IN THE

SUPERIOR COURT OF PENNSYLVANIA

PHILADELPHIA DISTRICT

No. 342 PHL 1996

IN RE L.J. AND JOHN DOE, JR.

APPEAL OF JOHN DOE, SR.

J#306569

D-5036-93-01

D-5958-93-06

BRIEF FOR AMICUS CURIAE,

JUVENILE LAW CENTER

Appeal from the order of the Court of Common Pleas,
Family Court Division, December 21, 1995

Marsha Levick
Attorney I.D. No.: 22535
Juvenile Law Center
801 Arch Street
Suite 610
Philadelphia, PA 19107
(215) 625-0551

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS

The Juvenile Law Center (JLC) submits this brief as Amicus Curiae on behalf of Appellant John Doe, Sr. JLC believes that children who are subject to dependency proceedings under the Pennsylvania Juvenile Act, and who have a statutory and constitutional right to counsel in such proceedings, are entitled to undivided loyalty from, and zealous advocacy by, these attorneys. JLC submits that attorneys representing children under the Act are bound and governed by the same conflict of interest principles set forth in the Rules of Professional Conduct of the Supreme Court of Pennsylvania as attorneys who represent adult clients; the duty of loyalty and zealous advocacy is not diminished by the age of the client. In this case, the attorney's conflict of interest was squarely presented by her decision to sacrifice the interests of one of her clients, John Doe, Jr., to the maintenance of his sibling relationship, in order to advocate the competing and adverse interest of her other client and John Doe, Jr.'s brother, L.J., in being adopted. Because joint representation of siblings in dependency proceedings is the rule and not the exception, clarification of the attorney's duties and obligations to her clients when conflicts of interest are even potentially present is vital to the protection of children's interests under the Act.

JLC is a private, non-profit public interest law firm that has represented children since 1975 in cases involving Pennsylvania's child welfare, juvenile justice, mental health and

public health systems. JLC has worked to ensure that all children involved in the child welfare system receive appropriate services to meet their basic and special needs, and that decisions affecting children in the child welfare system are made in conformity with the requirements of due process. JLC's publications are used by attorneys, judges, and child welfare professionals across the Commonwealth. They include: A Guide to Judicial Decisions Affecting Dependent Children: A Pennsylvania Judicial Deskbook (Third Edition); Child Abuse and the Law (Fifth Edition); and, the Children's Rights Chronicle. JLC has participated as amicus curiae in the Pennsylvania and United States Supremem Courts, as well as this court.

SUMMARY OF ARGUMENT

Federal constitutional and statutory law, as well as Pennsylvania law, accord protection to family relationships by supporting and encouraging the preservation of familial relationships whenever possible. Indeed, the Pennsylvania Juvenile Act ("Act") sets forth as one of its primary purposes the preservation of the family unit. Pennsylvania caselaw further makes clear that, "absent compelling reasons..., it is the policy of this Commonwealth that siblings should be raised together whenever possible." Wiskoski v. Wiskoski, 427 Pa. Super. 531, 535, 629 A. 2d 996 (1993), appeal denied, 436 Pa. 646, 639 A.2d 33 (1994). Both John Doe, Jr. and L. J., half-

brothers, have a constitutionally and statutorily protected interest in the protection and preservation of their family unit.

In proceedings under the Pennsylvania Juvenile Act, all parties, including John Doe, Jr. and L. J. herein, have a right to counsel at all stages of the proceedings under the Act. This right to counsel includes and assumes a right to effective assistance of counsel. Under Pennsylvania caselaw, the Rules of Professional Responsibility of the Pennsylvania Supreme Court, and the recently adopted American Bar Association Standards of Practice for Lawyers Who Represent Children In Abuse and Neglect Cases, this means that children involved in dependency proceedings have a right to zealous advocacy and undivided loyalty by their appointed counsel. Where, as here, counsel deliberately sacrificed John Doe, Jr.'s right and interest in the preservation of his family unit by advocating for the adoption of her other client, John Doe, Jr.'s half-brother, L. J., counsel had a clear conflict of interest which required withdrawal or disqualification and appointment of separate counsel.

In failing to recognize this inherent conflict of interest in counsel's continued representation of both children, the lower court clearly erred. The lower court erred as well in denying appellant's motion to intervene in the proceedings below. Given appellant's son John Doe, Jr.'s permanent, biological relationship to his half-brother with whom he has lived since birth, and the Juvenile Act's goal of preservation of that familial relationship whenever possible, appellant asserted a

legally protectable interest sufficient to accord him standing under Pennsylvania law to intervene on behalf of John Doe, Jr. in the goal change proceeding concerning his half-brother.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case set forth in the Brief For Appellant.

ARGUMENT

I. INTRODUCTION

This appeal raises important questions concerning whether children involved in dependency proceedings under the Pennsylvania Juvenile Act have the right to the zealous advocacy and undivided loyalty of their court-appointed counsel. Throughout the dependency proceedings below, Appellant's son, John Doe, Jr. and his half-brother L. J. were jointly represented by the same court-appointed lawyer from the Defender Association of Philadelphia Child Advocate Unit. Upon the motion of the Philadelphia Department of Human Services to change the placement goal of L. J. to adoption -- a goal change which was unopposed by joint counsel for L. J. and John Doe, Jr. -- appellant moved, unsuccessfully, to disqualify counsel from continuing to jointly represent both brothers in this matter and/or to intervene on behalf of John Doe, Jr. so that his interests in the proceeding could be asserted and considered. Appellant argued that counsel's continued dual representation constituted an inherent

conflict of interest since counsel could not reconcile L. J.'s purported interest in being adopted with John Doe, Jr.'s asserted interest in and right to the continued preservation of his familial relationship with his sibling.

In denying appellant's motions for intervention and disqualification of John Doe, Jr.'s court-appointed counsel, the court below sanctioned a standard of practice for children's lawyers in dependency proceedings which is directly at odds with the Rules of Professional Conduct of the Pennsylvania Supreme Court. The court rejected the traditional conflict of interest analysis embodied by the Rules, which plainly governs all other attorney-client relationships. Indeed, in failing to even address the conflict of interest raised by appellant, the lower court eviscerated John Doe, Jr.'s statutory (and constitutional) right to counsel under the Act and left him effectively without representation. In thus declining to enforce counsel's obligations under the Rules of Professional Conduct, the lower court misconstrued and misapprehended the right to counsel accorded John Doe, Jr. by the Act. As set forth below, Amicus submits that the lower court's rulings were a gross abuse of discretion and in clear disregard of Pennsylvania law. Amicus urges this Court to reverse.

II. JOHN DOE JR.'s INTEREST IN THE PRESERVATION OF HIS SIBLING FAMILIAL RELATIONSHIPS IS LEGALLY PROTECTED.

If John Doe, Jr. had been accorded separate counsel by the lower court, his lawyer would have presented to the court a

statement of his interests in preserving his sibling relationship that flows from well established principles of family integrity that are embedded in federal and state law.

A. The United States Constitution Recognizes and Protects the Integriy of Familial Relationships.

"The institution of the family is deeply rooted in this Nation's history and tradition." Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.). The U.S. Supreme Court has thus consistently recognized the importance of the family unit by holding repeatedly that the sanctity of the familial relationship is a liberty interest protected by the Due Process clause of Fourteenth Amendment. Moore, 431 U.S. at 499, 503 & n.12; see e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 845 (1977); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

For example, in Stanley v. Illinois, the Court concluded that parents are constitutionally entitled to a hearing on their fitness before their children can be removed from their custody. 405 U.S. at 651, 658-59. Thus, Stanley, an unwed father, was entitled to such a hearing prior to the state assuming custody of his three children upon the death of the children's mother. "Under the Due Process Clause that advantage [the convenience of presuming that unwed fathers are unfit] is insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." Stanley, 405 U.S. at 658.

Similarly, in Santosky v. Kramer, the Court found the "preponderance of the evidence" standard to be violative of due process in parental rights termination proceedings, and required that states provide at least for the higher and more demanding "clear and convincing evidence" standard. 455 U.S. 745. As in Stanley, the importance of preserving the family unit played a primary role in the Court's analysis. The Court quoted Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981), in declaring that it is "plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." Santosky, 455 U.S. at 758-59. Confronted with the state's attempt to infringe this fundamental liberty interest by its initiation of a termination proceeding, the parent's interest in the accuracy of the decision was characterized as a "commanding one." 455 U.S. at 759.

The Court further noted that this fundamental liberty interest does not evaporate because the parents have been less than model parents or have lost temporary custody of their child. "Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." 455 U.S. at 753. In fact, the Court noted that those persons faced with the dissolution of their parental rights have a more critical need for procedural protections. The Court thus decided that, "when the state seeks to destroy

weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S. at 753-54.

The Court took an even closer look at the importance of the family unit in Smith v. OFFER, 431 U.S. 816. In Smith, foster families sought to claim a constitutionally protected liberty interest in their relationships with their foster children similar to that which had been recognized by the Court for biological families. While the Court based its holding on narrower grounds without definitively resolving this issue, it reiterated the important role played by the family as well as the importance of maintaining the family unit. After acknowledging that freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause, 431 U.S. at 842, the Court identified some of the elements which define the concept of family and contribute to its place in our society. 431 U.S. at 843.

The Court first noted that the usual understanding of families implies a biological relationship. 431 U.S. at 843. Biological relationships are not the exclusive determination of the existence of a family, however:

> Thus the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in promoting a way of life through the instruction of children, as well as from the fact of blood relationship.

431 U.S. at 844 (internal quotations and citations omitted).

Moreover, the Court went on to state that where the claimed liberty interest of the foster family conflicts with the

constitutionally recognized liberty interest of the biological family, the foster family's interest "must be substantially attenuated." 431 U.S. at 846-47. This recognition that the liberty interest of the preexisting family unit is greater than that of the state-created foster family underscores the strength of this familial interest.

In 1980, Congress acknowledged the importance of preserving the family unit by passing the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. Secs. 608, 620-628, and 670-676, an amendment to the Social Security Act which provided fiscal incentives to states to reduce the unnecessary placement of children in foster care and to ensure periodic review of the cases of children in placement. Congress specifically provided that:

> in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671 (15). The aim of this legislation was, and continues to be, to shift the direction of federal funds from foster care programs to preventive and reunification services and programs. By denying federal reimbursement for foster care for children who were not provided the requisite prevention or reunification services, Congress applied fiscal pressure to prevent unnecessary placement and removal of children from their families.

B. The Pennsylvania Juvenile Act Likewise Recognizes and Protects Familial and Sibling Relationships.

In conformity with the intent of Congress in passing the Adoption Assistance and Child Welfare Act, Pennsylvania has similarly recognized the importance of preserving the family unit. Since 1973, the Pennsylvania Juvenile Act ("Act"), 42 Pa. C. S. Sec. 6301 et seq., has declared as one of its primary purposes: "To preserve the unity of the family whenever possible." 42 Pa.C.S. § 6301(b)(1). Additionally, § 6351 (Disposition of a Dependant Child) requires that prior to entering any disposition for a dependant child which would remove that child from his home, the court must first make findings on the record that continuation of the child in his home would be contrary to the child's welfare, as well as findings concerning whether the state has made reasonable efforts towards the goal of family unity.

Relying repeatedly on the above-cited purpose clause of the Act, Pennsylvania courts have stated that "[i]t is the policy of the Commonwealth to preserve and protect the family whenever possible." In re Adoption of M.J.H., 348 Pa.Super. 65, 71, 501 A.2d 648 (1985), appeal denied, 514 Pa. 636, 522 A.2d 1105 (1987); see also In re Mary Kathryn T., 427 Pa.Super 515, 629 A.2d 988 (1993), appeal denied, 536 Pa. 646, 639 A.2d 32 (1994); In re Ryan Michael C., 294 Pa.Super 417, 440 A.2d 535 (1982).

For example, in In re Mary Kathryn T., this Court reversed the trial court's termination of visitation of the children by their parents. In so doing, the Court stated that "[u]nless the

state demonstrates with clear and convincing evidence that even supervised visitation would severely endanger the child, the court must deny the complete foreclosure of parental visitation as being contrary to the Act's goal of family preservation." 427 Pa.Super at 530, 629 A.2d 988 (quoting In Interest of Rhine, 310 Pa.Super 275, 286, 456 A.2d 608 (1983)). If, on remand, the trial court determined that the children could not be returned home immediately, this Court ordered the reestablishment of visitation as well as the creation of a plan to reunify the family "with utmost dispatch." 427 Pa.Super. at 531, 629 A.2d 988.

Similarly, in In re Ryan Michael C., this Court vacated the order of the trial court and ordered a hearing to determine whether removal of the child from his parent's custody was clearly necessary. In determining that the trial court's order was improper, this Court stated: "an order placing a child in the custody of a state agency cannot properly be entered until the court has considered and rejected alternative dispositions which would allow the child to remain with his parents." 294 Pa.Super at 421, 440 A.2d 535.

Significantly to the case at bar, Pennsylvania courts have also recognized that the specific preservation of sibling relationships is subsumed in the state's commitment to the preservation of family bonds in general. Thus, Pennsylvania courts have declared that, absent compelling reasons, it is the policy of the Commonwealth that siblings should be raised

together. E.g. Pilon v. Pilon, 342 Pa.Super. 52, 55, 492 A.2d 59 (1985); Hockenberry v. Thompson, 428 Pa.Super. 403, 408, 631 A.2d 204 (1993); Wiskoski v. Wiskoski, 427 Pa.Super 531, 535, 629 A.2d 996 (1993), appeal denied, 436 Pa. 646, 639 A.2d 33 (1994). This Court has further acknowledged that this policy is not diluted simply because the siblings are half brothers or sisters. Wiskoski, 427 Pa.Super at 435-36, 629 A.2d 996; In re Davis, 502 Pa. 110, 124, 465 A.2d 614 (1983). Based on this policy, this Court has consistently vacated orders which resulted in the separation of siblings.

For example, in Wiskoski, the trial court awarded custody of the youngest of three boys to the father, while the older two boys were to remain in the mother's custody. In finding that the lower court erred in failing to consider the doctrine of "family unity" or "whole family doctrine," the Court stated:

> Absent compelling reasons to the contrary, it is the policy of this Commonwealth that siblings should be raised together whenever possible. This factor is not diluted by the fact that the children are half brothers and sisters. . . . Good reasons are not compelling reasons for disrupting the integrity of a family unit. In defining the phrase 'compelling reasons' this court has said that the evidence must indicate that it was necessary to separate the children, and the evidence was forceful in this regard. Absent compelling reasons, the children should be raised together in one household, for this permits the continuity and stability necessary for a young child's development.

427 Pa.Super. at 535-36, 629 A.2d 996 (internal quotations and citations omitted). See also Hockenberry, 428 Pa.Super. at 408-9, 631 A.2d 204 (trial court erred in entering order which separated half-sisters who were raised as sisters); Davis, 502 Pa. at 125, 465 A.2d 614 (trial court properly considered that

being raised together with his half-siblings would be a positive influence on the child's life); Albright v. Com. ex rel. Fetters, 491 Pa. 320, 327, 421 A.2d 157 (1980) (trial court properly considered the benefits to be derived from the children living together in awarding custody to the grandparents rather than awarding custody of only two of the three children to their father).

Although the Court has determined, in Ken R. on behalf of C.R. v. Arthur Z., 438 Pa.Super. 114, 651 A.2d 1119 (1994), appeal granted, __ Pa. __, 659 A.2d 987 (1995), that children do not have standing to sue for visitation privileges as to their siblings, this decision does not detract from the strength of the sibling relationship. In Ken R., both parents of the minor children refused to allow their half-sister permission to visit with the children. In denying C.R. standing to sue for visitation, the Court relied primarily on the strength of the parents' rights to raise their children as they see fit, and on the policy of the courts not to interfere in family matters. 438 Pa.Super at 116-17, 651 A.2d 1119. The Court noted, however, that its decision "should not be interpreted as lowering the value that we place on sibling relationships." 438 Pa.Super at 118, 651 A.2d 1119.

In the present case, the court is not faced with the dilemma faced by the court in Ken R. No competing policy interests are at stake. The child's natural parent clearly supports and desires that a strong, close relationship be maintained between

John Doe, Jr. and L.J., two half brothers who have lived together and been raised together since John Doe, Jr.'s birth. In the face of this "emotional attachment" that exists between John Doe, Jr. and L. J., derived "from the intimacy of [their] daily association," Smith v. OFFER, 431 U.S. at 844, John Doe, Jr. has a legally enforceable interest in ensuring a continued association with his only sibling relative. At the very least, the lower court could not determine that John Doe, Jr. lacks such an interest unless it actually held a hearing at which the issue was fully argued and considered.

III. LAWYERS REPRESENTING CHILDREN IN DEPENDENCY PROCEEDINGS ARE BOUND BY TRADITIONAL CONFLICT OF INTEREST RULES; SUCH RULES REQUIRE THE WITHDRAWAL OR DISQUALIFICATION OF COUNSEL IN THIS CASE.

A. Under the Pennsylvania Juvenile Act, Juveniles Subject to Dependency Proceedings are Entitled to Effective Assistance of Counsel.

The Juvenile Act provides that "a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter... Counsel must be provided for a child unless his parent, guardian, or custodian is present in court and affirmatively waive it." 42 Pa.C.S.A. § 6337. If the interests of the parent, guardian, or custodian may be in conflict with the interest of the child, they may not waive counsel for the child. Id. See Stapleton v. Dauphin County Child Care Service, 228 Pa.Super. 371, 324 A.2d 562 (1974), overruled in part by In re Interest of G.C., __ Pa.Super. __, 673 A.2d 932 (1996).

Moreover, the Act expressly requires the appointment of separate counsel for parties to a proceeding, "[i]f the interests of two or more parties may conflict." 42 Pa.C.S.A. § 6337 (emphasis added). See also, In re Davis, 288 Pa.Super. 453, 432 A.2d 600, 607, n.6 (1981) (a child should receive separate counsel if the child's interests are distinct from the other parties'), vacated on other grounds, 502 Pa. 110, 465 A.2d 614 (1983).[1] The child's right to counsel as set forth in the Act is derived from the due process clause of the Fourteenth Amendment. Matter of J.P., 393 Pa.Super. 1, 573 A.2d 1057 (1990). The right to counsel provided by the Act has been interpreted to include the right to effective assistance of counsel. In Interest of A.P., 421 Pa.Super. 141, 617 A.2d 764 (1992), affirmed, 536 Pa. 450, 639 A.2d 1181 (1994).

The Pennsylvania Adoption Act also calls for the appointment of counsel for a child in a contested involuntary termination proceeding. 23 Pa.C.S.A. § 2313.[2] This Court has found that the

---

[1] On appeal, the Supreme Court said that the child's lawyer should have presented the child's viewpoint to the court. 465 A. 2d at 632.

[2] 23 Pa.C.S.A. § 2313(a) states:

> (a) Child.-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. The court may appoint counsel or a guardian ad litem to represent any child who has not reached the age of 18 years and is subject to any other proceeding under this part whenever it is in the best interests of the child. No attorney or law firm shall represent both the child and the adopting parent or parents.

purpose of this section is "to guarantee that the needs and welfare of the children would be advanced actively by an advocate whose loyalty was owed exclusively to them." In re Adoption of N.A.G., 324 Pa.Super. 345, 351, 471 A.2d 871, 874 (1984) (emphasis added).

The Juvenile Act and the Adoption Act should be considered in pari materia. In re William L., 477 Pa. 322, 383 A.2d 1228, cert. denied, 439 U.S. 880 (1978). Together, these statutory provisions reflect the intent of the Legislature that children whose familial relationships are subject to scrutiny, intervention and possible dissolution by the state receive effective counsel -- that is, counsel who would vigorously advocate their rights and interests before the court in matters that impact so profoundly upon their lives.

In this context, the legislature uses "counsel" to refer to an attorney that advocates zealously for the child's expressed interests. As in both delinquency and dependency proceedings under the Juvenile Act, establishment of the traditional attorney-client relationship in an involuntary termination proceeding is statutorily required.

In other proceedings under the Adoption Act, the court may appoint "counsel or a guardian ad litem." Clearly, the legislature distinguished the traditional attorney-client relationship from the role of an advocate who determines what he or she feels is in the child's best interests, i.e. a guardian ad litem. In fact, "[t]he guardian ad litem concept is broad enough to allow the appointment of a person other than a lawyer....[I]n an appropriate case a nonlawyer guardian ad litem could request appointment of counsel." 23 Pa.C.S.A. § 2313, Comment. See AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, Preface (Approved February 5, 1996) (ABA-Abuse and Neglect Standards"); Emily Buss, "You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles, 64 Fordham L. Rev. 1699 (1996).

B. Where, As Here, A Conflict of Interest Arises In Counsel's Continuing Representation of Both John Doe, Jr. and L.J., Counsel Should Be Removed And Replaced By Separate Counsel.

The Rules of Professional Conduct prohibit an attorney from representing a client when a conflict of interest arises. Rules of Prof.Conduct, Rule 1.7, 42 Pa.C.S.A.[3] "Loyalty is an essential element in the lawyer's relationship to a client.... Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Rules of Prof.Conduct, Rule 1.7, Comment.

As set forth in Rule 1.7(b), the Rules deem the requirement of undivided loyalty so essential that a lawyer is expressly forbidden in sub-paragraph (b) from representing a client whose

---

[3]Rule 1.7 states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless;
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and advantages and risks involved.

interests conflict with those of another client, a third party, or the attorney's own interests. See also, IJA-ABA JUVENILE JUSTICE STANDARD, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.3(a), Comment.

Moreover, the test employed by courts to determine whether to remove current counsel is probability of conflict of interest, not certainty. Pirillo v. Takiff, 462 Pa. 511, 341 A. 2d. 896 (1975), aff'd., 466 Pa. 187, 352 A. 2d 11 (1976), appeal dismissed, 423 U. S. 1083 (1976). A motion to disqualify should be granted when "the representation is against an existing client if the representation interferes with the duty of undivided loyalty which the lawyer owes to each of his clients...." In re Birmingham Township, Delaware County, 142 Pa.Cmwlth. 317, 322, 597 A. 2d 253, 255 (1991).

The American Bar Association's recently adopted Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases (Approved February 5, 1996) ("ABA Abuse and Neglect Standards," attached hereto as Appendix "A") follow the Rules of Professional Conduct, including Rule 1.7, in delineating the proper role and duties of counsel representing children in dependency proceedings like those below. Most significantly, the Standards refuse to recognize any distinctions in the attorney's duties and obligations based on the age of the client.

The ABA Abuse and Neglect Standards state that a child's attorney "owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is

due an adult client." Id. at § A-1 (Approved February 5, 1996) ("ABA-Abuse and Neglect Standards"). "To ensure that the child's independent voice is heard, the child's attorney must advocate the child's articulated position." Id. Comment. This position is an affirmation and reiteration of its STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, supra at § 3.1(b)(ii)[b] (Approved 1979).

The ABA Abuse and Neglect Standards set forth clear rules concerning conflicts of interests in dependency proceedings which have been breached here. The Standards state that a child's attorney should be independent from the other participants in the proceeding. STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES § G-1. They require "that plans for providing counsel for children 'must be designed to guarantee the professional independence of counsel and the integrity of the lawyer-client relationship.'" Id. Comment (citing STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 2.1(d)).

Section B-2(2) of the ABA Abuse and Neglect Standards deals explicitly with the situation presented by this case. "If a lawyer is appointed as a "child's attorney" for siblings, there may also be a conflict which could require that the lawyer decline representation or withdraw from representing all of the children." Id. § B-2(2). The ABA Juvenile Justice Standards have long recognized that "[c]onflicts of interest also may arise when one attorney represents two or more children who are the subjects of neglect or dependency petitions. Sisters or brothers

may have different needs and desires; such divergent interests may necessitate the appointment of additional counsel." STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, supra at § 3.2, Comment. See Nancy J. Moore, Conflicts of Interests in the Representation of Children, 64 Fordham L. Rev. 1819 (1996); Christopher N. Wu, Conflicts of Interest in the Representation of Children in Dependency Cases, 64 Fordham L. Rev. 1857 (1996). ABA policy for children, consistent with its policies governing attorney conflicts with adult clients, firmly establishes that a conflict of interest may require an attorney to be removed from representing a child in juvenile proceedings.

As stated above, courts determine whether to remove current counsel based on the probability, not certainty of conflict of interest. Pirillo, 462 Pa. 511, 341 A.2d 896. In this case, appellant has clearly met the test for withdrawal or disqualification; indeed, the certainty of a conflict arising out of the continued dual representation of John Doe, Jr. and L.J. is readily apparent.

First, in advocating for L. J.'s adoption, counsel is arguing against preservation of L.J.'s and John Doe, Jr.'s sibling relationship which the Juvenile Act presumes is in both John Doe, Jr.'s and L. J.'s best interests. See Pilon, 342 Pa.Super. 52, 492 A.2d 59 (1985); In re Davis, 502 Pa. 110, 465 A.2d 614. In deciding whether or not to change a dependent child's placement goal the court must look to that child's best interests. In the Interest of Sweeney, 393 Pa.Super. 437, 574

A.2d 690 (1990), appeal denied, 526 Pa. 649, 585 A.2d 469 (1991). Indeed, in electing on her own to elevate L.J.'s interest in being adopted over his equally significant interest in maintaining his biological family relationships, counsel not only fails in her obligation to elucidate the full panoply of L. J.'s interests before the court[4], she has usurped the role of the court itself to decide L.J.'s best interests.[5]

---

[4] In the Report of the Working Group on Determining the Best Interests of the Child, 64 Fordham L. Rev. 1347 (1996), the Working Group believed strongly that "the lawyer's unfettered discretion to make any type of best interest recommendation [in cases in which children lack capacity to direct representation] must end." Id. The group recognized that with impaired child clients, an ultimate decision maker charged with making the best interest determination would be involved, and that the lawyer's task might well require presenting one or more "correct" best interest options from which the ultimate decision maker would be able to choose. The Working Group felt that for the lawyer to choose only one of those legitimate best interest options would be "ultra vires." Id. at 1350. To the contrary, "the lawyer should not become the decision maker, but must recognize that for the impaired client, presenting more than one option to the decision maker offers an ethically permissible result." Id. (emphasis in original)

[5] Indeed, only by deliberately co-opting the court's role of adjudicating the best interests of John Doe, Jr. and L.J. can counsel herein escape the Code's, and the ABA's, ethical mandates of undivided loyalty and zealous advocacy. But as one commentator has astutely questioned, if the attorney for these children sets for herself the same goal of determining ultimate best interests as the court, in what way does her role differ from "the judge...the social worker...the parents?", Christopher N. Wu, Conflicts of Interest in the Representation of Children in Dependency Cases, 64 Fordham L. Rev. 1857, 1865 (1996). Everyone of these parties in child welfare cases claims some stake in determining the child's best interests. "What can the attorney then bring to the table that is not already covered by the other players?" Id. at 1871. Who is left to speak exclusively for the particular and individual interests of these children?

Most importantly, by arguing that L. J. should be adopted and simultaneously failing to withdraw as John Doe, Jr.'s counsel, counsel has forever sacrificed any interest John Doe, Jr. has in maintaining his relationship with his brother.[6] Given that John Doe, Jr.'s interest enjoys legal protection under both the Constitution and state law, John Doe, Jr. must be allowed to intervene and be afforded separate counsel who will advocate solely on his behalf. In re Davis, 288 Pa.Super. 453, 432 A.2d 600; STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.2.

Another basis for removal is that the attorney may have obtained information in the course of representing the children which may be used against one of the children. Information learned via the attorney-client relationship cannot be used against the client. STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES § 3.3(b)(ii). While there may be limited privileged "communications" between attorneys and clients as young as those herein, counsel has certainly used confidential information

---

[6] In Counsel's Memorandum of Law submitted to the court below in support of denying appellant's motion for intervention, Counsel wrote, "[L.J.'s] best interest is to be adopted and this outweighs [John Doe, Jr.'s] interest to maintain contact with [L.J.]", R-87a. Whether or not this proves to be a proper assessment of John Doe, Jr.'s and L.J.'s respective best interests in this proceeding, this is plainly a determination which only the court is authorized to make after its thorough consideration of each party's interests, which must be presented to the court by zealous advocates exclusively loyal to each party. The conflict of interest inherent in counsel's ongoing dual representation of these two brothers could not be more squarely presented; by choosing to asset only one of her client's interests to the exclusion of the other client's interests, John Doe, Jr. is left with no counsel at all.

"learned via the attorney-client relationship" to develop her theory of the case and representation of L.J.

A Motion to Disqualify should be granted when, "the representation is against an existing client if the representation interferes with the duty of undivided loyalty which the lawyer owes to each of his clients,..." In re Birmingham Township, Delaware County, 142 Pa.Cmwlth. at 322, 597 A.2d at 255. Using information obtained during representation of a client against that client is a violation of the duty of loyalty. In addition to the conflict, current counsel may be in the position where zealous representation would require the use of information obtained in the course of representation. As that is the case, the children should be appointed new counsel.

C. Because John Doe, Jr. Is Unable To Consent To Continued Representation, and In View of the Severity of the Potential Conflict, Separate Counsel Must be Appointed.

The exceptions to Rule 1.7(a) or (b) of the Rules of Professional Conduct, pursuant to which an attorney may continue to represent a client despite a potential conflict of interest, require that the client consent to the representation after "full disclosure and consultation" with the attorney. Given the young ages of John Doe, Jr. and L.J., these children are unable to offer valid consent to the attorney's multiple representation. Accordingly, the exceptions to the mandate of "undivided loyalty" reflected in Rule 1.7 are unavailable to counsel here.

IV. AS A PARTY WITH A LEGALLY COGNIZABLE INTEREST, JOHN DOE, JR. HAS STANDING TO INTERVENE IN HIS BROTHER'S GOAL CHANGE HEARING.

A. John Doe, Jr. has a substantial, direct and immediate interest in his brother's goal change hearing.

"[F]or a party to maintain a challenge to an official order or action, he must be aggrieved in that his rights have been invaded or infringed." Jackson v. Garland, 424 Pa.Super. 378, 383, 622 A.2d 969 (1993). In other words, the party must have "some real interest in the cause of action, or a legal right, title or interest in the subject matter or controversy." Jackson, 424 Pa.Super. at 383, 622 A.2d 969.

This Court has elaborated on what it means to have standing by stating that a party must (a) have a substantial interest in the subject matter of the litigation; (b) the interest must be direct; and (c) the interest must be immediate and not a remote consequence. Wm. Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 202, 346 A.2d 269 (1975); South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 86, 555 A.2d 793 (1989).

These standards have been cited in dependency cases as the applicable requirements for when a person has standing in a dependency proceeding. See In Interest of Garthwaite, 422 Pa.Super. 280, 283, 619 A.2d 356 (1993).

A "substantial" interest has been defined as "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." South Whitehall Tp. Police Service, 521 Pa. at 86, 555 A.2d 793. John

Doe, Jr. certainly has an interest in the outcome of his brother's goal change hearing which surpasses the common interest of all citizens. If, during the goal change hearing, L.J.'s goal is changed to adoption, John Doe, Jr. will forever be denied his right legally to be raised with his biological brother, and will lose all of the benefits associated with, and derived from, that sibling relationship. There can be no doubt that John Doe, Jr.'s interest in preventing this outcome is a substantial one.

A "direct" interest has been held to require "that the matter complained of caused harm to the party's interest." South Whitehall Tp. Police Service, 521 Pa. at 86-87, 555 A.2d 793. Again, the goal change hearing for L.J. has a direct impact on John Doe, Jr.'s interest in being raised with his biological brother. If the hearing results in a change of goals for L.J., L.J. will be moved out of state, thus removing from John Doe, Jr.'s life the only biological family member he has ever lived with.

Finally, an "immediate" interest exists when "the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question." South Whitehall Tp. Police Service, 521 Pa. at 87, 555 A.2d 793. As discussed previously, the integrity of the family unit, in general, as well as the sibling relationship itself, are interests protected by both the U.S. Constitution and the Juvenile Act.

As discussed above, the U.S. Supreme Court has consistently interpreted the Due Process Clause of the 14th Amendment to protect the liberty interest a person has in maintaining the family unit. See, e.g., Stanley, 405 U.S. at 651; Smith, 431 U.S. at 845; Santosky, 455 U.S. at 753. Similarly, Pennsylvania courts have consistently relied upon the primary goal of the Juvenile Act, that of preserving the family unit whenever possible, in stating that it is the policy of the Commonwealth that siblings should remain together whenever possible. See, e.g., Pilon, 342 Pa.Super. at 55, 492 A.2d 59; Hockenberry, 428 Pa.Super. at 408, 631 A.2d 204; Wiskoski, 427 Pa.Super. at 535, 629 A.2d 996.

Because John Doe, Jr. meets each of the requirements set forth for a party to have standing, he should have been allowed to intervene in his brother's goal change hearing.[7] The cases relied upon by the trial court in denying John Doe, Jr.'s motion, In Interest of Michael Y., 365 Pa.Super. 488, 530 A.2d 115 (1987) and In re Davis, 502 Pa. 110, 465 A.2d 614, do not support a contrary conclusion.

---

[7] It is worth noting that from the outset of L.J.'s dependency case, John Doe, Jr. has been treated as a party to his brother's dependency matter. He was placed with his brother in the same foster home almost immediately after his birth. Family service plan meetings and court dates were scheduled on the same dates and at the same time for both children. Additionally, both John Doe, Jr. and L.J. have been named as co-parties throughout the proceedings in the current matter; indeed, the Findings of Fact and Conclusions of Law entered by the court below are captioned "In the Interest of [John Doe, Jr. and L.J.]".

In Michael Y., when finding that the person in question qualified as a "party" to the action, the court did proceed to list two considerations which supported this finding. However, these were simply two factors which fit the circumstances of the case before the court at the time -- they were not the exclusive factors relevant to deciding whether a person was to be considered a party. In fact, the court specifically stated that "[t]he term party is not defined in the Juvenile Act. Nor de we attempt to define its exact parameters here." 365 Pa.Super. at 496, 530 A.2d 115. Thus, nothing in Michael Y. precludes a court from finding that other factors or circumstances present in a particular case would also support a finding that the person in question was a party to the action.

The second case cited below, Davis, also does not support the position that John Doe, Jr. lacks standing in the present case. Davis did not address whether half-siblings have standing. Indeed, the half-siblings in Davis did not seek to intervene.

Additional case law, directly on the issue of standing in dependency proceedings, further supports Amicus' position that John Doe, Jr. has standing in his brother's goal change hearing. Three cases, in particular, address the relevant considerations for granting a person standing. Mitch v. Bucks County Children and Youth Social Service Agency, 383 Pa.Super. 42, 556 A.2d 419, appeal denied, 524 Pa 621, 571 A.2d 419 (1989); Kellogg v. Kellogg, 435 Pa.Super. 581, 646 A.2d 1246 (1994); and In Interest of G.C., __ Pa.Super. __, 673 A.2d 932 (1996).

In Mitch, the Court held that prospective adoptive parents had standing to contest a decision of the child welfare agency. The court based this decision on the nature of the relationship between prospective adoptive parents and the child placed in their home. Prospective adoptive parents, the court noted, have an expectation of permanency and are expected and encouraged to form emotional bonds with the child.

> In light of the expectation of permanent custody that attends an adoptive placement, an agency's decision to remove a child constitutes a direct and substantial injury to prospective adoptive parents. Because prospective adoptive parents, unlike foster parents, suffer a direct and substantial injury when an agency removes a child from them, we see no reason in law or policy why we should limit their standing to sue for custody.

383 Pa.Super. at 50, 556 A.2d 419 (emphasis added).

The bonds that have formed between John Doe, Jr. and L.J. are at least as strong, if not stronger, than those which prospective adoptive parents form with a child placed in their home. Further, unlike any interest prospective adoptive parents have, the interest in maintaining family unity is one which has been recognized as being protected by both the U.S. Constitution and the Juvenile Act. Thus, since a direct and substantial injury to John Doe, Jr. will result if L.J.'s goal is changed, John Doe, Jr. should have standing to intervene in his brother's goal change hearing.

Similarly, in Kellogg, the Court held that the first wife of a man had standing to sue for custody of the boys of the man's second marriage. The Court held that to have standing in a custody matter, the party to be accorded standing must show "a

sustained, substantial and sincere interest in the welfare of the child.... [A] third party seeking custody must show more than a passing interest in the child." 435 Pa.Super. at 587-88, 646 A.2d 1246. The first wife was granted standing in the custody action, despite a lack of a biological relationship with the boys, based on the evidence that she sought to foster a relationship between the boys and her children, the boys' half siblings, and that she saw the boys on a regular basis. 435 Pa.Super. at 589-90, 646 A.2d 1246.

In contrast, in G.C., the Court denied standing to a child's foster parents. In doing so, however, the Court stressed that this denial of standing to foster parents in custody and adoption proceedings "is premised on the unique, state-created and agency-maintained relationship of foster care which creates only 'ephemeral expectations' in those who enter the relationship. __ Pa.Super. at __, 673 A.2d at 938 (internal citation omitted). As a result of the unique status of foster parents, whose relationship with the child is subordinate to the relationship between the child and the state agency, and whose role in the child's life is, by its very nature, temporary, "the decision of a legal custodian regarding custody does not cause the type of direct and substantive injury necessary for standing." __ Pa.Super. at __, 673 A.2d at 939. It is on these grounds that the Court distinguished the rights of foster parents with the situation faced by the court in Kellogg.

The situation in the present case is much more analogous to Mitch and Kellogg than to the foster care situation discussed in G.C. There is nothing "inherently temporary" about a child's relationship with his older brother. To the contrary, this is the type of relationship which is expected to last a lifetime.

B. John Doe, Jr.'s Interest In Preserving His Family is Not Opposed By A Biological Parent.

Courts have found that a person lacks standing to seek custody of, or visitation with, a sibling when opposed by the custodial parents. Weber v. Weber, 362 Pa.Super. 262, 524 A.2d 498 (1987), appeal dismissed, 517 Pa 458, 538 A.2d 494 (1988); In the Interest of C.F., 436 Pa.Super. 83, 647 A.2d 253 (1994); Ken R., 438 Pa.Super. 114, 651 A.2d 1119.

These decisions, however, rely on a lack of "statutory basis for court interference with the parents' right to custody." In Interest of C.F., 436 Pa.Super at 92, 647 A.2d at 257. As a result of the broad statutory and constitutional protection afforded parents to raise their children as they see fit, the court has been reluctant to grant standing to third parties seeking to interfere with this right. Courts have thus only granted standing to sue for custody or partial visitation in such cases when the legislature has specifically granted a cause of action to the third party.

In the present case, John Doe, Jr.'s interest in maintaining a familial relationship and bond with L.J. is unopposed by any biological parent of L.J.'s, both of whom are dead. John Doe, Jr.'s father fully supports maintenance of the relationship; he

is the appellant herein. No conflict with the parents' rights to raise their children in the manner they choose exists. In the case of two dependent siblings, the Commonwealth has custody of the children and shoulders the responsibility of maintaining the familial bond shared by siblings. Prior to her death, the mother of both children and appellant, the father of John Doe, Jr., shared a desire that the children remain together. R-6a, 52a. In fact, upon learning that he would not be considered for custody of the older child, appellant agreed to long term placement for John Doe, Jr. in an effort to ensure the continued development of the sibling relationship. John Doe, Jr.'s interest in maintaining that relationship must be considered by the court.

C. John Doe, Jr. Has Standing to Intervene Because a Legally Enforceable Interest of His May be Affected by the Determination of the Hearing.

The principles set forth in Pennsylvania Rule of Civil Procedure 2327(4), which allows for intervention in a cause of action when "the determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action," should be applied to this case.[8]

John Doe, Jr.'s interest in participating in his brother's goal change hearing plainly rises above the level of the "curious

---

[8] In Ford Motor Company v. Commonwealth of Pennsylvania, 510 Pa. 91, 99, 507 A.2d 49 (1986), the court noted that the "origin of the rules pertaining to intervention is rooted in the desire of the courts to prevent the curious and meddlesome from interfering with litigation not affecting their rights."

or meddlesome" person interfering with litigation not affecting his rights. As discussed previously, John Doe, Jr. has a legally protected interest in the preservation of his family unit, including an interest, as recognized by Pennsylvania courts, in being raised with his sibling. This right will not only be "affected" by the outcome of L.J.'s goal change hearing, it could be extinguished altogether if L.J. is adopted and moved out of the state.

In Ford Motor Co. v. Commonwealth, 510 Pa. 91, 100-101, 507 A.2d 49 (1986), the Court held that, because the outcome of the litigation would effectively decide the issue of the prospective intervenor's rights and would foreclose the intervenor from further pursuing his claim, the person should be permitted to intervene. Similarly, if John Doe, Jr. is not permitted to intervene in this action, there is no possibility of his trying to protect his rights at a future date, nor is there any other redress he can seek to remedy the dissolution of his sibling relationship.

The goal change hearing of L.J. will be a final determination of the rights John Doe, Jr. has with respect to his brother; this final determination of John Doe, Jr.'s rights should not be made without providing John Doe, Jr. a voice -- a zealous and loyal advocate -- in the proceeding.

D. A Proper Determination of the Child's Best Interests Requires That A Sibling Present His or Her Argument to the Court.

The potential for harm to a child from separation from his sibling has been recognized:

> By forcing Sharon and Jennifer to remain apart there may be more harm done to Jennifer than merely depriving her of a potential supportive relationship. If there already exists a deeprooted bond between the sisters, severing it may cause Jennifer to suffer a deep sense of loss and undermine her sense of security and stability.

Weber, 362 Pa.Super. at 267, 524 A.2d at 500. This court has already recognized that to determine the best interest of the child being considered for adoption the lower court must examine the nature of his relationship with his siblings. Ferencak v. Moore 300 Pa.Super. 28, 445 A.2d 1282 (1982). Prohibiting John Doe, Jr. from intervening in L.J.'s goal change hearing may well result in the obstruction of the trial court's best interests determination:

> Where, as in the present case, there are competing allegations of the best interests of the child, and where the court, without conducting a hearing by which it could receive evidence so that it could make a fully informed determination of the BEST interests of the child, summarily dispenses with one of the competing allegations of the child's best interests, and where no counsel has been appointed to represent exclusively the child's best interests, we cannot conclude that the BEST interests of the child have necessarily been advocated and determined.

In re Adoption of Hess, 386 Pa.Super. 301, 313, 562 A.2d 1375, 1381 (1989), affirmed, 530 Pa. 218, 608 A.2d 10 (1992). Advocacy of John Doe, Jr.'s interest in maintaining his sibling relationship with L.J. is both relevant and essential to the

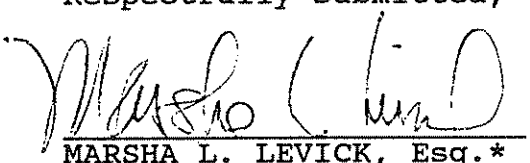
court's full consideration and understanding of L.J.'s best interests in this matter, who likewise will forever lose the only sibling relationship he has ever had.

CONCLUSION

Should John Doe, Jr. be prohibited from taking part through separate counsel in the proceeding below, the arguments presented to the court concerning L.J.'s best interests will be limited. Any determination based on the proceeding will be suspect, having been made on a deliberately skewed record intended to foreclose full consideration of the issue. The purposeful exclusion of evidence reflecting John Doe, Jr.'s and L.J.'s interests in maintaining and preserving their familial relationship affronts the integrity of the family, contrary to the mandates of the Constitution and federal and state law. It is up to the court -- not counsel-- to weigh the respective interests of both John Doe, Jr. and L.J. in preserving their sibling relationship, while simultaneously weighing L.J.'s individual and separate interest in being adopted. While the court might ultimately decide in favor of the proposed goal change for L.J., it should not be asked to make that determination on anything less than a full and complete record, nor is it authorized to do so. Amicus submits

that a full and complete record cannot be developed absent the participation of John Doe, Jr., appearing through independent and separate counsel loyal to his interests only. For this reason, the judgment of the lower court must be reversed.

Respectfully submitted,



MARSHA L. LEVICK, Esq.*
Attorney No. 22535
Juvenile Law Center
801 Arch Street, Suite 610
Philadelphia, Pa. 19106
(215) 625-0551

Attorney for Amicus Curiae

*Counsel gratefully acknowledges the assistance of Randee Waldman, a third year law student at the University of Chicago Law School, in the preparation of this brief.