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VIA NEW JERSEY LAWYERS SERVICE

January 19, 2016

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: In the Matter of the Adoption of a Child By J.E.V. & D.G.V., A-39-15 (076767)
App. Div. Docket No. A-3238-13T3

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ).

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## Preliminary Statement

*Amicus curiae* American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief, pursuant to *R.* 1:13-9(d)(4), in support of affirming the Appellate Division's decision. The New Jersey Constitution requires that in any court proceeding involving the termination of parental rights over the objection of an indigent parent, the State must provide the parent with appointed counsel. In this matter, the trial court approved termination of L.A.'s parental rights without providing her counsel, thereby denying her due process and equal protection of law.

The right to raise one's children is fundamental. It is beyond dispute that when the State seeks to remove a child over a parent's objection, the constitutional right to counsel attaches immediately. A parent's interests are identical in a private adoption proceeding, and so the guarantees of due

process and equal protection under the law also require that indigent, objecting parents have a right to counsel in these proceedings. That right should attach when adversarial proceedings against the parent begin. Because L.A. was not provided with counsel here, the case should be remanded for a new trial in which L.A. is represented by state-funded counsel.

## Statement of Facts and Procedural History[1]

The record in this case was impounded, and so *Amicus* is constrained to accept the facts and procedural history as recounted in the Appellate Division opinion and in the parties' briefs on appeal. For the purposes of its brief, *Amicus* highlights the following facts and procedural history.

In March 2013, when Children's Home Society of New Jersey (CHS) told L.A. it was proceeding to adoption, it sent her a letter saying, "[y]ou have the right to be represented by an attorney, and you may or may not have the right to have counsel appointed to represent you." Pet. for Cert. at 3. In August, after J.E.V. and D.G.V. had filed for adoption, the trial court issued an order requiring service of a notice on the biological mother informing her, *inter alia*, that at the hearing she could "have counsel or court-appointed counsel, if unable to afford counsel." The notice of hearing L.A. received noted, "if you

[1] The Statement of Facts and Procedural History have been combined for the convenience of the Court.

cannot afford an attorney, you may contact the Essex County Legal Aid Society . . . or the Essex County Surrogate's Court . . . If you qualify, the Court will appoint counsel for you free of charge." *Id.* At the case management conference on October 31, 2013, the trial court asked L.A. if she would obtain an attorney, and she responded, "working on it." *Id.* The trial court did nothing further to ensure that L.A. understood and voluntarily relinquished her right to counsel.

As a result, L.A. proceeded to trial *pro se*, and her inability to represent herself was apparent. L.A. was confused about where to send interrogatories, the role of expert psychologists, how to give an opening statement, how to cross-examine witnesses, how to make evidentiary objections, the standards the Court would apply to her case, and her ability to submit evidence. L.A. App. Div. Br. at 12.

The trial court issued its order to terminate her parental rights on March 4, 2014, approximately seven months after the Petition for Adoption had been filed. *Id.* at 3. L.A. filed a Notice of Appeal on March 21, 2014, along with requests to proceed as indigent, for assignment of counsel, for free transcripts, and for a stay pending appeal. *Id.* The Appellants filed a case information statement on March 28, 2014. *Id.* at 4.

One month later, on April 28, 2014, the Appellate Division granted L.A's stay and request to proceed as indigent. It denied

without prejudice her requests for free transcripts and assignment of counsel, directing the Office of Parental Representation (OPR) to consider representation of L.A. *Id.* The same day, OPR said it was unauthorized to represent clients on appeal of private adoption actions and indicated that Appellants should bear the cost of transcripts for the appeal. Approximately six weeks later, on June 12, 2014, the Appellate Division issued a supplemental order requiring Appellants to bear the costs of transcripts. *Id.*

L.A. filed a timely submission on September 10, 2014, two days before it was due. *Id.* Nearly one month later, on October 6, 2014, the Appellate Division rejected her brief because of its format and the format of the Appendix. *Id.* at 5.

L.A. then filed motions in October and December 2014 seeking to regain custody and restore her parental rights, both of which the Appellate Division denied in November 2014 and January 2015, respectively. *Id.*

It was not until August 19, 2015, more than 15 months after the Appellate Division first denied L.A.'s motion for counsel, that it contemplated providing L.A. representation by seeking supplemental briefing on her right to counsel. *Id.* It issued its opinion on October 23, 2015. *In re Adoption of Child by J.E.V.*, 442 *N.J. Super.* 472, 483 (App. Div. 2015). Proceedings in this Court followed.

## Argument

### I. THE TERMINATION OF PARENTAL RIGHTS BY A COURT IMPLICATES THE CONSTITUTIONALLY-PROTECTED RIGHT TO COUNSEL.

"The bond between parent and child remains society's most fundamental relationship." *In re Adoption of Children by G.P.B.*, 161 *N.J.* 396, 403 (1999) (citing *Santosky v. Kramer*, 455 *U.S.* 745 (1982)). This Court has emphasized "the inviolability of the family unit, noting that the rights to conceive and to raise one's children have been deemed essential, basic civil rights . . . and rights far more precious than property rights." *New Jersey Div. of Youth & Family Svcs. v. A.W.*, 103 *N.J.* 591, 599 (1986) (internal alterations and quotation marks omitted).

The right of parents to the custody and care of their children has been determined to be "a fundamental liberty interest protected by the Due Process Clause" of the United States Constitution and by Article I, Paragraph 1 of the New Jersey Constitution. *Moriarty v. Bradt*, 177 *N.J.* 84, 101 (2003) (citations omitted); *see also Watkins v. Nelson*, 163 *N.J.* 235, 245 (2000).

#### A. Due Process Requires that Indigent Parents Who Object to Adoption Proceedings Have an Attorney to Protect Their Fundamental Rights.

The federal Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty

interests," *Washington v. Glucksberg*, 521 *U.S.* 702, 720 (1997), including parents' fundamental right to make decisions concerning the care, custody, and control of their children. *Santosky*, 455 *U.S.* at 747-48 (the Due Process Clause requires that when terminating parental rights, the allegations must be supported by clear and convincing evidence); *Stanley v. Illinois*, 405 *U.S.* 645, 651 (1972)(a parent's interest in the companionship, care, custody, and management of her children warrants deference).

Proceedings to terminate parental rights implicate these liberty interests. *New Jersey Div. of Youth & Family Svcs. v. B.R.*, 192 *N.J.* 301, 305 (2007) ("It is beyond dispute that the termination of parental rights implicates a fundamental liberty interest.").

There are few actions taken by the State as severe as the termination of parental rights: "A judicial order that terminates parental rights permanently severs the relationship between children and their biological parents." *New Jersey Div. of Youth & Family Svcs. v. I.S.*, 202 *N.J.* 145, 196 (LaVecchia, J., dissenting). Even parents who have not been able to maintain custody of a child retain their fundamental liberty interest in preventing the severing of familial ties. *Santosky*, 455 *U.S.* at 753.

Here, L.A. is "an indigent whose parental rights are being terminated pursuant to a statutorily authorized, involuntary process." *See In re Adoption of a Child by J.D.S.*, 176 *N.J.* 154, 158 (2003) (describing private party adoptions). When subjecting this fundamental right to interference, the State is required to offer procedural protections. *Santosky* 455 *U.S.* at 747. For example, in proceedings to terminate an individual's parental rights, a trial court's decision must be based on clear and convincing evidence supported by the record. *Id.* This standard applies in termination proceedings regardless of whether they are initiated by the State or by private parties. *In re Adoption of Child by J.E.V.*, 442 *N.J. Super.* 472, 483 (App. Div. 2015).[2]

The right to counsel is another vital procedural protection for parental rights. "The due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution serves as a bulwark

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[2] *Amicus* notes that the Appellate Division appropriately rejected the use of the substantive legal standard outlined in *N.J.S.A.* 9:3-46(a) because L.A. never agreed to place her child for adoption. *In re Adoption of Child by J.E.V.*, 442 *N.J. Super.* at 484. Though not posed directly by this appeal, *N.J.S.A.* 9:3-46 does not on its face provide adequate protection for the fundamental rights of objecting parents. This Court has made clear that a statute that intrudes into family autonomy must contain "a threshold harm standard that is a constitutional necessity because a parent's right to family privacy and autonomy are at issue." *Moriarty*, 177 *N.J.* at 118. Therefore, the polestar in any fact-finding hearing in which parental rights might be terminated is whether the record sustains, by clear and convincing evidence, "proof of serious physical or psychological harm or a substantial likelihood of such harm." *Id.* at 113. (quoting *Watkins*, 163 *N.J.* 235, 248 (2000)).

against the loss of parental rights without counsel being afforded." *New Jersey Div. of Youth & Family Svcs. v. B.R.*, 192 *N.J.* 301, 305 (2007). This right has been codified by the legislature for proceedings initiated by the State. Even for cases when the State seeks only temporary custody of children over a parent's objection, the right to court-appointed counsel for indigent parents attaches immediately. *See, e.g., N.J.S.A.* 9:6-8.28-29; *N.J.S.A.* 30:4C-15. Failing to provide L.A. with counsel interfered with her fundamental right to a fair procedure. "However well-intentioned and scrupulously fair a judge may be, when a litigant is threatened with the loss of his liberty, process is what matters." *Pasqua v. Council*, 186 *N.J.* 127, 146 (2006).

This Court previously identified four interests that compel the need for assigned counsel when the State seeks to terminate parental rights: (1) "the nature of the right involved;" (2) "the permanency of the threatened loss;" (3) "the State's interest in exercising its *parens patriae* jurisdiction only where necessary;" and (4) "the potential for error in a proceeding in which the interests of an indigent parent, unskilled in the law, are pitted against the resources of the State." *B.R.*, 192 *N.J.* at 305. As discussed below, similar interests are present in all cases involving indigent parents who object to the termination of their parental rights.

**B. Due Process and Equal Protection Principles Require that the Right to Appointed Counsel Attach Whether the Deprivation is Effected by a Private Party or by the State.**

The interests that mandate assigned counsel when the State seeks to terminate parental rights exist with full force when the court uses its power to terminate parental rights in cases brought by private parties.

Indeed, the first two interests this Court identified in *B.R.* - the nature of the right involved and the permanency of the threatened loss - are *identical* where a private party seeks to terminate parental rights. With respect to the third interest, though CHS was the involved agency, and not DCPP, the State was nevertheless an integral party to the deprivation, both because it licensed CHS, *see N.J.S.A.* 9:3-40, and because the court's approval was necessary to effect the termination. *See Shelley v. Kraemer*, 334 *U.S.* 1, 19 (1948) (holding that judicial intervention constitutes state action and may alone constitute a state deprivation of constitutional rights where the deprivation could not have been effected "but for the active intervention of the state courts, supported by the full panoply of state power"); *In re Adoption of K.A.S.*, 499 *N.W.2d* 558, 565-66 (N.D. 1993) (adoption proceedings are not "purely private" because of the state's exercise of its "exclusive authority to terminate the legal relationship of parent and child"). The

state's interest in a restrained use of its *parens patriae* jurisdiction is thus squarely implicated in this case. Finally, the potential for error in a proceeding in which a parent represents herself against a sophisticated, represented party with superior resources was present here. L.A. demonstrated throughout the proceedings that she did not have sufficient legal expertise to represent herself, while the opposing party was represented, "financially advantaged," and supported by a "State-licensed agency." *J.E.V.*, 442 *N.J. Super.* at 478.[3]

Because L.A. was not provided counsel, but would have been had the matter been brought by the State rather than a private party, L.A. was deprived not only of her right to due process, but also her right to equal protection under the law. The disparate treatment of persons before the court based on the

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[3] *Amicus* notes that the Appellate Division explicitly cabined the right it recognized to cases in which a State-licensed agency, directly or indirectly, pursues a private adoption. *See J.E.V.*, 442 *N.J. Super.* at 487 ("We do not address a non-custodial parent's entitlement to counsel when objecting to adoption after the custodial parent's surrender of parental rights, or objecting to a stepparent adoption, or objecting after the child is left with a relative or friend."). The power imbalance described above is particularly acute in the context of agency adoptions, but the *B.R.* factors are not unique to such adoptions, and so *Amicus* would urge this Court to recognize the right of all indigent objecting parents in private adoptions to court-appointed counsel. Indeed, the reasoning on which the Appellate Division relied, that "the preservation of families is a 'paramount concern' of the State, and the termination of parental rights is of constitutional dimensions," *id.* at 479, would support finding such a right in all private adoptions.

identity of the party initiating the action violates the right to equal protection because there is no overriding justification for the court to devalue one group's loss of parental rights compared with the other.

As the Appellate Division noted, "while this matter may have taken the route of a private adoption, from L.A.'s perspective, in many ways it followed a parallel course to a Division case." *J.E.V.*, 442 *N.J. Super.* at 486. Indeed, there is no principled distinction between indigent parents who object to the termination of their parental rights by the courts.[4] That New Jersey has differing mechanisms to sever their familial ties, *i.e.*, through proceedings initiated by a state agency and those initiated through private parties, is of no consequence to the biological parents. They face the same loss and are deserving of the same protection.

New Jersey's equal protection guarantees are offended when parents objecting to the termination of their parental rights in

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[4] This is particularly so because CHS presented itself as a resource similar to DCPP - not just as an adoption agency, but as a provider of parenting assistance, and as such, L.A. should have received the constitutional protections that she would have received had DCPP sought to remove her child. Courts have held that where private parties function as state actors, individuals must receive the same constitutional protections they would if the State were carrying out these functions. *See, e.g., Marsh* v. *Alabama*, 326 *U.S.* 501, 507 (1946); *Terry v. Adams*, 345 *U.S.* 461, 469 (1953). CHS should not be able to take advantage of its position of providing resources to families in crisis to deprive indigent parents of their rights.

private adoption proceedings are not provided the same opportunity to defend their rights as those parents in state-initiated proceedings. State courts from around the country have held as much. *See, e.g., In re Adoption of A.W.S. and K.R.S.*, 339 *P.3d* 414, 419-20 (Mont. 2014); *In re Adoplion of Meaghan*, 961 *N.E.2d* 110 (Mass. 2012); *In re L.T.M.*, 824 *N.E.2d* 221, 231 (Ill. 2005); *In re S.A.J.B.*, 679 *N.W.2d* 645 (Iowa 2004); *In re Adoplion of K.A.S.*, 499 *N.W.2d* at 564-65; *Zockert v. Fanning*, 800 *P.2d* 773, 777 (Or. 1990).

Article 1, Paragraph 1 of the New Jersey Constitution "protects against injustice and against the unequal treatment of those who should be treated alike." *Lewis v. Harris*, 188 *N.J.* 415, 442 (2006) (citations omitted). When a practice treats two classes of similarly situated people differently, the distinction must "bear a substantial relationship to a legitimate governmental purpose." *Id.* The Court employs a balancing test, considering "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg v. Kimmelman*, 99 *N.J.* 552 (1985)(citing *Right to Choose v. Byrne*, 91 *N.J.* 287 (1982)). It is "particularly appropriate" when a fundamental right is infringed upon. *Right to Choose*, 91 *N.J.* at 310.

As noted, all of the interests identified in *B.R.* that

compel the need for assigned counsel are present, and this class of objecting parents should be entitled to the same resources. The *B.R.* factors discussed above undergird the equal protection analysis by addressing the first two prongs, namely the nature of the affected right and the extent of the intrusion.

As for the third prong of the equal protection analysis, the public's need to limit access to counsel for indigent parents in private adoptions, the interest usually identified to justify the denial of the right to counsel for indigent parents is "avoid[ing] both the expense of appointed counsel and the cost of the lengthened proceedings [the] presence [of counsel] may cause." *In re Adoption of A.W.S. and K.R.S.*, 339 *P.3d* at 418 (quoting *Lassiter* v. *Dep't of Social Svcs*, 452 *U.S.* 18, 28 (1981)) (alterations in original); *see also In re L.T.M.*, 824 *N.E.2d* at 231 ("The only state interest served by denying appointed counsel under the Adoption Act is the interest in limiting the payment of attorney fees.").

When weighing the threat of permanent loss of a parent's constitutionally-protected relationship with their child, the State's fiscal interests do not justify withholding vital resources to protect that right. *See In re Adoption of K.A.S.*, 499 *N.W.2d* at 565 (holding that state's legitimate interest in conserving resources associated with appointed counsel does not override a person's fundamental interest in parental rights). In

*Lassiter*, the United States Supreme Court noted that a state's financial interest "is hardly significant enough to overcome private interests as important as those here." 452 *U.S.* at 28. There is no legitimate justification that outweighs providing appointed counsel to L.A. and other indigent parents to protect their rights in private adoption proceedings.

## II. THE RIGHT TO APPOINTED COUNSEL SHOULD ATTACH WHEN ADVERSARIAL REMOVAL PROCEEDINGS BEGIN; HERE, WHEN CHILDREN'S HOME SOCIETY TOLD L.A. IT WAS GOING TO BEGIN ADOPTION PROCEEDINGS.

The need for appointed counsel arose when CHS informed L.A. that it was planning to initiate adoption proceedings and the relationship between CHS and L.A. shifted from collaborative and voluntary to adversarial. L.A. needed counsel to inform her of her rights and advocate on her behalf then and during trial.

As the Appellate Division acknowledged, "[t]he assignment of counsel to an individual who does not yet have a matter before the court presents an unusual administrative challenge," *J.E.V.*, 442 *N.J. Super.* at 487, but there is no question that counsel is necessary at this stage. The Appellate Division referred the assignment procedure to the Acting Administrative Director of the Court, and though *Amicus* takes no position on how to assign counsel in such cases, it stresses the obligation of counsel to perform effectively, at least meeting the test

established in *Strickland v. Washington*, 466 *U.S.* 668 (1984). *See B.R.*, 192 *N.J.* at 308-09.

## III. L.A. DID NOT KNOWINGLY AND VOLUNTARILY WAIVE HER RIGHT TO COUNSEL.

J.E.V. and D.G.V. contend that L.A. waived her right to counsel because she was informed several times that she had a right to counsel and that she *might* be entitled to appointed counsel and she did not ask the court to appoint an attorney. *See* Pet. for Cert. at 13.

First, it is illogical to suggest that L.A. could have knowingly waived a right Appellants do not concede she in fact had. *See id.* at 7 (referring to the "new right to appointed counsel" that the Appellate Division "created").

Next, the warnings L.A. received were insufficient to provide counsel to L.A., and L.A.'s statements do not constitute waiver. As this Court has made clear, "[f]undamental rights explicitly rooted in the Constitution require a waiver by defendant that is 'knowing and voluntary.'" *State v. Buonadonna*, 122 *N.J.* 22, 35 (1991) (quoting *Johnson v. Zerbst*, 304 *U.S.* 458 (1938)). In the criminal context, this Court has held that to ensure that a waiver is knowing and voluntary, the Court must conduct an on-the-record colloquy in which the person waiving the right to counsel is "made aware of the dangers and disadvantages of self-representation, so that the record will

establish that he knows what he is doing and his choice is made with eyes open." *State v. Crisafi*, 128 *N.J.* 499, 510 (1992) (quotation marks omitted). In the context of parental rights, this Court has emphasized that only a "knowing and voluntary" decision to relinquish "befits the waiver of any constitutional right." *In re T.J.S.*, 212 *N.J.* 334, 341 (2012). The trial court's question to L.A., "Do you intend to get an attorney at all in this matter?" and L.A.'s response, "Working on it," obviously falls short of demonstrating a knowing and voluntary waiver of any right to counsel.

J.E.V. and D.G.V. contend that something less than a full colloquy was required, suggesting that civil matters only require that the rights to be waived "are communicated in a clear manner." J.E.V. September 10, 2015 Br. at 6. This Court's jurisprudence does not support the distinction the Petitioners draw between the requirements for waiver of the right to counsel in criminal and in parental rights termination cases. The Court has referred to termination of parental rights as "quasi-criminal in nature" and clarified, "[i]t is not the ordinary civil suit where . . . the parties are left to their own resources in the litigation they pursue." *In re Guardianship of Dotson*, 72 *N.J.* 112, 118 (1976). Indeed, the Court has recognized that the same standard for effective assistance of counsel applies in parental rights terminations and in criminal

cases. *See New Jersey Div. of Youth & Family Svcs. v. B.R.*, 192 *N.J.* 301, 308 (applying the ineffectiveness standard for criminal representation from *Strickland* to cases involving termination of parental rights).

Finally, *New Jersey Div. of Youth & Family Svcs. v. N.S.*, 412 *N.J. Super.* 593, 632 (App. Div. 2010), on which petitioners rely, does not support the position that L.A.'s right to counsel was met in this case. In *N.S.*, the Appellate Division found that the parents, who were not represented at an initial hearing after an emergency removal, were not denied their right to counsel where they were provided counsel shortly after the hearing and thus "were fully and effectively afforded counsel at all critical stages after formal proceedings have begun." *N.S.*, 412 *N.J. Super.* at 632. *N.S.* simply does not apply here, where L.A. *never* received counsel.

## IV. APPOINTING COUNSEL IS PARTICULARLY IMPORTANT IN LIGHT OF THE TIME-SENSITIVITY OF REMOVAL AND TERMINATION PROCEEDINGS.

The appointment of counsel for indigent parents who object to the termination of their parental rights is especially significant because removal and termination proceedings are both time-consuming and unusually time-sensitive. For parents who successfully appeal terminations of proceedings, the deprivation of parental rights is not one that can be fully remedied on appeal because of the loss of the time they would have spent

developing a relationship with the child. Similarly, the child at the center of this litigation also has a right to stability and permanency. *In re Guardianship of K.H.O*, 161 *N.J.* 337, 357-58 (1999) (describing New Jersey's strong public policy in favor of permanency). With counsel, these appeals will proceed more efficiently, which protects the rights of parents and children.

In the Petition for Certification, the Appellants suggest that the amount of time that the child has been in their care should weigh in favor of reversal. Pet. For Cert. at 14-15. By the time this matter is argued, half of the time that the child will have been in the care of Appellants will have been attributable to the appeals process. From the filing of the petition to the decision by the trial court, the termination of L.A.'s parental rights took approximately seven months. The appeals process will take more than three times as long, including sixteen months passing between L.A.'s filing of her notice of Appeal and the Appellate Division's order to appoint counsel for supplemental briefing.

Further, the process for reviewing this unrepresented litigant's appeal required significant judicial resources, as she attempted to vindicate her rights by filing motions and submissions without familiarity with the substantive law or procedural requirements.

Providing counsel will better ensure that parents' objections and defenses are adequately presented and considered during the proceedings. Moreover, appointed counsel will create a more complete record, which will aid in appellate review. Thus, the appointment of counsel for indigent parents who object to the termination of their parental rights will likely be not only more fair, but more efficient as well.

## CONCLUSION

For the foregoing reasons, this Court should remand this matter for a new trial in which L.A. is represented by state-funded counsel.

Respectfully submitted,

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