

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

NOS. 84 & 85 MAP 2016

In re: ADOPTION OF L.B.M., A Minor, *Appellee*.
Appeal of: J.P., Mother.

In re: ADOPTION OF A.D.M., A Minor, *Appellee*.
Appeal of: J.P., Mother.

BRIEF OF JUVENILE LAW CENTER, AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA, COMMUNITY LEGAL SERVICES, INC.,
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, NATIONAL
COALITION FOR A CIVIL RIGHT TO COUNSEL, AND PENNSYLVANIA
LEGAL AID NETWORK, AS *AMICUS CURIAE* IN SUPPORT OF
APPELLANT J.P.

Appeal from the May 31, 2016, Order of the Superior Court, at No. 1834 MDA & 1835 MDA
2015, Affirming the September 25, 2015 Order of the Court of Common Pleas o
Franklin County, Orphans' Court, at Nos. 42-Adopt-2014, 41-Adopt 2014, CP-28-
DP-0000050-2013, CP-28-DP-0000051-2013.

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Other Authorities

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are non-profit organizations that promote the rights of children and their families in the child welfare system or that advocate for the right to counsel in civil proceedings. *Amici* 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.

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Core to Juvenile Law Center's work is ensuring that children's rights to due process are protected by access to quality counsel able to fully assert a child's legal interests at all stages of the proceedings. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

American Civil Liberties Union of Pennsylvania (“ACLU-PA”) is the Pennsylvania state affiliate of the American Civil Liberties Union (“ACLU”), a nonprofit, nonpartisan organization founded in 1920 to protect and advance civil liberties throughout the United States. ACLU-PA has over 15,000 members throughout the Commonwealth of Pennsylvania. Since its founding in 1920, the ACLU has been dedicated to preserving and defending the principles of individual liberty embodied in the United States Constitution. Those principles are primarily designed to structure the relationship between the individual and the state in a manner that affords proper protection for individual rights and ensures against any abuse of power by state officials. The ACLU has a long history of protecting rights of due process, especially the right to counsel. The ACLU believes appointment of counsel for minors affected by parental-rights-termination proceedings is essential to ensuring fair and just decision making.

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.

Founded in 1977, the **National Association of Counsel for Children (NACC)** is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the wellbeing of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

Formed in January 2004, the **National Coalition for a Civil Right to Counsel (NCCRC)** is an unincorporated association that seeks to advance the recognition of a right to counsel for indigent litigants in civil cases involving basic human needs, such as shelter, safety, sustenance, health, and child custody. NCCRC is comprised of nearly 300 participants from 38 states, including civil legal services attorneys, supporters from public interest law firms, and members of the private bar, academy, state/local bar associations, access to justice commissions, national organizations, and others.

NCCRC supports litigation, legislation, and other advocacy strategies seeking a civil right to counsel, including amicus briefing where appropriate. In this vein, NCCRC participants worked closely with the American Bar Association's Presidential Task Force on Access to Justice on its 2006 Resolution (which passed the ABA House of Delegates on a unanimous vote) that urges federal, state and territorial governments to recognize a right to counsel in certain civil cases.¹ By promoting such a civil right to counsel, NCCRC works tirelessly to try to close the "justice gap" in the United States that has grown to the point

¹ American Bar Association Resolution 112A (Aug. 2006), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_s_sclaid_06A112A.authcheckdam.pdf.

where less than 20 percent of the legal needs of poor people are addressed.²

Among its body of work is research into potential support for a civil right to counsel in the constitutions of each of the fifty states (and the District of Columbia), and a comparative analysis thereof.

The **Pennsylvania Legal Aid Network, Inc. (“PLAN”)** is a client-centered 501(c)(3) organization providing leadership, funding, and support to improve the availability and quality of civil legal aid. PLAN is the state’s coordinated system of organizations providing civil legal aid for those with nowhere else to turn. PLAN provides funding to civil legal aid providers across the state and offers direct services itself. It conducts numerous statewide trainings for public interest lawyers, it administers and funds a Martin Luther King Jr. Internship and Fellowship Program, and it provides leadership and support for legal aid providers in their proper accounting for funds and contract compliance.

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

² Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

handled annually. This network provides direct representation to clients in every Pennsylvania county.

STATEMENT OF JURISDICTION

Amici incorporate the Statement of Jurisdiction in the Brief of Appellant.

ORDER OR OTHER DETERMINATION IN QUESTION

Amici incorporate the statement of the Order or Other Determination in Question in the Brief of Appellant.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amici incorporate the Statement of the Scope and Standard of Review in the Brief of Appellant.

STATEMENT OF THE QUESTION INVOLVED

Whether, in a contested termination of parental rights hearing, children are entitled to client-directed counsel who represents their legal interests, and who does not serve the dual role of guardian *ad litem*.

Answer of the Superior Court: No.

Suggested Answer: Yes.

STATEMENT OF THE CASE

Amici incorporate the Statement of the Case in the Brief of Appellant.

SUMMARY OF ARGUMENT

Terminating parental rights imposes on children the unique and irreversible possibility that their legal ties to existing family members may be permanently severed through no fault of their own. Independent legal representation is critical to ensuring that their voices are heard in a proceeding that determines their future.

Amici do not address the court's decision to terminate parental rights itself; rather, *amici* assert that L.B.M. and A.D.M. were entitled to client-directed counsel to represent their legal interests at the termination hearing as required by the unambiguous language of Pennsylvania's Adoption Act. In explaining the critical role that counsel plays in termination hearings, *amici* rely on the growing number of legislative mandates, child welfare studies, and legal organizations' model rules and recommendations that recognize the value children's voices have in reaching the solemn and irreversible decision to sever family ties. Developing, understanding, and advocating a child's preference helps courts make the right decision; counsel is crucial to that effort.

Collapsing the role of counsel who represents a child's *legal* interests with a GAL who advocates for the child's *best* interests impedes effective advocacy and ultimately may prevent a child from receiving the full benefit of legal counsel. Given the importance of the legal issues at stake in a termination hearing, failure to appoint independent counsel for L.B.M. and A.D.M. was reversible error.

ARGUMENT

The Adoption Act requires that a “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. § 2313(a). Despite the clear mandate of the Adoption Act, the trial court denied Appellant’s request that counsel be appointed for her children when she disputed termination of her parental rights. The trial court’s decision violates the General Assembly’s unambiguous directive. Moreover, by conflating the roles of a court-appointed guardian *ad litem* and client-directed counsel, the trial court’s decision ignores the key role that a child’s voice must play in a decision to forever terminate his rights to his family.

I. Section 2313 of the Adoption Act Unambiguously Requires Appointment of Counsel, Not a GAL, to Represent a Child’s Stated Interest in a Contested Termination of Parental Rights Hearing

The object of statutory construction is to ascertain and effectuate the General Assembly’s intention. 1 Pa. C.S. § 1921(a). “Generally speaking, the best indication of legislative intent is the plain language of a statute.” *Sternlicht v. Sternlicht*, 876 A.2d 904, 909 (Pa. 2005) (quotation omitted). Therefore, “[w]hen the words of a statute are clear and free from all ambiguity, the letter is not to be disregarded under the pretext of pursuing the spirit.” 1 Pa. C.S. § 1921(b).

Words and phrases shall be construed according to rules of grammar and according to their common and approved

usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.

1 Pa. C.S. § 1903(a). However, in construing and giving effect to the text, the court “should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.” *Roethlein v. Portnoff Law Assoc., Ltd.*, 81 A.3d 816, 822 (Pa. 2013).

When the text of a statute is ambiguous—and only then—the court shall construe the legislative intent by considering the following factors:

- (1) The occasion and necessity of the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

1 Pa. C.S. § 1921; *Sternlicht*, 876 A.2d at 909 n.9.

Section 2313 of the Adoption Act is not ambiguous: it expressly *requires* that *counsel* be appointed to a child when one or both of his parents contest involuntary termination of parental rights. 23 Pa. C.S. § 2313(a). By using the word “shall,” the General Assembly made such appointment mandatory. *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition,

‘shall’ is mandatory.”); *see also In re E.F.H.*, 751 A.2d 1186, 1190 (Pa. Super. Ct. 2000) (without interpreting definition of “counsel,” holding that “this Court has interpreted the word “shall” in section 2313(a) as being mandatory, not permissive, and as serving as a direction to the court to appoint counsel.”).

The trial court declined to follow this imperative, believing that the GAL could also serve as counsel for the children here because she was a lawyer. (*See Tr. Ct. Op.*, 2016 WL 3080124, at *20). But the statutory language reveals that the General Assembly understood counsel and GAL as two different roles. When “the legislature includes specific language in one section of the statute and excludes it from another, the language should not be implied where excluded.” *Fonner v. Shandon, Inc.*, 724 A.2d 903, 907 (Pa. 1999). Although Section 2313 requires “counsel” in contested termination hearings, the next sentence of the statute authorizes courts to appoint “counsel *or* a guardian ad litem” in other proceedings. 23 Pa. C.S. § 2313(a) (emphasis added). The General Assembly distinguished counsel and GALs in the very statute at issue here and only explicitly required appointment of counsel in a disputed termination hearing. The General Assembly’s choice of language is dispositive of its intention to delineate two distinct roles. *Fonner*, 724 A.2d at 907.

Recognizing that a GAL does not fulfill the role of counsel is consistent with the use of the word in the rest of the statute, which also mandates that “counsel” be

appointed for qualifying parents whose rights are subject to involuntary termination. 23 Pa. C.S. § 2313(a.1); *see Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1285 (Pa. 2014) (“[E]very portion of statutory language is to be read ‘together and in conjunction’ with the remaining statutory language, ‘and construed with reference to the entire statute’ as a whole.”). The General Assembly used the same word—“counsel”—to describe the representation to which children are entitled. 23 Pa. C.S. § 2313(a). Thus, the General Assembly intended to provide to children the same attorney-client relationship typical of any adult-representation: they are entitled to a lawyer who represents their stated interest. *See, e.g.*, Pa. R. Prof. Cond. 1.2(a) (“[A] lawyer *shall abide by a client’s decisions* concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” (emphasis added)) *See also* Pa. R. Prof. Cond. 1.14(a) (“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished because of minority . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”).

The distinction between counsel and a GAL is not unique to the Adoption Act. The Juvenile Rules contemplate that children may be entitled to both a GAL and counsel in dependency proceedings, recognizing that “legal counsel represents the legal interests of the child and the guardian *ad litem* represents the best

interests of the child.” Pa. R. Juv. Pro. 1151, cmt.; *see* 1 Pa. C.S. § 1932(b) (“Statutes in pari materia shall be construed together, if possible, as one statute.”). The definition of GAL is also apparent in other contexts. In child custody disputes, this Court has recognized that a GAL’s purpose is to “advocate the child’s best interests in concrete terms.” *K.E.M. v. P.C.S.*, 38 A.3d 798, 809 (Pa. 2012). The differences between the roles of GAL and counsel are clear: children are entitled to a lawyer who represents their legal interests when they face losing their families in contested hearings to terminate their parents’ rights.

As is also clear on the face of the statute, the General Assembly used the terms “counsel” and “GAL” to refer to two different people. Simply appointing someone with a law degree to represent both the child’s best interests *and* his stated interest is not enough to fulfill the statutory mandate of Section 2313, as the trial court suggests. (*See* Tr. Ct. Op., 2016 WL 3080124, at *20 (quoting *In re K.M.*, 53 A.3d 781, 786 (Pa. Super. Ct. 2012))). The General Assembly explained in Section 2313 that “[t]he guardian *ad litem* concept is broad enough to allow the appointment of a person other than a lawyer.” 23 Pa. C.S. § 2313, cmt. If the General Assembly intended to collapse the roles of GAL and counsel when the GAL was licensed to practice law, then it would not have used both the word “counsel” and “lawyer.” “Counsel,” therefore, can only mean one thing: a lawyer who advocates for a child’s stated interest.

II. Section 2313 of the Adoption Act Is Consistent with the Disparate Roles that a Child’s Counsel and a GAL Serve

Pennsylvania Courts understand that the purpose of Section 2313 of the Adoption Act “is to protect the interests of the child.” *In re Adoption of J.L.*, 769 A.2d 1182, 1185 (Pa. Super. Ct. 2001). “Implicit in this appointment of counsel is a recognition that the interests of the child may be very different than or diverge from the interests of the other parties to the proceedings.” *Id.* While the Superior Court here inherently rejected that the child’s interests include his preference to maintain a parent-child relationship with his biological mother, child welfare experts, academics, and organizations like the American Bar Association recognize the importance of developing, articulating, and understanding a child’s stated interest at termination hearings.

Courts must listen to a child’s voice before forever severing the ties that bind his family. Appointing client-directed counsel to represent a child’s legal interests ensures that children can effectively make their voices heard. This opportunity, in turn, serves a child’s best interest. But watering-down the role of counsel by allowing a single individual to serve the dual roles of both counsel and GAL impedes both of these goals.

A. The Child’s Input Is Critical to the Decision to Terminate Parental Rights

1. *Severing a Child’s Connection to His Family Is Inherently Consequential to His Future*

Terminating parental rights is a serious decision inflicting a grievous loss on families that is equivalent to the “death sentence” to a parent-child relationship. *In re Coast*, 561 A.2d 762, 778 (Pa. Super. Ct. 1989) (Tamilia, J., concurring); *see also Santosky v. Kramer*, 455 U.S. 745, 758-59 (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. *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.”).³

For a child, the risk of an erroneous termination includes not only the loss of his parents, but his extended family members and potentially his siblings. He also risks the prospect of a lifetime in substitute care without a meaningful relationship

³ This Court need not determine that children have a liberty interest in the parent-child relationship to consider the undeniable impact termination will have on some children. Regardless, *amici* note for the Court that at least one federal district court has recognized that children are entitled to counsel at termination hearings because the proceeding implicates a child’s fundamental interests in health, safety, family integrity, and physical liberty. *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1360-61 (N.D. Ga. 2005) (“[T]he private liberty interests at stake support a due process right to counsel in deprivation and TPR proceedings.”)

to a permanent adoptive family. *See Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 837 (1977) (“[E]ven when it is clear that a foster child will not be returned to his natural parents, it is rare that he achieves a stable home life through final termination of parental ties and adoption into a new permanent family.”). In 2012, Pennsylvania was home to 1,321 such children waiting for adoption whose parents’ rights had been terminated. U.S. Dep’t of Health and Human Services, *Child Welfare Outcomes 2009–2012* at 284 (2014) at <http://www.acf.hhs.gov/programs/cb/resource/cwo-09-12>.

Pennsylvania law indeed recognizes that termination of parental rights impacts a child’s well-being. Before a court may terminate parental rights, it must consider whether doing so will serve the child’s best interest. *In re Adoption of J.J.*, 515 A.2d 883, 892 (Pa. 1986). Whether severing the parent-child bond serves the child’s welfare is a separate question from his parents’ capacity or willingness to care for him. *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 decision may have on a child. *See also Kenny A.*, 356 F. Supp. 2d at 1360-61 (discussing the impact of termination of parental rights on children’s health, safety, family, and physical liberty).

Giving children a voice recognizes the manifest conclusion that termination

of parental rights affects children, too. Child welfare experts agree. “[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.” MODEL RULES OF PROF’L CONDUCT R 1.14, cmt. 1. Children’s opinions are advanced when explored 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 7, 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).

2. *Child Welfare Law Increasingly Recognizes the Importance of a Child’s Voice in Child Welfare Proceedings*

More than fifteen years ago, the Superior Court disagreed that a child’s stated preference plays a role in the decision to terminate parental rights, holding that a child’s right to be heard is irrelevant at a termination hearing. *See In re B.L.L.* 787 A.2d 1007, 1014 (Pa. Super. Ct. 2001). But *B.L.L.* is a product of an

antiquated view of children's roles in proceedings that determine their fate. *Amici* assert that *B.L.L.* does not and should not control this court's assessment of children's right to counsel that represent their stated interests.

Since the Superior Court decided *B.L.L.*, the United States Congress and the Pennsylvania General Assembly have enacted legislation requiring youth involvement in planning for their own permanency.⁴ Signaling a trend toward expanding youth engagement in child welfare proceedings, the federal Child and Family Services Improvement and Innovation Act of 2006 required for the first time that States establish procedural safeguards "to assure that in any permanency hearing held with respect to the child, . . . the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child." Child and Family Services Improvement & Innovation Act of 2006, Pub. Law No. 109-288, 120 Stat. 1233, 1255 (codified in relevant part at 42 U.S.C. § 675(5)(C)). In adopting the act, Congress recognized that "each child deserves the opportunity to participate and be consulted in any court proceeding affecting his or her future, in an age-appropriate manner." 152 Cong. Rec. H7384 (daily ed. Sept. 26, 2006).

⁴ Pennsylvania has also given youth a greater voice in child welfare proceedings on other matters affecting their welfare. For example, to further the goal of achieving normalcy for children placed outside of their parents' homes, the Juvenile Rules of Court Procedure now provide that courts should consult a child to determine if he "has been provided regular, ongoing opportunities to engage in age-appropriate or developmentally-appropriate activities." Pa. R. Juv. Pro. 1608(D)(1)(p).

Moreover, the Pennsylvania Rules of Juvenile Court Procedure promulgated by this court in 2006 provide for the attendance of the child at all proceedings. Pa. R. Juv. Pro. 1128, cmt.

On September 29, 2014, the federal Preventing Sex Trafficking and Strengthening Families Act (“SFA”) further established youth engagement as central to effective and proper case planning—including achieving permanency. The SFA empowers children in foster care who are fourteen or older to participate in permanency planning with the child welfare agency—and to identify two adults to attend case planning meetings to advocate on their behalf or explain their rights. 42 U.S.C. § 675a(b). The SFA also requires that these children receive documentation of their right to court participation among other things. *Id.* In December 2015, Pennsylvania signed legislation implementing the SFA into state law, which mandates that dependency courts consult with a child about his “desired permanency goal” at every permanency hearing. 2015 Pa. Legis. Serv. Act 2015-94 (H.B. 1603) (West) codified at 42 Pa.C.S. § 6351(E)(1)).

Multiple legal and child-focused organizations have also since recognized the importance of a child’s right to attend and be heard at child-welfare proceedings since the *B.L.L.* decision. In a 2004 report, the Pew Commission on Children in Foster Care recommended that courts should enable children and parents to participate in a meaningful way in their own court proceedings. The

report recognizes that children benefit when they have the opportunity to actively participate in court proceedings, as does the quality of decisions when judges can see and hear from key parties. THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE 41-44 (2004). In 2011, the American Bar Association passed The Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings, which provides for client-directed representation in child welfare proceedings. American Bar Association, *ABA Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (Aug. 2011) [hereinafter “*ABA Model Act*”]; *see infra*, §(II)(B). One year later, the National Council of Juvenile and Family Court Judges passed a new best practice recommendation that presumes children should be in court. NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, SEEN, HEARD, AND ENGAGED: CHILDREN IN DEPENDENCY COURT HEARINGS (2012), *available at* www.ncjfcj.org/sites/default/files/CIC_FINAL.pdf. The UN Convention on the Rights of the Child also encourages consideration of the child's voice, not just the child's best interests, in any proceeding that affects the child. Convention on the Rights of the Child, 28 I. L.M. 1488, Art. 9. Sec. 2 (1989).

B.L.L. is at odds with the growing recognition that children can and should be heard before courts make decisions that ultimately affect their futures. Permanency planning necessarily includes the possibility of terminating parental

rights. There is no logical basis for recognizing that engaging children in decision-making and listening to their voices in court proceedings serves their best interests in a goal change proceeding, but not when severing their relationships with their families. Rather, terminating parental rights forecloses entirely the option that a youth may return home or otherwise achieve a permanency option that allows him to maintain a relationship with his parents. Here, the trial court changed the children's permanency goal to adoption and terminated parental rights at the same hearing, underscoring that permanency cannot be achieved without addressing whether family ties should be maintained.

B. The Purpose of Appointing Counsel Is to Ensure that a Child's Legal Interests Are Adequately Protected

Nearly fifty years ago, the United States Supreme Court recognized that, even more than adults, children need counsel to effectively navigate complex legal proceedings. *In re Gault*, 387 U.S. 1, 36 (1967) (holding that children need the “guiding hand of counsel” to represent their legal interests); *id.* at 38 n.65 (even “[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.”) (quoting Report by the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) at 86-87). Counsel's role is central in hearings that would ultimately deprive children of their families. Without lawyers representing their

legal interests, children are deprived of their full voice. Children need competent lawyers “to present evidence and testimony of [their] own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the [final] decision, [and] to take an appeal.” *Id.*

Consistent with this need, the ABA Model Act⁵ unequivocally declares that “providing the child with an independent and client-directed lawyer ensures that the child’s legal rights and interests are adequately protected.” American Bar Association, *ABA Model Act* § 7(c), cmt. Thus the ABA Model Act recognizes that a child-directed attorney-client relationship “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.” *Id.* Counsel’s fundamental role is “to make the child’s wishes and voice heard but [he] is not merely the child’s mouthpiece.” *Id.* Thus, “[w]ithout unduly influencing the child, the lawyer should advise the child by providing options and information to assist the child in making decisions. The lawyer should explain the practical effects of taking various positions, the likelihood that a court will accept particular arguments, and the impact of such decisions on the child, other family members,

⁵ The ABA Model Act includes termination of parental rights hearings in its definition of abuse, neglect, and dependency proceedings. *ABA Model Act* § 1(a)(5).

and future legal proceedings.” *Id.*

A child’s participation via counsel ensures that courts receive all relevant information before forever terminating a child’s ties to his biological family. Terminating parental rights is an irreversible decision, and courts must be sure that they choose correctly. *See Santosky*, 455 U.S. at 765 (recognizing the risk of an erroneous deprivation). “Hearing from a child who wants to participate in his or her court case and who has had effective counsel to understand the legal issues involved, the impact of different decisions, and the scope of possibilities is imperative to sound decision-making by a court.” First Star & Children’s Advocacy Inst., *A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* (3d ed. 2012) [hereinafter “First Star Report Card”]; *see also* Lucy Johnston-Walsh, et al., *Assessing the Quality of Child Advocacy in Dependency Proceedings in Pennsylvania* 17-18 (Oct. 2010); Brent Pattison, *When Children Object: Amplifying an Older Children’s Objection to Termination of Parental Rights*, 49 U. MICH. J.L. REFORM 689, 702 (2016) (giving children a legal voice “may make it more likely that judges, social workers, and attorneys will explore the child’s views about TPR and adoption and help alleviate the child’s fears or misconceptions about TPR.”)

C. Appointing Counsel to Provide Client-Directed Representation Promotes Outcomes that Meet the Child's Best Interest

Legal representation in termination hearings fosters the child's trust in and understanding of the system that is making fundamental decisions about his life. A child's participation in the legal process can assist him in making better and more informed decisions. *See, e.g., Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, 6 NEV. L.J. 592, 609 (2006); *ABA Model Act* §7. Therefore, not only are a child's interests better served, they are also better articulated.

Children who participate in decisions involving their futures are also more likely to embrace the court's final order. "Children who are represented by a lawyer often feel the process is fairer because they had a chance to participate and to be heard. Consequently, children are more likely to accept the court's decision because of their own involvement in the process." *ABA Model Act*, Report at 21. Promoting an outcome that the child accepts serves his best interest. Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 Fam. Ct. Rev. 163, 169 (2008) (explaining that court participation may counteract the feelings of helplessness that all children, especially those in the child welfare system experience).

Young people report that being involved in child welfare proceedings "is

exactly what they need to enable them to heal and move on—hearing difficult information in an appropriate setting, with support available and the opportunity to express their own views about their life’s course, enables them to come to terms with and work through the abuse and neglect they have suffered.” Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302, 1307 (2006).

D. A Lawyer Cannot Serve as Both a GAL and Counsel

While both a GAL and counsel owe a duty of loyalty to the child they represent, they fulfill that duty in different ways. A lawyer serving the dual roles of GAL and counsel faces conflicting demands, even when the child’s legal and best interests are aligned. Counsel receiving direction from a minor client must abide by the child’s decisions concerning the objectives for representation and must consult with the child as to the means by which they are obtained. A GAL, by contrast, is bound by a duty to independently assess the child’s best interest and to recommend to the court steps for achieving it. Pa. R. Juv. Pro. 1154. Unlike a GAL, who will consider a child’s stated interest as one of many factors that ultimately determine a child’s best interest, counsel is beholden to advocating on behalf of the child’s legal interest. Client-directed counsel is thus better placed to help a child articulate his legal interests: it is the sole end he must serve. *See* First Star Report Card at 4 (“[C]hildren are best served by client-directed advocates who

are obligated to really listen to them, and who can advise and speak for them without conflict.”) Here, the difference between the child’s stated interests and his best interests was “staggering.” (Super. Ct. Op., 2016 WL 3080124, at *34 (Strassburger, J., dissenting).) Discounting A.D.M.’s stated preference to maintain a relationship with his mother, the trial court speculated about the nature of his feelings toward her. (Tr. Ct. Op., 2016 WL 3080124, at *17-18.) This is the exact information a lawyer tasked with representing a child’s legal interest must ferret out. *ABA Model Act §7*.

Collapsing the two roles into one places an attorney in an untenable and conflicted position—serving as a GAL and undertaking to determine what she believes to be the best interests of the child, as compared to serving as counsel, advocating for the child’s expressed wishes, which may present other reasonable options or that may not be a feasible legal option, despite what she, acting as GAL, believes to be the child’s best interests.

Client-directed counsel must also maintain client confidences. Attorney-client privilege is necessary to foster a trusting and open dialogue in support of effective representation. *Commonwealth v. Chmiel*, 738 A.2d 406, 423 (Pa. 1999). No such duty binds a GAL, who may be *required* to disclose confidences if necessary to protect and advocate for the best interests of a child. OFFICE OF CHILDREN & FAMILIES IN THE COURTS, STANDARDS OF PRACTICE FOR PARENTS’

ATTORNEYS, GUARDIANS AD LITEM & LEGAL COUNSEL PRACTICING CHILD WELFARE DEPENDENCY CASES IN PENNSYLVANIA 25 (2011), *available at* www.ocfpacourts.us (“GALs may find it necessary to disclose certain client communications to comply with the Child Protective Services Law, Rules of Professional Conduct or to advance the client’s best interests.”). When a lawyer serves both as GAL and counsel, it may chill a child’s communications or harbor distrust between child and his counsel. Emily Buss, “*You’re My What?*” *The Problem of Children’s Misperceptions of Their Lawyers’ Roles*, 64 *Fordham L. Rev.* 1699, 1713-16 (1996). One can imagine a situation in which a child would not wish to share a wide range of important and relevant conduct without the assurance of confidentiality. *See id.* Without open and *protected* communications, a lawyer cannot effectively represent his client’s legal interests. Nor is a child’s trust in the system fostered when, believing his candid communication will help formulate legal strategies that he chooses, they are instead disclosed in purported service of identifying his best interests—a goal that may be formed without his input.

III. As in Criminal Proceedings, the Trial Court’s Failure to Appoint Counsel for the Child is Structural Error and Thus Not Subject to Harmless Error Review

The U.S. Supreme Court has “uniformly found constitutional error without any showing of prejudice when counsel [in criminal proceedings] was either totally

absent, or prevented from assisting the accused during a critical stage of the proceeding.” *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984). The rule requiring automatic reversal extends not just to representation at trial, but also a defendant’s ability to consult his attorney—to make tactical decisions and review strategies with the advice of counsel. *Geders v. United States*, 425 U.S. 80, 88 (1976). The logic behind reversing automatically when a criminal defendant is denied counsel to guide and represent his legal decisions applies equally in termination proceedings. In such cases, courts routinely apply criminal protections in civil cases, especially when a litigant’s substantial interest is at stake. *Amici* respectfully propose that this Court should do the same and hold that denying children the right to counsel guaranteed by the General Assembly is error requiring automatic reversal.

A. Courts Routinely Apply Criminal Procedural Protections to Termination of Parental Rights Hearings and Other Civil Proceedings

Courts have already extended various criminal law protections to termination proceedings to safeguard the fundamental interests at stake. For example, the United States Supreme Court justified elevating the standard of proof for termination cases by analogy to criminal cases, where heightened proof requirements are “a prime instrument for reducing the risk of convictions resting on factual error.” *Santosky*, 455 U.S. at 764. The Court held that at termination,

elevated proof similarly would “impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered.” *Id.* at 764-65 (quotation omitted); *see also In re Adoption of R.I.*, 312 A.2d 601, 602 (Pa. 1973) (holding that the logic for appointing counsel in criminal cases “is equally applicable to a case involving an indigent parent faced with the loss of her child” due to the “substantial right[]” involved).

Pennsylvania courts, including this one, have extrapolated from criminal cases, reversing for structural error in civil cases when:

- A court officer wrongly replaced a juror without notice to the parties, *Bruckshaw v. Frankford Hosp. of Phila.*, 58 A.3d 102, 154 n.6 (Pa. 2012) (“[T]he inability to assess prejudice in this case causes the error to defy analysis by prejudice standards.”);
- The judge was absent from closing argument, *Dimonte v. Neumann Med. Ctr.*, 751 A.2d 205, 212 (Pa. Super. Ct. 2000) (“[T]he same reasoning [for recognizing structural error in the criminal context] is sound in the civil context.”); and
- A paternity defendant was denied effective assistance of counsel, *Banks v. Randle*, 486 A.2d 974 (Pa. Super. Ct. 1984).

Pennsylvania is not alone. Other state courts applying criminal law protections to child welfare cases have found that the “civil” or “criminal” labels on a proceeding are less important than the interest at stake. *See, e.g., Rutherford v. Rutherford*, 464 A.2d 228, 235 (Md. 1983) (recognizing right to counsel in civil contempt cases under state constitution because “it is the fact of incarceration, and not the label placed upon the proceeding, which requires the appointment of

counsel for indigents”); *Artibee v. Cheboygan Circuit Judge*, 243 N.W.2d 248, 250 (Mich. 1976) (“[M]any procedural safeguards attendant to criminal trials have been made applicable to [civil] paternity proceedings.”).

B. The Structural Error Test Applies to the Denial of Counsel in Termination Cases

The logic underlying automatic reversal when a criminal defendant is denied counsel applies equally to termination proceedings. The Supreme Court has reasoned that a complete deprivation of the right to criminal counsel is a structural error because it “def[ies] analysis by ‘harmless-error’ standards.” *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Expanding on this conclusion in a case addressing deprivation of the choice of counsel (a lesser harm than complete deprivation of counsel), Justice Scalia explained that, if the Court were to attempt a harmless error analysis “we would not be looking for mistakes committed by the actual counsel, but for differences in the defense that would have been made by the rejected counsel . . . And then we would have to speculate upon what effect those different choices or different intangibles might have had.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006). The Court declined to engage in “a speculative inquiry into what might have occurred in an alternate universe,” instead holding that deprivation of the choice of counsel entitles criminal defendants to automatic reversal. *Id.* at 150. This reasoning applies with even greater force when counsel is absent altogether: it is impossible to determine what

an attorney might have been able to do had she been involved.

The determination of what counsel might have done in a termination case is no easier to make: the same questions arise about how to determine what might have occurred in the “alternate universe” where counsel would have been present. Only when a child has been appointed counsel and thus “afforded an opportunity of developing a record upon which his rights may be intelligently and certainly determined,” *Atkins v. Moore*, 218 F.2d 637, 638 (5th Cir. 1955) (per curiam), can the record have been adequately developed and the risk of error be accurately assessed. Even courts applying a harmless error analysis have acknowledged this impossible dilemma.⁶

The Georgia Supreme Court recently reversed its own precedent and abandoned the harmless error test, concluding that “when the state is terminating a parent’s ‘fundamental and fiercely guarded right’ to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact-finding process.” *In re J.M.B.*,

⁶ See, e.g., *State ex rel. Adult and Fam. Servs. Div. v. Stoutt*, 644 P.2d 1132, 1137 (Or. Ct. App. 1982) (conceding that “[I]t is circular to look to the record to determine whether counsel could have affected the result, when one of the principal missions of counsel in any litigation is to develop the record”); *J.C.N.F. v. Stone Cty. Dep’t of Human Servs.*, 996 So. 2d 762, 771 (Miss. 2008) (agreeing that presence of counsel “may have greatly changed the hearing transcript now before this Court”).

676 S.E.2d 9, 12 (Ga. Ct. App. 2009). The North Dakota Supreme Court echoed this concern: “[T]he denial of counsel to an indigent parent in an adoption proceeding which results in the termination of parental rights can [n]ever be ‘harmless,’ under any standard.” *In re Adoption of J.D.F.*, 761 N.W.2d 582, 588 (N.D. 2009). “Without competent counsel, parents in [termination of parental rights] proceedings will be unlikely to mount an effective defense.” *Id.*

Although these cases highlight the rights of parents, the reasoning applies with equal force for children, who also face the complete severance of the constitutionally protected parent-child relationship. *See supra*, § II. A child is even less equipped to “execute basic advocacy functions to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross examine witnesses, make objections, and preserve a record for appeal,” and therefore such reasoning should be applied to the complete denial of counsel for a child. *See J.D.F.*, 761 N.W.2d at 588 (quotation omitted); *see also Gault*, 387 U.S. at 36 (explaining that children require “the guiding hand of counsel” even more than adults do).

C. Pennsylvania and Many Other State Courts Find Structural Error When Counsel Is Denied in a Termination Case

Recognizing that it is equally impossible to discern error when counsel is completely denied in a civil case, and in light of the fundamental interests at stake, numerous state courts have held that the complete denial of counsel for parents in

termination cases is harmful per se and/or a structural error requiring reversal.⁷

For all the reasons stated above, such an approach is equally sound when a child is denied counsel.

The Superior Court has effectively applied the structural error test when children and parents were denied counsel in termination proceedings. *In re E.F.H.*, 751 A.2d 1186, 1190 (Pa. Super. Ct. 2000) (finding “reversible error of law” when trial court denied counsel to child, without engaging in harmless error analysis); *In re Adoption of G.K.T.*, 75 A.3d 521, 526-27 (Pa. Super. Ct. 2013) (rejecting argument that child’s youth and inability to communicate with counsel rendered failure to appoint counsel harmless); *Ex rel. X.J.*, 105 A.3d 1, 7 (Pa. Super. Ct.

⁷ See *People ex rel. R.D.*, 277 P.3d 889, 897 (Colo. App. 2012) (“given the importance of the statutory right to counsel in termination of parental rights hearings, the deprivation of that statutory right constitutes reversible error per se”); *Wilkins v Georgia*, 337 S.E.2d 20, 24 (Ga. 1985); *State v. Doe*, 850 P.2d 211, 212 (Idaho Ct. App. 1993); *G.P. v. Ind. Dep’t of Child Servs.*, 4 N.E.3d 1158, 1167 (Ind. 2014) (adopting bright-line rule on right to counsel in dependency cases); *Ex rel. S.A.J.B.*, 679 N.W.2d 645, 651 (Iowa, 2004); *In re K.L.T.*, 237 S.W.3d 605, 607 (Mo. Ct. App. 2007); *In re A.S.A.*, 852 P.2d 127, 129–30 (Mont.1993); *State v. R.M.*, 484 N.W.2d 77, 83 (Neb. 1992); *Williams v. Bentley*, 26 A.D.3d 441, 442 (N.Y. App. Div. 2006) (“The deprivation of a party’s fundamental right to counsel in a custody or visitation proceeding is a denial of due process and requires reversal, without regard to the merits of the unrepresented party’s position.”); *Richard v. Michna*, 431 S.E.2d 485, 488 (N.C. Ct. App. 1993) (reversing when trial court failed to appoint GAL for mentally disabled mother in termination, despite that she was not prejudiced); *In re S.S.*, 90 P.3d 571, 575-76 (Okla. Civ. App. 2004) (“[T]he ‘actual or constructive denial of assistance of counsel altogether is legally presumed to result in prejudice.’”); *Ex rel. J.M.O.*, 459 S.W.3d 90, 94 (Tex. Ct. App. 2014) (“the *Cronic* presumption should apply when appointed counsel wholly fails to appear at trial in a parental-rights termination proceeding”); *In re Torrance P., Jr.*, 724 N.W.2d 623, 635 (Wis. 2006) (“The fairness and integrity of the judicial proceeding that the legislature has established for termination proceedings has been placed in doubt when the statutory right to counsel is denied a parent. Accordingly, the denial of the statutory right to counsel in the present case constitutes structural error.”).

2014) (reversing, without harmless error analysis, because mother did not receive counsel at termination proceedings). Such an approach is especially appropriate when child’s counsel is denied, as the child’s right to counsel is explicit in the statute and “[t]o effect an adoption, the legislative provisions of the Adoption Act must be strictly complied with.” *In re Adoption of E.M.A.*, 409 A.2d 10, 11 (Pa. 1979).

CONCLUSION

This Honorable Court should vacate the decision terminating J.P.’s parental rights and remand for a new hearing in which A.D.M. and L.B.M. are represented by independent, client-directed counsel to advocate their legal interests.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the word count limitation of Rule 2135 of the Pennsylvania Rules of Appellate Procedure. This brief contains 7,758 words. In preparing this certificate, I relied on the word count feature of Microsoft Word.

Dated: September 19, 2016

/s/ Marsha L. Levick

Marsha L. Levick