements are subject to the consent of all parties, including any child over the age of 12. 23 Pa.C.S.A. § 2734. Thus, if the adoptive resource does not agree to enter into a post-adoption contact agreement (PACA), TPR will divest the child of their legal right to any ongoing contact with their parent. *See In re Adoption of G.L.L.*, 124 A.3d 344 (Pa. Super. 2018) (noting that PACA is a purely voluntary agreement requiring the consent of the adoptive parents). Further, even if a post-adoption contact agreement is approved and filed with the court, the adoptive family may seek to terminate the agreement against the child's wishes upon a showing in court that discontinuing the parental contact serves the needs, welfare, and best interest of the child. 23 Pa.C.S.A. § 2739.

Id. at 1211, 1213. Because D.M.C. was not given this critical information before expressing his ostensible preference for TPR, the Superior Court was unable to determine that D.M.C.'s legal interests were represented by counsel. *Id.* at 1213.

D.M.C., the ABA Model Act, and the Pennsylvania Rules of Professional Conduct all require that counsel provide the child with a complete picture of the circumstances surrounding a TPR petition and the consequences that TPR would bring before expressing a preferred outcome. 192 A.3d at 1211-12; ABA MODEL ACT § 7(c) cmt. at p.8; Pa.R.P.C. 1.4(b). Soliciting information about the client's preferred outcome for a case is meaningless if the decision is based on incomplete information. *In re Adoption of D.M.C.*, 192 A.3d at 1211, 1213.

Having an informed client is vital in the TPR context, where permanent decisions about family relationships are made. For example, had the *D.M.C.* court not directed D.M.C.'s counsel to explain the impact of his decision on remand in order to adequately ascertain his preferred outcome, his family could have been irreparably split in a way that D.M.C. could not have anticipated or been prepared for. 192 A.3d at 1212.

B. The Child's Preference To Maintain Or Sever The Legal Relationship With The Parent Is Distinct From A Child's Custodial Preference

Counsel for P.G.F. failed to provide the child with the necessary information to make an informed decision about his preference regarding terminating Father's parental rights. Similar to the child in *D.M.C.*, who had incomplete information

regarding his ability to see his mother should her parental rights be terminated, P.G.F. was not informed of who his father was and the consequences of terminating Father's parental rights on their future relationship. Attorney Rose consulted with P.G.F. and determined that he desired to live with his mother and her husband. *In re P.G.F.*, 2020 WL 579038, at *4. However, she failed to identify Father as P.G.F.'s biological parent and discuss with P.G.F. what it would mean to have Father's rights terminated. *Id.* at *6-7 (Bowes, J. dissenting).

Attorney Rose advised the trial court that she did not believe it was her duty to explain to P.G.F. who Father was. *Id.* at *9 (Bowes, J. dissenting). In fact, it was her responsibility as counsel to do so; without knowing the identify of his biological father, P.G.F. cannot understood the consequences of severing his legal relationship to him. *Id.* (Bowes, J. dissenting) ("Thus, at a minimum, she must provide P.G.F. with the necessary facts to enable him to articulate any preference he has about the outcome of the termination proceedings. That is, counsel should gently explain to P.G.F. the adoption proceedings, identify K.F. as P.G.F.'s legal father, and ask the child if he has a preferred outcome."). Withholding this information from P.G.F. prevented Attorney Rose from fulfilling her primary responsibility of ascertaining P.G.F.'s preference for whether Father's parental rights should be terminated. As the dissent aptly notes, Mother herself could share this information with P.G.F. in order to mitigate the emotional impact of the disclosure; nevertheless, Attorney Rose has

an obligation to ensure that her client has adequate information in order to identify and advance his legal position. See *In re P.G.F.*, 2020 WL 579038, at *9, n.2 (Bowes, J. dissenting).

The majority's conclusion that P.G.F. preferred to terminate Father's rights because P.G.F. "became upset when considering the possibility of not living with Mother and Husband," *In re P.G.F.*, 2020 WL 579038, at *4, misconstrues the nature of the legal right at stake in TPR proceedings. As the dissent aptly notes, "the child's preference regarding physical custody is not suggestive, much less determinative, of his legal interest. The question is not whether P.G.F. preferred to remain in the same household as Mother and Husband, but whether he prefers to sever Father's parental rights." *Id.* at *8 (Bowes, J., dissenting). Attorney Rose failed to explain, and the Superior Court majority failed to consider, that maintaining Father's parental rights would not in any way jeopardize P.G.F.'s continued relationship or residence with Mother and Husband.

Here, rather than *directly* ascertaining her client's position on the *only* question before the court, Attorney Rose "gleaned the child's preference from his various relationships and interactions with Mother, Husband, and paternal grandmother, 'Grammy.'" *Id.* at *7 (Bowes, J., dissenting). However, it is impermissible for counsel to impute a preference to their client based on statements about the child's various relationships with the adults in their life. In *In re Adoption*

of M.D.Q., the children’s counsel argued in favor of TPR, stating that the children “both see their Stepmother as fulfilling the motherly role in their lives,” and “did not seem as concerned with discussing their Mother, whom they acknowledged they had not seen in some time.” 192 A.3d at 1204 (quoting the trial court opinion). The Superior Court reversed, holding that nothing in the record “indicate[d] that counsel attempted to ascertain [the children’s] preferences directly.” *Id.* at 1206. Counsel’s failure to directly ascertain the children’s preferred outcome—similar to Attorney Rose’s failure to directly ascertain P.G.F.’s preferred outcome—deprived the children of their right to counsel.

The majority’s analysis here fails to acknowledge that the legal rights and relationships at stake for a child in a TPR proceeding go beyond the question of physical custody. If TPR is granted, not only will P.G.F. not return to the physical custody of Father, but he may also forever lose any legal right to any ongoing relationship with his Father and his extended family. Absent a representation on the record that P.G.F. understood the nature of the legal relationship he ostensibly preferred to sever, the trial court’s finding that P.G.F.’s legal and best interests both favored TPR is unwarranted.

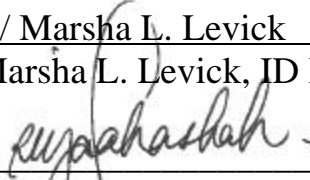
CONCLUSION

WHEREFORE, for the foregoing reasons, we urge this Court to reverse the decision of the Superior Court and remand for a new termination of parental rights

proceeding that ensures P.G.F. meaningful representation.


Respectfully submitted,

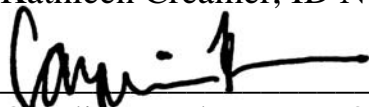
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Dated: July 13, 2020

APPENDIX A

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

For over 50 years, **Community Legal Services, Inc.** (CLS) has served the legal needs of low-income Philadelphia residents by providing them with advice and representation in civil matters, advocating for their legal rights, and conducting community education about legal issues. The Family Advocacy Unit (FAU) is a unit within CLS which provides high quality representation to hundreds of parents each year in Philadelphia dependency and termination of parental rights proceedings. As part of its mission, the FAU works to ensure that low-income vulnerable families involved with the child welfare system receive the due process to which they are entitled and have meaningful access to justice in these extremely important proceedings. In addition to individual client representation, the FAU engages in

policy advocacy and continuing legal education at both a statewide and local level to improve outcomes for children and families.

The **Barton Child Law and Policy Center** is a multidisciplinary clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile and criminal courts and the child welfare and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center adopts a multidisciplinary, collaborative approach to achieving justice for youth through which children are viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk of system involvement.

The Barton Center was founded in March 2000. Its work is directed by Emory Law faculty and performed by law and other graduate students who advocate for children through participation in the Policy and Legislative Advocacy Clinics, the Juvenile Defender Clinic, and the Appeal for Youth Clinic. Under the supervision of experienced faculty members, students represent children in juvenile delinquency, special education, and school discipline cases and seek post-conviction relief for youthful offenders in criminal matters. Students also engage in legislative and policy advocacy on issues impacting vulnerable children. The Barton Center has

represented hundreds of youth and trained nearly over 1000 students who now serve in leadership positions in nonprofit organizations, state and local government agencies, and private firms.

Legal services provided by the Barton Center are provided at no cost to our clients. The work of the Barton Center is funded by Emory Law School, private gifts, foundation grants, and contracts with a variety of organizations.

Through participation as *amicus curiae*, the Barton Center hopes to provide a voice for the child and for those who are similarly situated who will be directly and profoundly affected by the court's decision, and to provide research and data as context for informed decision-making.

The Center for Children & Youth Justice (“CCYJ”) is a 501(c)(3) nonprofit organization with a mission to improve—through systems reform—the outcomes of children and youth who enter the youth justice, child welfare, and related systems. CCYJ is unequivocal in its conviction that to ensure fair and effective dependency and termination proceedings, children should be provided counsel who can zealously advocate on behalf of their expressed interest, with undivided loyalty and assurance of confidentiality in their interactions. Without the assistance of counsel, children's legal rights cannot be fully protected. As a nonprofit organization advocating for the rights and interests of children, CCYJ seeks to ensure enforcement of children's right to counsel where such results are at stake.

Children's Advocacy Institute, at the University of San Diego School of Law, is an academic center and national child advocacy organization involved in legislation, rulemaking, litigation and informational studies and reports.

Children's Rights, Inc. is a national advocacy organization dedicated to improving the lives of vulnerable children in government systems. Through relentless strategic advocacy and legal action, Children's Rights holds governments accountable for keeping kids safe and healthy. We use civil rights impact litigation, policy expertise, and public education to create lasting systemic change. With a more than 20-year record of accomplishment in the area of child welfare reform, the core strength of our national advocacy program has been the grassroots investigation and consequential litigation of reform campaigns designed to address dangerous systemic failings in child welfare systems across the country. Children's Rights has won, and continues to work toward, significant legal victories that drastically improve child welfare systems for thousands of children. Children's Rights represented the class of plaintiff children in the Kenny A. lawsuit, an early seminal case, establishing children's right to counsel in dependency matters.

First Star, a national non-profit, improves the lives of foster youth by partnering with child welfare agencies, universities, and school districts to ensure foster youth have the academic, life skills, and adult supports needed to transition to higher education and adulthood successfully. We pursue our mission through

innovative, university-based college-preparatory programs, providing technical assistance to stakeholders, and advocating for policy change.

The **Juvenile Rights Practice of The Legal Aid Society**: The Legal Aid Society is the oldest and largest not-for-profit legal services organization in the nation, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. The Juvenile Rights Practice (“JRP”) is the primary institutional provider of legal services for children in New York, and it represents 90 percent of the children—34,000 children annually—who appear before the Family Court in New York City on child protective, termination of parental rights, PINS (person in need of supervision), and juvenile delinquency petitions. The JRP was established concurrently with New York State’s Family Court in 1962 (five years before the U.S. Supreme Court ruled that children have a constitutional right to counsel at government expense), and it was one of the first organizations in this country to represent children in a juvenile court. Since then, the JRP has grown into one of the nation’s leading organizations in the field of child advocacy.

Kansas Appleseed Center for Law and Justice, Inc. is a nonprofit, nonpartisan advocacy organization dedicated to vulnerable and excluded Kansans, including those within the juvenile justice system. We investigate social, economic, and political injustice in Kansas and work toward systemic solutions through advocacy, community organization, and litigation.

Kara R. Finck, JD, is a Practice Professor of Law at University of Pennsylvania Carey Law School and the Director of the Interdisciplinary Child Advocacy Clinic. In her clinic, she focuses on the civil legal needs of children and families through a holistic, interdisciplinary model of representation. Professor Finck previously served as the Managing Director of the Family Defense Practice at The Bronx Defenders where she oversaw the first institutional representation program for parents accused of abuse or neglect in Bronx Family Court. There she created a groundbreaking model for holistic representation of parents involved in the child welfare system. As a lecturer, she has presented both nationally and internationally on issues including child welfare, parents' rights, child advocacy and interdisciplinary collaboration. She co-authored "Social Work Practice and the Law" (Springer Publishing, 2011) and has written on child welfare theory and practice in various law journals.

Lawyers For Children (LFC) is a not-for-profit legal corporation dedicated to protecting the rights of individual children in foster care in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody and visitation. This year, our attorney-social worker teams will represent children and youth in more than 3,000 court cases in New York City

Family Courts. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional legal and social work training sessions, and works to reform systems affecting vulnerable children. LFC's experience, expertise and insight as *amicus curiae* on matters pertaining to court-involved children has been accepted by state and federal courts throughout the country. LFC's insight into the issues in this matter is borne of more than 35 years experience acting as court-appointed attorneys for children in matters pertaining to their custody.

Legal Counsel for Youth and Children (LCYC) is a nonprofit civil legal aid organization that improves the well-being of young people by advancing their legal rights. LCYC accomplishes its mission through direct representation services, strong community partnerships, and systemic advocacy. LCYC was founded in 2010 to focus exclusively on children's rights and legal interests, providing holistic, child-centered legal advocacy, in collaboration with other experts and natural supports. LCYC serves over 500 youth annually in King and Walla Walla Counties in Washington State through four main programs: juvenile court, child welfare, youth and family immigration, and youth and young adult homelessness.

LCYC provides specialized, holistic legal advocacy services to young people, from toddlers to 24 years old. The majority of youth that LCYC serves are youth of color. Over one-fifth of youth served through LCYC's homeless advocacy program

self-identify as LGBTQ+. All of the young people LCYC serves have experienced childhood trauma to varying degrees. Some have traveled across countries alone, some were kicked out of their home for being LGBTQ+, most were abused, neglected, abandoned or otherwise without a parent to keep them safe and well-cared for. LCYC attorneys ensure youth have access to education, comprehensive services, healthy relationships, and safe homes.

The **National Center for Youth Law (“NCYL”)** is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure they have the resources, support, and opportunities necessary for healthy and productive lives. NCYL provides representation to youth in cases that have a broad impact, including on the right to counsel for children in foster care. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions affecting their lives, and supports advocacy efforts around the country by providing trainings and technical assistance.

Partners for Our Children, a research and policy center at the University of Washington School of Social Work, supports evidence-informed child welfare policies and practice and advances research and innovations to improve system response and prevent system involvement. Partners for Our Children activities include systems assessment, workforce development supports, program evaluation,

intervention development and testing, data science and analytics, and public policy research, analysis, and education at the state and federal levels.

The **Pennsylvania Legal Aid Network, Inc. (“PLAN”)** is a client-centered non-profit organization providing direct services to those in need and acting as the state’s coordinated system of programs providing leadership, funding, and support to civil legal aid providers across the state to improve the availability and quality of civil legal aid. Through its advocacy and funding, PLAN promotes the rights of children and their families in the child welfare system and the right to counsel in civil proceedings. PLAN and its funded programs have a special interest and substantial expertise with respect to the needs and rights of court-involved children and their interest in meaningful access to justice. The network of programs that PLAN funds offers a continuum of critically needed legal information, advice, and services through direct representation of low-income individuals and families facing urgent civil legal problems, with family law matters representing about 30% of the approximately 75,000 cases handled annually.

The **Rocky Mountain Children's Law Center** is a private non-profit Colorado law firm that has, for 38 years, dedicated itself to advocating for children and youth, driving systemic reform, and boldly challenging the status quo so that every young person who has experienced trauma or instability has the opportunity to thrive. For nearly four decades, the Children's Law Center has directly served over

20,000 children, youth, and families across Colorado, and has worked with partners across the spectrum to advocate for a system that protects and supports Colorado's most vulnerable individuals. From training and policy work to legal representation and appellate advocacy, the Children's Law Center has spent its existence championing the rights, well-being, safety and stability of children, youth, and their families.

The **Temple Legal Aid Office** and the **Sheller Center for Social Justice**, both at Temple University Beasley School of Law, are clinics in which students represent low-income clients and community organizations. The Family Law Litigation Clinic at the Temple Legal Aid Office has extensive experience in termination of parental rights, custody and dependency proceedings, and is committed to ensuring that the interests of children are fully represented in all such proceedings. The Access to Justice Clinic at the Sheller Center focuses on, among other matters, the development of rights to counsel for unrepresented persons, including children. Both organizations seek, via this *amicus* memorandum, to inform the Court of the reasons why, in their view, the decision of the Superior Court in this case should be reversed.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 531 and 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 5,051 words. In preparing this certificate, I relied on the word count feature of Microsoft Word. I further certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that requires filing confidential information and documents differently than non-confidential information and documents.

Dated: July 13, 2020

/s/ Marsha L. Levick
Marsha L. Levick