IN THE SUPREME COURT OF GEORGIA

In the Interest of : W.L.H., A child	Supreme Court Case No. S12G1049 Court of Appeals Case No. A11A2335

BRIEF OF JUVENILE LAW CENTER AS AMICUS CURIAE IN SUPPORT OF APPELLANT W.L.H.

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Juvenile Law Center, founded in 1975, is the oldest multi-issue 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. Recognizing the critical developmental differences between youth and adults, 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 due process are protected by access to quality counsel able to fully assert a child's legal interests at all stages of the proceedings, including through appeals. 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.

SUMMARY OF ARGUMENT

The child's legal interest in these proceedings is clear. "The decision makers in a child protective proceeding literally decide for the child the central questions of his daily life. Where is home? Who takes care of me? Who are my parents, my siblings, my extended family and my classmates?" Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005*, 6 NEV. L.J. 966, 967 (2006). At issue in this case is who may assert those interests in an appellate court and whether anyone can block the child's access to the court. Amici submit that a child has the right to be heard in legal proceedings that implicate his life and legal interests. For a child to be fully and fairly heard, he must be able to assert his rights and advocate for himself, including having access to the appellate courts. In the instant case, counsel for W.L.H. asserted the child's rights to appeal but was blocked from doing so. This flies in the face of basic concepts of due process. Interests of constitutional magnitude—the right to family integrity and physical liberty—are at stake for children who are the subject of deprivation proceedings. The resolution of these critical issues has far-reaching impact—now and for the future.

When an attorney represents a twelve-year-old child in such proceedings, the attorney's role is to speak for the child and to advocate his wishes. If the child is dissatisfied with the outcome of the proceeding and wishes to file an appeal, the

child should have the right to do so, regardless of the position of any other party to the proceeding, including a guardian ad litem. To allow the decision of a Court Appointed Special Advocate ("CASA") or guardian ad litem to unilaterally veto a child's expressed desire to appeal would allow a third party to interfere in the attorney-client relationship, prevent the child from having a voice in the proceeding, and prevent the lawyer from effectively representing his or her client. The child must be permitted to have his day in (appellate) court where all parties, including the CASA, can weigh in on the merits of the appeal.

Due process applies to children in child welfare proceedings. When a court makes a ruling that directly impacts the child, due process requires that the child be allowed to appeal that ruling. While a CASA plays an important role in child welfare proceedings, the CASA may not act as a barrier to a child exercising fundamental rights. Denying a child his right to due process is not in a child's best interest.

ARGUMENT

I. Children Have Important, Independent Legal Interests in Deprivation Proceedings that Are Protected by Due Process, Including Access to Appellate Remedies.

Important and independent legal interests are at stake for a child who is the subject of a deprivation proceeding, separate from those of the parents or the state. These interests require robust due process protections. Indeed, it is the child on whom the proceeding will likely have the greatest impact. Fundamental fairness requires that the child be allowed to assert his right to appeal without barriers. The decision below is at odds with due process and threatens the fundamental fairness that all individuals, including children, are due in proceedings where their legal interests are at issue.

A. A Child Has An Independent Liberty Interest in Family Integrity that Is Implicated in Deprivation Proceedings and that Requires Due Process Protection.

Our laws prioritize the protection of families and the significant legal interests at stake in deprivation hearings, which bring the state into the life of the family. Our courts vigilantly protect the rights of parents to guide the upbringing of their children and the integrity of the family unit. The Supreme Court's historical recognition that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment" is entrenched in our constitutional jurisprudence. *Santosky v. Kramer*, 455 U.S. 745,

753 (1982); *see also Lehr v. Robinson*, 463 U.S. 248, 258 (1983) ("In these cases the Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection."). This liberty interest remains even when families are not headed by "model parents or [parents] have lost temporary custody of their child to the State." *Santosky,* 455 U.S. at 753. The constitutional protection given to this interest is reflected in the scrutiny given the intrusion of the state in matters of the family; "[p]arents' right to direct their children's upbringing is a right *against* state interference with family matters." *Hodgson v. Minnesota*, 497 U.S. 417, 471 (1983).

This "vital legal interest" in family integrity is important to the child as well as the parents. *Santosky,* 455 U.S. at 753; *see also Nix v. Dep't of Human Resources*, 236 Ga. 794, 795, 225 S.E.2d 306 (1976) (describing the importance of the interest in family integrity in termination of parental rights decisions). This interest is significantly implicated when the child is removed from the home and family. While a child's interest in family integrity is clearly bound up with that of her parents, the child has her own independent interest. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("[I]t seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."); *Duchesne*

v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' . . . and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent.") (citations omitted).

The child's significant legal interest in the outcome of a deprivation proceeding cannot be doubted; these proceedings determine the child's very safety and future. If a child is at serious risk of harm and the court does not remove him from the home, the child may remain in a dangerous environment where his health and safety are at risk. If the court mistakenly adjudicates a child as deprived, he may be unnecessarily subjected to the trauma of removal from his home, family, and community. *See, e.g.*, J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* 5-6, 24-26 (1973) (describing the trauma that can result from removal from the home); CHILD WELFARE INFORMATION GATEWAY, LONG TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT (2008), *available at* http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf. Once adjudicated as a deprived child, he may languish in foster care for months or even years, experience multiple placements, and be permanently separated from his biological family.

In *Kenny A. v. Perdue*, the court emphasized the importance of the child's legal interest in deprivation matters and based this interest on the Georgia Constitution. 356 F. Supp. 2d 1353, 1359-60 (N.D. Ga. 2005). The court found:

> children have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents. On the one hand, an erroneous decision that a child is not deprived or that parental rights should not be terminated can have a devastating effect on a child, leading to chronic abuse or even death. On the other hand, an erroneous decision that a child is deprived or that parental rights should be terminated can lead to the unnecessary destruction of the child's most important family relationships.

Id. at 1360. The importance of this independent legal interest to the child was also recognized in *In re Jamie T.T.*, where the court stated:

> We would be callously ignoring the realities of Jamie's plight during the pendency of this abuse proceeding if we failed to accord her a liberty interest in the outcome of that proceeding, entitling her to the protection of procedural due process. . . . Notably, Jamie had a strong interest in obtaining State intervention to protect her from further abuse and to provide social and psychological services for the eventual rehabilitation of the family unit in an environment safe for her. . . . Jamie's interest in procedural protection was heightened because of the irreconcilably conflicting positions of her and her parents in this litigation.

599 N.Y.S.2d 892, 894 (App. Div. 1993). For these reasons, the independent legal interests of the child must be voiced and the child must be assured adequate and

full representation. The child's unqualified ability to assert his right to appeal is integral to ensuring that his independent legal interest is protected.

B. A Child's Physical Liberty Interest Is Implicated in Deprivation Proceedings, Which Requires Unfettered Access to the Courts in These Matters.

Children have a substantive right to physical liberty and an interest in avoiding unnecessary intrusion on that liberty by the state without due process protections. While the child's physical liberty interest is not identical to an adult's,[1] removal from the home is a significant intrusion—more intrusive even than the state's interference with the decision-making rights of parents. State action to limit a child's physical liberty unquestionably implicates Fourteenth Amendment guarantees. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment.") Protection of the child's liberty interest in deprivation proceedings merits substantial procedural due process protections. *See, e.g.*, *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 26-27 (1981) ("[A]n indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived

[1] *See Schall v. Martin*, 467 U.S. 253, 265 (1984) (stating that "juveniles, unlike adults, are always in some form of custody").

of his physical liberty. It is against this presumption that all other elements in the due process decision must be measured.").

Even where a child does not suffer loss of liberty by being removed from his home, foster care imposes restrictions on physical liberty that are often substantially greater than those placed on children living at home with their biological parents. "A salient feature of all foster care systems . . . is that decisions about where children will live are made by caseworkers, agency officials, and judges—as opposed to parents, relatives, or people who have some lasting connection to them." Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 682 (2006). For children who are dependent on adults for their care, the placement and care decisions made by the state must be acknowledged as qualitatively different from the restriction on liberty that is experienced as a result of traditional parental decision making. In *Parham v. J.R.*, the Supreme Court acknowledged that to some degree the bonds that a parent has with her child are different in some respects from the bond that state has with the many children in its care. *Parham*, 442 U.S. at 602. This distinction was recognized in *Smith v. OFFER*, where the Supreme Court highlighted the significant authority of the child welfare agency to move children. 431 U.S. 816 (1977). The Court recognized that the typical child welfare system bestows broad plenary authority on the state agency, including the

right to recall the child "upon request." *Id.* at 860 (Stewart, J., concurring).

This broad authority over children is also routinely exercised. Indeed, the data presented in *Smith* demonstrated that children were frequently moved between placements while in care. *Id.* at 837. Since *Smith*, this data has been repeatedly affirmed.[2] While the child welfare system often provides needed protection to abused and neglected children, far too often the lives of children in care are rife with a level of instability and a lack of control of day-to-day activities. These consequences flow directly from state involvement.[3]

The liberty interest in family integrity requires "fundamentally fair procedures." *Santosky*, 455 U.S. at 754. The degree of process due an individual,

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[2]*See, e.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. CHILD. BUREAU, CHILD WELFARE OUTCOMES 2004–2007: REPORT TO CONGRESS 32, *available at* http://www.acf.hhs.gov/programs/cb/pubs/cwo04-07/cwo04-07.pdf (reporting that states continue to struggle with reducing the number of placement changes that youth in care experience, especially youth who have been in care for longer periods of time, with almost 60% of youth who had been in care for at least two years having more than two placement moves); CTR. FOR ADVANCED STUDIES IN CHILD WELFARE, UNIV. OF MINN. SCH. OF SOC. WORK, PROMOTING PLACEMENT STABILITY (2010), *available at* http://www.cehd.umn.edu/ssw/cascw/attributes/PDF/publications/CW360_2010.pdf (focusing on high levels of placement instability in the child welfare system, as well as its long-term consequences for children in terms of hard skills such as education and likelihood of achieving permanency and family and exiting the system).

[3]*See, e.g.*, *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) (noting negative outcomes from prolonged stays in care); *B.H. v. Johnson*, 715 F. Supp. 1387, 1392 (N.D. Ill. 1989) (noting harm from multiple placements); *Braam v. State*, 81 P.3d 851, 854 & n.1 (Wash. 2003) (noting that frequent movement of children in foster care "may create or exacerbate existing psychological conditions, notably reactive attachment disorder").

including a child, depends, among other things, on the interest at stake. It is well established that children are persons under the United States Constitution. *See, e.g.*, *In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."); *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (holding that children have due process rights in connection with disciplinary actions taken by schools).

Where important legal interests are at stake, especially those expressly protected under the United States Constitution, the due process protections are virtually coextensive with those of adults. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion). In fact, the Court has stated that its "concern for the vulnerability of children is demonstrated in its decisions dealing with minors' claims to constitutional protection against deprivations of liberty or property interests by the State. With respect to many of these claims, we have concluded that the child's right is virtually coextensive with that of an adult." *Id*.

C. Twelve-Year-Old Child Is Capable of Directing His Representation, Including Access to the Courts Through Appeal.

There is broad consensus that children even younger than the age of twelve are presumed capable of directing their representation. In this case, the child's decision to appeal should have been respected and allowed to proceed without barriers. The presumption that children are capable to direct their representation is rooted in both law and social science. For example, children are constitutionally

guaranteed the right to counsel in delinquency proceedings. *See In re Gault*, 387 U.S. 1 (1967). While the minimum age of criminal responsibility varies according to state law, many states have settled on age ten as the minimum age for delinquency court jurisdiction,[4] meaning children aged ten and older receive client-directed representation. *See, e.g.*, *Matter of Pedro M.*, 21 Misc. 3d 645 (Fam. Ct., Albany Co., 2008) (while addressing requirement that court consult child during permanency proceeding, court establishes guidelines that presume a child age seven or over should be produced in court; court notes that the age of seven is

[4] *See, e.g.*, Rights of Juveniles § 2:2 (2012 Ed.) (Mass. Gen. Laws Ann. ch. 119, § 52; *see* Tex. Fam. Code Ann. § 51.02(2)(A) (child is person 10 years of age or older and less than 17 years of age); Colo. Rev. Stat. §§ 19-1-103(18), 19-2-104(1)(a) ("child" is person under 18 years of age and court has jurisdiction over child 10 years of age or older alleged to have committed delinquent act); *see also* Wash. Rev. Code Ann. § 9A.04.050 (children under eight incapable of committing crime; children between eight and 12 presumed incapable, but presumption may be rebutted). *Cf. Com. v. Walter R.*, 610 N.E.2d 323 (1993) (no presumption, conclusive or rebuttable, in Massachusetts that a person under the age of 14 is incapable of committing rape); *In re Washington*, 662 N.E.2d 346 (1996) (abolishes common law presumption in Ohio that child between seven and 14 years of age is incapable of committing crime of rape). In Minnesota, neither the statutory definition of "child" nor that of "delinquent child" contains a minimum age, but the definition of "child in need of protection or services" includes a child who has committed a delinquent act before becoming 10 years old. Minn. Stat. Ann. §§ 260B.007(3), (6), 260C.007(4), (6). The statutes have been construed to preclude delinquency jurisdiction over a nine-year-old child (and by implication any other child under 10 years of age). *Matter of Welfare of S.A.C.*, 529 N.W.2d 517 (Minn. Ct. App. 1995).

generally considered the "age of reason," is the age when children acquire a sufficient facility with spoken language to be able to communicate with adults, and is the age at which juveniles can be charged in juvenile delinquency and persons in need of supervision proceedings). In addition, the Model Rules of Professional Conduct assert that an attorney's relationship with his child client should be normal "as far as reasonably possible." MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2010). Commentary to the Rule explains that "children as young as five or six years of age, and *certainly those of ten or twelve*, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." MODEL RULE OF PROF'L CONDUCT R. 1.14 cmt. 1 (emphasis added).[5]

Many state legislatures require client-directed representation for children in dependency proceedings regardless of age. *See, e.g.*, Conn. Gen. Stat. § 46b-129(a)(2) ("the primary role of any counsel for the child […] shall be to advocate for the child in accordance with the Rules of Professional Conduct"); Massachusetts Committee for Public Counsel Services, Children and Family Law Division, *Performance Standards Governing the Representation of Children and*

[5] Likewise, the newly-adopted ABA Model Act on Representation of Children in Abuse and Neglect Proceedings asserts that the lawyer-client relationship for the child's lawyer is "fundamentally indistinguishable" from the lawyer-client relationship in any other situation, while recognizing that the lawyer should explain the legal process to the child in a developmentally appropriate manner that will change based on age. American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (2011), available at http://www.caichildlaw.org/Misc/ABA_Resolution.pdf.

Parents in Child Welfare Cases, 1.6(b), *available at* http://www.publiccounsel.net/Practice_Areas/cafl_pages/performance_standards_for_cafl_attorney.html ("if counsel reasonably determines that the child is able to make an adequately considered decision with respect to a matter in connection with the representation counsel must represent the child's expressed preferences regarding that matter."). Other states have specifically codified the capacity of children aged twelve and younger to direct representation. *See, e.g.*, Minn. Stat. § 260C.163(3)(d) (court may appoint counsel to represent child who is ten and older in dependency proceedings); Idaho Code Ann. § 16-614(2) (court may order counsel for child twelve and older in dependency proceedings). In the traditional attorney-client relationship, it would be a violation of ethical rules to block a client's decision, asserted through counsel, to appeal an adverse legal determination. Such a violation results when a twelve-year-old's decision to appeal a legal determination through counsel is blocked completely by the CASA.

Scholars and preeminent authorities concur that children as young as seven or ten should be presumed capable of client-directed representation. *See Report of the Working Group on the Role of Age and Stage of Development*, 6 NEV. L.J. 623, 623 (2006) ("attorneys should presumptively function as client-directed attorneys for children age seven and above"); Merril Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 TOURO L. REV. 745, 820 (2006)

("[c]hildren above the age of ten usually comprehend the issues and are capable of formulating a position with the assistance of counsel—even if, on occasion, the assistance should be more structured than with an adult."); Donald Duquette, *Two Distinct Roles/Bright Line Test*, 6 NEV. L.J. 1240, 1240 (2006) (endorsing "a bright line test" around the age of seven). Research on child development firmly supports the position that children as young as age seven are generally capable of directing their own representation. *See, e.g.*, Jaclyn Jean Jenkins, *Listen to Me! Empowering Youth and Courts Through Increased Youth Participation in Dependency Hearings*, 46 FAM. CT. REV. 163, 173 (2008) ("Studies have shown that children as young as 6 years of age have the capability to reason and understand. Certainly from age 6, and at ages even younger than that, children are capable of having and sharing their view of what happened in the past and what they would like to see happen in the future. This is especially true for foster children, who, by necessity, have had to grow up more quickly than their peers.").

Despite these authorities, the trial court allowed the CASA to unilaterally bar appellate access to a competent twelve-year-old represented by counsel. Such a result is fundamentally unfair and in conflict with rules of legal ethics and professional responsibility.

II. A Child's Fundamental Interest in Access to the Courts Through Appeal of Deprivation Proceedings Is Meaningless If the CASA Can Unilaterally Block It.

It can hardly be disputed that children are parties in child welfare proceedings where their life and liberty are at stake. *See A Child's Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children* 19-20 (3d ed.) ("National Report Card") (summarizing state laws on this issue and finding that thirty-four states and the District of Columbia explicitly give children full party status and the rights associated with that status, including the right to appeal). "As the individual who is the subject to dependency proceedings, a child should always be considered a party to the proceedings. . . . [W]hen a child is considered a party to the proceedings, all the rights of parties are assumed to be held by the child." National Report Card at 14. In fact, this national survey used as one of its six "grading" criterion whether children are given party status and all associated rights. *Id.* Party status equates to due process:

> It has been said that the object of making a person a party to a legal proceeding is to enable him or her to be heard in the assertion of his or her rights, and failing to set them up, to preclude that person from again litigating them, and also to enable the court to entertain the action. It is broadly stated that every person is entitled to an opportunity to be heard in a court of law upon a question involving his or her rights or interests before he or she is affected by any judicial decision on the question.

59 AM. JUR. 2D *Parties* § 1.

This due process right belongs to the child and cannot be blocked by another

party. A CASA, tasked with presenting and advocating for the child's best interest, may argue to a court of appeals that a child's appeal should not succeed. But the CASA may not bar from this Court any argument by either party about the merits of an appeal. A CASA cannot determine jurisdiction, standing and access to an appellate court, which is what she has effectively done here.

A. Children Have a Fundamental Right of Access to Courts and to Direct Representation in Child Welfare Proceedings.

Youth are parties in child deprivation proceedings. *See Black's Law Dictionary* 878 (2d ed. 1910) ("The term 'parties' includes all persons who are directly interested in the subject—matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess these rights. 'Party' is a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons, (they are parties in the writ, and parties on the record); and all others who may be affected by the suit, indirectly or consequentially, are persons interested, but not parties") (internal citations omitted).

The Court of Appeals has addressed the issue of party status and the parent's right to appeal with respect to a child's delinquency adjudication. In *in the Interest of J.L.B.,* the court reinforced that parents are necessary parties in their children's

delinquency actions and have an independent right to appeal. 634 S.E.2d 514, 516 (Ga. Ct. App. 2006). Parents are necessary parties because, among other things, "the consequences of complying with the disposition order will fall on both the parents and their child." *Id.* Parents may temporarily lose custody of their child, be required to participate in counseling with their child, or be required to pay counseling or supervision fees. *Id.* Similarly, children, who are significantly affected by the deprivation court's determination, are necessary parties in these proceedings and should "have the right to appeal the juvenile court's judgment and to participate in the appellate process." *Id.* This appellate access must be unfettered to be meaningful. Allowing a third party, such as a CASA, to thwart the clear assertion by a child to appeal the deprivation court order is at odds with the very concept of party status and the due process rights attached to that status. Such an interpretation is also at odds with Georgia's liberal construction of appellate practice and disapproval of practice that thwarts access to the courts. *See* Ga. Code Ann. § 5-6-30 ("It is the intention of this article to provide a procedure for taking cases to the Supreme Court and the Court of Appeals, as authorized in Article VI, Sections V and VI of the Constitution of this state; to that end, *this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any points raised therein*, except as may be specifically referred to in this article.") (emphasis

added). While the CASA may assert a position based on her view of the child's best interests with respect to the merits of the appeal, blocking the appeal from getting heard improperly empowers the CASA at the expense of the child's most basic due process right as a party—the right to be heard.[6] Such a denial of due process is unprecedented.

As the Supreme Court explained in *In re Gault*, due process protections in juvenile courts do not eliminate the relevant distinctions between children and adults and will not eliminate the therapeutic and often collaborative aspects of child welfare proceedings in court. *See In re Gault*, 387 U.S. at 21 (in the context of delinquency proceedings, the Court wrote: "[T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process."). In

[6] The purpose of a CASA is very different than a lawyer for a child. A lawyer is appointed for a child to represent his or her expressed interest and legal interest. *See* American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (2011), *available at* http://www.caichildlaw. org/Misc/ABA_Resolution.pdf. In accordance with these prevailing rules of professional responsibility, a lawyer must allow the child to direct the representation, tempered by the lawyer's professional obligation to counsel a client against decisions that may hurt them. A CASA is appointed to assist the court in determining the best interest of the child; the CASA determines himself what the child's best interests are and then communicates those interests to the court. This representation of the child's 'best interests' may differ from the child's expressed interest. CASAs serve the court, not the child. They are appointed to help the court do its job of determining what is in the child's best interest. The CASA and lawyer, therefore, may not always advocate the same position before the court.

fact, the Supreme Court has cited the vulnerability of children as one of the reasons for giving robust due process protections to children. *See, e.g.*, *Bellotti*, 443 U.S. at 634 (describing cases such as *In re Gault* and *Breed v. Jones*, 421 U.S. 519 (1975) as decisions that demonstrate the Court's "concern for the vulnerability of children" with respect to "constitutional protection against deprivations of liberty or property interests by the State").

Admittedly, the court's role in child welfare matters is more active than in other civil proceedings. *National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 15 (1995) (noting that given the complicated nature of cases and the numbers of parties involved, "the court performs a more managerial and directive function than in other litigation"). In these proceedings, presentation of accurate information is crucial to just determinations. Allowing the voices of all parties to be expressed and considered by the court is of the utmost importance to ensure that due process is provided and to increase the odds of a just and accurate determination. A child's decision to appeal a determination of the trial court is part and parcel of this process.

The right to pursue an appeal is a proper component of the due process rights of a litigant. *Jackson v. Huddleston*, 397 P.2d 132, 134 (Okla. 1964) ("It is a fundamental principle of law that the right to invoke judicial action carries with it

the right to appeal from an adverse decision . . . ."). While acknowledging the right to appeal has never been held a requirement of due process, the American Bar Association policy views appeal as "a fundamental element of procedural fairness" to which a party "should be entitled . . . [as] of right from a final judgment." ABA Judicial Administration Division, Standards Relating to Appellate Courts § 3.10 (1994 ed.) (hereinafter "Appellate Court Standards").

This principle holds equally true in the context of a deprivation proceeding. *See In re: Adoption of J.L.*, 769 A.2d 1182, 1185 (Pa. Sup. Ct. 2001) ("To deny J.L. any opportunity to seek review of the trial court's decision, or to challenge the findings of fact and errors of law, flies in the face of why counsel is appointed in the first place."); *Newman v. Newman*, 235 Conn. 82, 96 (Conn. 1995) (holding child's attorney "should honor the strongly articulated preference regarding taking an appeal of a child who is old enough to express a reasonable preference").

But whether or not the child has an absolute right of appeal from a deprivation hearing determination, no other party should be able to block the child's right of appeal where it is otherwise available. This is not to say that the CASA does not represent important interests. Indeed, the CASA plays an important role in deprivation proceedings by presenting to the court what she believes is in the child's best interest. The CASA, however, cannot be empowered to thwart the child's own voice with respect to her legal interests through the filing

of an appeal by the child's legal counsel.

Amici urge this Court to follow established principles of law that suggest that the child's legal rights belong to the party in interest—the child—to assert through his legal advocate. *See Neilson v. Colgate-Palmolive*, 199 F.3d 642 (2d Cir. 1999). In this case, W.L.H. was appointed counsel by the court. The child may exercise his right through that attorney so long as the attorney conforms his representation to the law, the rules of procedure and the profession's ethical obligations.

Significantly, Georgia recently embraced the principle that a lawyer, in this case a law guardian, is properly suited to advocate for the expressed interests of the child. *See* Supreme Court of Georgia, Formal Advisory Opinion No. 10-2 (approved and issued on Jan. 9, 2012, Supreme Court Docket No. S11U0730) (hereinafter "Op. 10-2") (adopting both the Model Rule and the Comment).

The American Bar Association's Model Rules of Professional Conduct, Rule 1.12 states that a lawyer "shall abide by a client's decisions concerning the objectives of representation." Model Rule 1.14 states that where a lawyer is representing a client with diminished capacity, such as a child, "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Consistent with the extended explanation above that twelve-year-olds are not too young to direct counsel, the comment to this rule notes, "[C]hildren as

young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody." Both the rule and the comment have been adopted by this state Supreme Court. Op. 10-2.

As an outgrowth of the general ethical rule that gives the client control over his or her own representation, the ABA's standards on the representation of children state that children also should be empowered to direct their lawyers. *See* ABA Standards for Lawyers Representing Children in Juvenile Court Proceedings (1979); ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases (1996) § F-1 ("Standards of Practice"). In August 2011, the ABA's House of Delegates approved the Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings ("Model Act") which declared that "[i]n order for the child to have an independent voice in abuse and neglect proceedings, the lawyer shall advocate for the child's counseled and expressed wishes. . . . The lawyer should also facilitate the child's participation in the proceeding." Model Act § 7(c) & commentary.

The lawyer has a duty to advise a client—even a child client—to facilitate the child's ability to make and assert good choices. ABA Standards of Practice direct the lawyer to explain all necessary information to the child and, "[a]s in any other lawyer/client relationship," make his or her own recommendations.

Standards of Practice § B-4 commentary. At the same time, the lawyer needs to be aware of the child's circumstances, and of the various factors that may be influencing the child's decision. *Id.*

Experts and child advocates agree that children should direct their own legal representation because client-directed legal representation, as reflected in Rule 1.2 of the Model Rules of Professional Conduct, reflects our society's commitment to personal freedom and individual rights. This right, and this responsibility, can and should extend to children, with the advice and consultation of their lawyers and others whose role it is to help and support them. "Children need lawyers not simply to promote fair processes and outcomes, but to promote children's autonomy—their right and need to have a say in what happens to them in legal proceedings." Bruce Green and Annette Appell, *Representing Children in Families* – Foreword, 6 NEV. L.J. 571, 578 (2006).

B. In Georgia, These Principles of Due Process Are Inherent in the Statutory Scheme that Governs the Adjudication of Children's Rights.

The trial court's provision of a lawyer to help W.L.H. assert his legal interests is consistent with Georgia law, which establishes a child's right to counsel in a deprivation proceeding. Ga. Code Ann. § 15-11-98(a). Many other statutory provisions regard the child as a party. *See id.* § 15-11-6(b) ("Counsel must be provided for a child not represented by the child's parent, guardian or custodian. If

the interests of two or more parties conflict, separate counsel shall be provided for each of them."); *id.* § 15-11-9(b) ("The court . . . shall appoint a guardian ad litem for a child who is a party to the proceeding."); *id.* § 15-11-39 ("A party other than the child may waive service of summons by written stipulation or by voluntary appearance at the hearing.").

In this vein, the child is just one of many parties who can, for example, seek a modification or vacation of an order. Ga. Code Ann. § 15-11-40. If the child has the right to seek the modification or vacation of an order under Georgia Code § 15-11-40, then it follows that he must also maintain the right to appeal the court's order should he not prevail in seeking a modification. In fact, under Georgia law, *any party* possesses the right to appeal. Pursuant to Georgia Code § 15-11-3, "[i]n all cases of final judgments of a juvenile court judge, appeals shall be taken to the Court of Appeals or the Supreme Court in the same manner as appeals from the superior court." As noted in *J.J. v. State of Georgia*, 135 Ga. App. 660, 664 (1975), "the juvenile is expressly granted the same rights of appeal as are possessed by adults."[7] Georgia Code Title 15, Chapter 11 does not designate that only *certain* parties may appeal a final judgment of a juvenile court judge. Thus,

[7] Amici acknowledge that *J.J. v. State* is a juvenile justice case that patterns itself after criminal law because liberty is at stake in the form of incarceration in those proceedings. However, under Georgia law, both proceedings in child deprivation and delinquency are governed under the same provisions and are civil adjudications. Thus, the same basic due process principles should apply.

in the absence of any Georgia appellate rule or statute barring his right to appeal, W.L.H. possesses standing to appeal. As discussed above, Georgia construes its appellate rules liberally, favoring access to courts. This liberal view is consistent with the Georgia Constitution, which gives parties unlimited court access. Ga. Const. of 1983, Art. I, § I, ¶ XII ("No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state.").

As W.L.H. asserted in his brief citing errors, "Statutory and case law have made it very clear that the child in a deprivation proceeding is a party to the case." Citing *McBurrough v. Dep't of Human Resources*, 150 Ga. App. 130, 131 (1979); *see also* Ga. Code Ann. § 15-11-9(b) (referring to the child as a party in deprivation hearings). W.L.H. stands at the center of the deprivation proceeding below. Absent concern for *his* well-being, no such proceeding would have been initiated. He is not only a party, but he is an indispensable party, entitled to all the rights and privileges afforded to a party, including the right to appeal. As stated in the Georgia Code:

> It is the intention of this article to provide a procedure for taking cases to the Supreme Court and the Court of Appeals, as authorized in Article VI, Sections V and VI of the Constitution of this state; to that end, this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case or refusal to consider any

> points raised therein, except as may be specifically referred to in this article.

Ga. Code Ann. § 5-6-30.

The decision in this case should be guided by this mandate.

CONCLUSION

Amici urge this Court to deny any CASA the right to bar a minor's decision to appeal on his own behalf from a deprivation proceeding. Amici urge this Court to conclude that such a deprivation would violate the due process rights of W.L.H. and any youth similarly situated. This Court must affirm the right of children to be heard.

Dated: September 28, 2012

Respectfully submitted,

/s/ J. Richard Hammett

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served the foregoing **BRIEF OF THE JUVENILE LAW CENTER IN SUPPORT OF APPELLANT W.L.H.** upon counsel of record for the parties by depositing a true and correct copy of same in the U.S. Mail, first-class postage prepaid, addressed to:

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This 28th day of September, 2012.

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