**Nos. 11-FS-1217, 11-FS-1218,
11-FS-1255, 11-FS-1256, 11-FS-1257,
11-FS-1258, 11-FS-1259, 11-FS-1260**

DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE: PETITION OF R.W & A.W.;
IN RE: T.A.L.;
IN RE: A.L.;
IN RE: PETITION OF E.A.

T.L (father) A.H. (mother), E.A. (aunt).

**On Appeal from the Superior Court of the District of Columbia
Family Court, Domestic Relations Branch**

BRIEF *AMICUS CURIAE* OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLANTS

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RULE 28 (a)(2)(B) DISCLOSURE STATEMENT

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TABLE OF AUTHORITIES

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Cases

A.J.G. v. State, 148 P.3d 759 (Nev. 2006) 12

Agostini v. Felton, 521 U.S. 203 (1997) 16

B.F. Saul Co. v. Tiefenbacher, 28 A.3d 1115 (D.C. 2011) 23

Brandon v. Hines, 439 A.2d 496 (D.C. 1981) 23

Brown v. Kone, Inc., 841 A.2d 331 (D.C. 2004) 16

Campbell v. Campbell, 58 A.2d 825 (D.C. Mun. App. 1948) 16

Carson v. American Brands, 450 U.S. 79 (1981) 22, 23

H.P. v. State, 93 P.3d 982 (Wyo. 2004) 15

HBE Leasing Corp. v. Frank, 48 F.3d 623 (2d Cir. 1995) 23, 24

Horne v. Flores, 557 U.S. 433 (2009) 16

In re A.B., 486 A.2d 1167 (D.C. 1984) 16

In re A.O.T., 10 A.3d 160 (D.C. 2010) 10, 11

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In re Curtis B., 784 N.E.2d 219 (Ill. 2002) 15

In re D.A., 990 A.2d 530 (D.C. 2010) 17

In re D.M., 771 A.2d 360 (D.C. 2001) 22

In re Damon M., 765 A.2d 624 (Md. 2001) 8

In re Dom. L.S., 722 A.2d 343 (D.C. 1998) 16

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In re J.M.C., 741 A.2d 418 (D.C. 1999) 14

In re J.W., 837 A.2d 40 (D.C. 2003) 16

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In re K.F., 201 P.3d 985 (Utah 2009) 18

**In re K.M.T.*, 795 A.2d 688 (D.C. 2002) ..... passim

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In re L.L., 653 A.2d 873 (D.C. 1995) 8, 9

In re Lem, 164 A.2d 345 (D.C. Mun. App. 1960) 17, 18

In re M.B., 565 A.2d 804 (Pa. Super. Ct. 1989) 15

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In re S.A.W., 491 S.E.2d 441 (Ga. Ct. App. 1997) 15

In re S.J., 772 A.2d 247 (D.C. 2001) 20

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In re T.L., 859 A.2d 1087 (D.C. 2004) 21

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In re W.D., 988 A.2d 456 (D.C. 2010) 9

In re Williams, 130 P.3d 801 (Or. Ct. App. 2006) 14

Jordan v. Jordan, 14 A.3d 1136 (D.C. 2011) 20, 21

K.H. v. R.H., 935 A.2d 328 (D.C. 2007) 1

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 12, 13

McQueen v. Lustine Realty Co., 547 A.2d 172 (D.C. 1988) 22, 24

Meyer v. Nebraska, 262 U.S. 390 (1923) 12

Murphy v. McCloud, 650 A.2d 202 (D.C. 1994) 21

Oregon Natural Res. Council, Inc. v. Kantor, 99 F.3d 334 (9th Cir. 1996) 24

P.F. v. N.C., 953 A.2d 1107 (D.C. 2008) 1

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 12

Prince v. Massachusetts, 321 U.S. 158 (1944) 12

Puckrein v. Jenkins, 884 A.2d 46 (D.C. 2005) 16

Quilloin v. Walcott, 434 U.S. 246 (1978) 12

Richman Towers Tenants' Ass'n v. Richman Towers LLC, 17 A.3d 590 (D.C. 2011) 25

Rita J. v. Arizona Dep't of Econ. Sec., 1 P.3d 155 (Ariz. 2000) 14

Salazar v. District of Columbia, 671 F.3d 1258 (D.C. Cir. 2012) 23

Santosky v. Kramer, 455 U.S. 745 (1982) 12

Sherri A.D. v. Kirby, 975 F.2d 193 (5th Cir. 1992) 24

Smith v. Org. of Foster Families, 431 U.S. 816 (1977) 12

Troxel v. Granville, 530 U.S. 57 (2000) 11, 12

Umana v. Swidler & Berlin, Chartered, 669 A.2d 717 (D.C. 1995) 1

United States v. Debruhl, 38 A.3d 293 (D.C. 2012) 25

W.D. v. C.S.M., 906 A.2d 317 (D.C. 2006) 1

Washington v. Glucksberg, 521 U.S. 702 (1997) 12

Wilkins v. Bell, 917 A.2d 1074 (D.C. 2007) 16

Wilson v. Craig, 987 A.2d 1160 (D.C. 2010) 17

Wisconsin v. Yoder, 406 U.S. 205 (1972) 12

Statutes

28 U.S.C. § 1292 (a) (2006) 23

28 U.S.C. §§ 1291-1292 (2006) 23

42 U.S.C. § 671 (a)(15)(B) (2006) 13

42 U.S.C. § 671 (a)(15)(C) (2006) 6

42 U.S.C. § 671 (a)(15)(D) (2006) 7

42 U.S.C. § 671 (a)(19) (2006) 3

42 U.S.C. § 675 (1)(E) (2006) 18

Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) 7

Adoption and Safe Families Amendment Act of 2000, D.C. Law 13-136, 47 D.C. Reg. 5520 (Jul. 7, 2000) 7

Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) 7

D.C. Code § 11-721 (a)(1) (2001) 6, 16, 25

D.C. Code § 11-721 (a)(2) (2001) 6, 22, 25

D.C. Code § 16-2320 (f) (2001) 16

D.C. Code § 16-2322 (2001) 17

D.C. Code § 16-2323 (2001) 17

D.C. Code § 16-2323 (c) (2001) 17

D.C. Code § 4-1301.02 (3)(E)(iii) (2001) 18

D.C. Code § 4-1301.09a (b) (2001) 13

D.C. Code § 4-1301.09a (c) (2001) 6

D.C. Code § 4-1301.09a (d) (2001) 7

Rules and Regulations

29 DCMR § 1642.1 (2012) 3

45 C.F.R. § 1356.21 (2011) 13

45 C.F.R. § 1356.21 (b)(2) (2011) 7

D.C. Fam. Ct. R. D 8

Super. Ct. Civ. R. 60 (b) 16

Super. Ct. Neg. R. 25 (e) 16

Other Authorities

Child and Family Services Agency, Annual Public Report FY 2010 (2011).....7, 8, 9, 19

Child and Family Services Agency, Permanency Planning Policy (May 24, 2011).....7

David J. Herring, The Adoption and Safe Families Act—Hope and Its Subversion, 34 Fam. L. Q. 329 (2000).....6

H.R. Rep. No. 105-77 (1997).....7

Jeanne M. Kaiser, Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases, 7 Rutgers J.L & Pub. Pol'y 100 (2010).....2

Josh Gupta-Kagan, Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency, 10 Conn. Pub. Int. L.J. 13 (2010).....7, 18, 19

U.S. Dep't of Health & Human Servs., AFCARS Report: Preliminary FY 2010 Estimates (2011).....9, 19

***Authorities principally relied on**

INTEREST OF *AMICUS CURIAE*

The Legal Aid Society is the oldest general civil legal services program in the District of Columbia. Founded in 1932, Legal Aid's mission is to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, art. II, § 1. Legal Aid represents parents in disputes involving custody of children. *See, e.g., P.F. v. N.C.*, 953 A.2d 1107 (D.C. 2008); *W.D. v. C.S.M.*, 906 A.2d 317 (D.C. 2006) (amicus brief in opposition to rehearing); *K.H. v. R.H.*, 935 A.2d 328 (D.C. 2007). Legal Aid also recently represented a father in a second appeal of an adoption decree. *In re N.R.*, 41 A.3d 1219 (D.C. 2012) (order pending opinion). The experience of *amicus* as counsel in custody and neglect matters has shown that because of the interest in maintaining stable placements for children, postponing appellate review of decisions that implicate fundamental parental rights can often thwart the correction of errors.

OVERVIEW AND STATEMENT

Amicus urges this Court to suggest *en banc* reconsideration of this Court's decision in *In re K.M.T.*, 795 A.2d 688 (D.C. 2002) (per curiam), which held that a change in permanency goal from family reunification to adoption is not a final order for appeal. Absent *en banc* reconsideration or further appropriate action by this Court, *K.M.T.* will deter the filing of future appeals and remain a permanent barrier to the review of decisions curtailing important and constitutionally-protected parental rights until it is too late to remedy any mistakes that may have been made.[1] Parents are unlikely to seek review of permanency goal changes in the face of

[1] It is uncertain whether the D.C. Council could enact legislation conferring appellate jurisdiction to alter the result of *K.M.T.* *See Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 723-24 & n.15 (D.C. 1995) (noting that the Home Rule Act withholds Council authority to amend title 11). The likely absence of legislative recourse is a further reason for the full Court to exercise its discretion to reconsider the issue.

K.M.T., so the only realistic opportunity for the Court of Appeals to address the matter will be in a later appeal of an adoption like this one.

A. The Problem of Delayed Review of Decisions Concerning Family Reunification

Years may pass after a court has changed the permanency goal in a neglect case from family reunification to adoption or some other long term disposition before the new goal is accomplished. If appellate review is delayed until after an adoption decree has been entered, this Court (or the Family Court on remand) often faces an agonizing choice: whether to disrupt bonds that have formed between the child and the foster parents while court-enforced separation has weakened the relationship to the natural parents, or to leave uncorrected errors that occurred at an earlier stage in the neglect case. There will often be expert testimony that remedying errors and reunifying the family would harm the child's development. This Court has acknowledged the resulting dilemma. *See, e.g., In re F.W.*, 870 A.2d 82, 86 (D.C. 2005) (per curiam) (noting interest in preserving a "'stable and desired environment'" with foster parents); *id.* at 90 (Ruiz, J., concurring in part and dissenting in part) (decision "primarily compelled by the wish not to disrupt the child's successful incorporation into the adoptive family"). The same is true in other courts. Jeanne M. Kaiser, Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases, 7 Rutgers J.L. & Pub. Pol'y 100, 103 (2009) (when an appellate court reverses a permanent placement "it may also be reversing years of work to obtain permanency, safety, and emotional well-being for children who are parties to the case").

The interest in maintaining a stable placement can frustrate or nullify the Court's ability to correct fundamental errors made earlier in the process, weakening enforcement of the important statutory requirement for "reasonable efforts" at family reunification. Deferring appellate review of disputes between biological parents and foster parents—as required by

K.M.T.—may undermine confidence in the neglect process and drag out disagreements about reunification efforts. Addressing such disputes promptly and resolving legitimate grievances would encourage all of the adults interested in the welfare of the child to unite in pursuit of the child's best interests. Reviewing decisions when they can still readily be corrected also promotes the best interests of all parties including the child. Otherwise, the choices of parents who are statutorily and constitutionally responsible for making decisions affecting the welfare of their children and whose wishes concerning adoption are entitled to "weighty consideration,"[2] may be cast aside because delayed review has made "possession" of the children tantamount to the proverbial nine-tenths of the law.

B. The Proceedings In This Case Reflect the Problem

The present case illustrates the problem that arises when appellate review occurs long after a change in the permanency goal. On appeal, the parents and the aunt challenge decisions to place the children with unrelated foster parents rather than with their aunt, despite a clear statutory preference for a kinship placement (*see* 42 U.S.C. § 671 (a)(19) (2006) (requiring such a preference as an element of state child welfare plans); 29 DCMR § 1642.1 (2012) ("The first priority of the foster care system shall be to maintain a child in his or her home or that of a relative.")), and the "weighty consideration" owed to the parents' adoption choice. The lower court concluded that, regardless of the correctness of previous placement decisions, the children would be harmed at the time of the adoption trial by removal from their long-term foster parents. (B10, 14-15).[3] The Child and Family Services Agency ("CFSA") and the foster parents will

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[2] *In re K.D.*, 26 A.3d 772, 777-78 (D.C. 2011); *In re T.W.M.*, 964 A.2d 595, 602 (D.C. 2009).

[3] A copy of the Family Court opinion in this matter, which has been redacted to remove any identifying information, is included as Addendum B to this brief. Citations to this redacted opinion are by page number and designated "(B__)."

undoubtedly renew those arguments in this Court. The Court will therefore be presented with a seeming *fait accompli*, insulated from appellate correction.

CFSA removed the children (then about 15 months and 28 months old) from their parents (appellants T.L. and A.H.) in March 2008, more than three years before the adoption trial. (B2). Although the parents identified two of the children's aunts as family placements, (B2), CFSA did not pursue placement with the second (appellant E.A.) after the first proved ineligible for licensing. (B3). Instead, CFSA left the children in foster care with appellees (R.W. and A.W.), and they have remained in their care now for over four years. (B2).

The parents stipulated to neglect, with a permanency goal of reunification reflected in the disposition order entered in May 2008. (B2). A year later, however, the magistrate judge deemed the parents' progress towards reunification insufficient, and changed the neglect disposition to a permanency goal of adoption. (B3). Appellees applied to adopt the children, over the objections of the parents; the parents advocated adoption by the aunt, who filed her own petition to adopt. (B3). The parents formally consented to adoption by the aunt, and refused consent to adoption by appellees. (B4). During the ensuing two-year period between the change in the permanency goal and the adoption trial, the children continued to live with appellees— notwithstanding the parents' expressed preference for placement with the aunt in what would have been an uncontested adoption and the "weighty consideration" owed to the parents' preference— while the aunt was limited to supervised visits with the children. (B3, 8).

The lower court found that the aunt is an entirely suitable adoptive parent. At the time of trial, she had been employed as a special police officer at the Smithsonian for 19 years, owned a five-bedroom home in a quiet neighborhood, and had been licensed as a therapeutic foster parent who has successfully raised a foster child as well as her own children. (B7-8). During her visits,

"[t]he children are excited to see [the aunt] when they arrive for the visits, and the children's interactions with [the aunt] during the visits are appropriate and positive." (B8). She "ably directs the children's play, sets appropriate limits, has a nice manner with the children, and is attuned to their needs." (B8). Had CFSA placed the children with the aunt, either during the reunification period or once the permanency goal changed and the parents' preference for adoption by the aunt had been expressed, there would now be no dispute for the Family Court or for this Court to resolve.

Despite the parents' (and the law's) strong preference for the aunt and the aunt's undisputed suitability as an adoptive placement, the lower court considered evidence about the bonds formed between the children and their foster parents to be dispositive. The lower court concluded that it could not consider, because it could not do anything to remedy, CFSA's failure to pursue a family placement proposed by the parents back in 2008. (B10). The lower court was persuaded by expert testimony that by the time of trial, "a disruption of the children's attachments with [appellees] would pose unacceptably grave risks of harm to the children." (B11). "As to each child," the lower court ruled, "the risks of harm from an order granting [the aunt's] adoption petitions are simply too great to accept, notwithstanding the constitutional presumption favoring the preferences of the biological parents and the court's generally favorable view of [the aunt] and her caretaking abilities." (B14-15). The passage of time since the adoption trial will not diminish those risks.

SUMMARY OF ARGUMENT

The time has arrived for this Court to cut the cords that have limited its ability to review erroneous Family Court decisions to change the permanency goal. In the decade and more since *K.M.T.* was decided, experience has shown that review delayed is, too often, review denied. The

Court has significantly diminished its own role in the administration of the child welfare laws, to the detriment of all concerned.

K.M.T. is doctrinally unsound as well as bad policy. A decision to change the permanency goal is a modification of the final disposition in the neglect case, and therefore qualifies under this Court's cases as a final and appealable order itself. *In re K.M.T.* was incorrectly decided and merits reconsideration by the full Court.

The Court can also hold that a change in permanency goal from reunification to adoption has the practical effect of an injunction because it compels CFSA to redirect its services from strengthening the bonds between the parents and child to undermining them. The question of the appealability of a permanency goal change as an injunction under D.C. Code § 11-721 (a)(2) rather than a final order under D.C. Code § 11-721 (a)(1) was not considered in *K.M.T.*, and so it is open to resolution by a division of this Court.

ARGUMENT

THE COURT SHOULD HOLD THAT A CHANGE IN THE PERMANENCY GOAL FROM REUNIFICATION TO ADOPTION IS APPEALABLE, EITHER AS A FINAL ORDER, OVERRULING *IN RE K.M.T.* EN BANC, OR AS AN INJUNCTION, AN ISSUE NOT CONSIDERED IN *K.M.T.*

A change in the permanency goal from reunification with the parents to adoption (or permanent guardianship or any other permanent placement with others) is a watershed event in a neglect case. "[O]nce the child's permanency plan calls for an outcome such as adoption," federal law imposes "an obligation to make reasonable efforts to secure an adoptive home and to cease reunification efforts." David J. Herring, The Adoption and Safe Families Act—Hope and Its Subversion, 34 Fam. L. Q. 329, 337 (2000); *see* 42 U.S.C. § 671 (a)(15)(C) (2006); D.C. Code § 4-1301.09a (c) (2001). So long as reunification is the permanency goal, CFSA is responsible for providing a broad array of services to families to help them correct the conditions

that led to a neglect adjudication.[4] When the permanency goal changes, however, CFSA's duty changes from providing services to bolster the child's connection to the parents to undermining those connections and bolstering the child's connections to a new family. As a member of this Court noted during an oral argument, "'the goal change in essence makes a fait accompli of the termination of parental rights and adoption.'" Josh Gupta-Kagan, Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency, 10 Conn. Pub. Int. L.J. 13, 45 (2010) (quoting oral argument in *In re S.M.*, 985 A.2d 413 (D.C. 2009)). Directing CFSA to shift "'all the resources away from assisting in the reunification, . . . create[s] a situation in which you can't defend against a termination.'" *Id.* (quoting *S.M.* oral argument).

This Court has acknowledged "that agency recommendations that create a presumption in favor of adoption are problematic when it becomes almost impossible to overcome this presumption irrespective of the efforts made by the natural parents." *In re F.W.*, 870 A.2d at 87

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[4] Under the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980), the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997), and the District of Columbia's conforming legislation, D.C. Law 13-136, 47 D.C. Reg. 5520 (Jul. 7, 2000), the District is required to make "reasonable efforts" to preserve and reunify families except in certain aggravated circumstances. *See* 42 U.S.C. § 671 (a)(15)(D) (2006); D.C. Code § 4-1301.09a (d) (2001). The reasonable efforts requirement was intended to prevent removal of children or, where removal is necessary, to return children to their families as soon as possible by providing social services and support. *See, e.g.*, H.R. Rep. No. 105-77, at 12 (1997) ("[T]he Committee believes that the termination of parental rights is such a serious intervention that it should not be undertaken without some effort to offer services to the family."). In order to continue receiving federal funding, CFSA must obtain an annual judicial determination in each case that it has made reasonable efforts to achieve the permanency plan. *See* 45 C.F.R. § 1356.21 (b)(2) (2011). The available services are described in CFSA's policy manual and annual report. *See* CFSA, Permanency Planning Policy 5-6 (May 24, 2011), *available at* http://cfsa.dc.gov/DC/CFSA/Publication%20Files/Policy%20Manual/Policies/Program%20-%20Permanency%20Planning%20(final)(H).pdf (listing available services); CFSA, Annual Public Report FY 2010 at 10 (2011) (hereinafter "2010 D.C. Report"), *available at* http://cfsa.dc.gov/DC/CFSA/Publication%20Files/CFSA%20PDF%20Files/About%20CFSA/Publications/CFSA_Annual_Public_Report_FINAL.pdf ("Families of abused and neglected children are provided the necessary services to ameliorate problems and, when possible, to reunify children with their families.").

(quotation omitted). That is especially true if adoption trials are held by the same judicial officer who changed the permanency goal under the Family Court's one judge policy and now-amended Family Rule D. *See In re H.S.W.C.-B*, 836 A.2d 908, 910-11 (Pa. 2003). In its decision holding that a change in permanency goal from reunification to adoption was appealable, the Maryland Court of Appeals acknowledged that such a change, "may be outcome determinative" in subsequent termination or adoption proceedings. *In re Damon M.*, 765 A.2d 624, 627 (Md. 2001).[5] Experience since *K.M.T.* has shown that the Court was incorrect in characterizing a permanency goal change order as one that "does not affect the parents' substantive rights in any way." 795 A.2d at 691.

A. The Effect of *K.M.T.* Has Been to Delay and Thus Render Ineffective This Court's Important Role in Protecting Fundamental Rights in Neglect and Adoption Proceedings.

There is perhaps no area of the law in which the maxim justice delayed is justice denied resonates with greater force than the custody of children. Under this Court's per curiam decision in *K.M.T.*, a parent cannot appeal the frequently "outcome determinative" change in the permanency goal and the concomitant reversal of CFSA's role until there is an order granting an adoption, termination of parental rights or permanent guardianship. *K.M.T.*, 795 A.2d at 690-91. That appellate remedy is illusory if it comes—as is often the case—so long after the permanency goal change that meaningful appellate relief is all but impossible. *See, e.g., In re L.L.*, 653 A.2d

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[5] Statistics collected by CFSA show that "[t]he longer a child remains in out-of-home care, the less likely s/he is to reunify with family." 2010 D.C. Report, *supra*, at 19. In 2010, the most recent year for which data are available, children who exited foster care within 9 months of entering the system were reunited with their parents in 75 percent of cases. *See id.* at 19 (244 out of 327 reunited). By contrast, for children who exit foster care after 24 months, only 10 percent were returned to their parents. *See id.* at 28 (42 out of 412 reunited). Some of this difference is likely because children who quickly exit foster care represent less difficult cases. However, these data also suggest that, in contested cases, the passage of time can stack the deck in favor of adoption or guardianship by a foster parent.

873, 882 (D.C. 1995) ("[T]he best interest of the child . . . may compel [terminating] parental rights regardless of the defaults of public agencies.").

1. Experience has shown that delayed review may be ineffective.

The interval between a change in permanency goal and adoption or guardianship can be years.[6] During this time, the child will naturally form a strong bond of affection with the presumptive adoptive parent or guardian. (*See, e.g.*, B6-7). At the same time, the relationship between the natural parents and the child will inevitably suffer due to the years of separation and limited court-regulated visitation. (*See, e.g.*, B14). Thus, by the time of any appeal, correcting legal errors that would lead to reunifying the family is difficult because there will always be expert testimony (*see, e.g.*, B14-15) that doing so would be harmful to the child's emotional development. *See In re W.D.*, 988 A.2d 456, 460-61 (D.C. 2010); *In re C.L.O.*, 41 A.3d 502, 513 (D.C. 2012). Under these circumstances, concern for the child's best interest often deters error correction. Even if this Court determines that a remand is required, the Family Court will consider the child's changed relationships with the biological and adoptive parents in making its new decision, which inevitably stacks the deck against reunification.

In re S.M., 985 A.2d 413 (D.C. 2009), the case that caused a member of this Court to refer to the permanency goal change as a "fait accompli," (*see* p. 7, *supra*), is a compelling illustration of the harmful consequences of *K.M.T.* The children were placed in foster care because of neglect by the mother in September 2004. The original permanency goal was

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[6] Federal data show that 27 percent of children who leave foster care remained in the foster care system for 30 months or more before exiting. *See* U.S. Dep't of Health & Human Servs., AFCARS Report: Preliminary FY 2010 Estimates (2011) (hereinafter "2010 AFCARS Report"), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm. In 2010, the most recent year for which data were available, 58 percent of foster children in the District of Columbia had been in foster care for 24 months or longer. *See* 2010 D.C. Report, *supra*, at 20.

reunification with the father. The goal changed in September 2005 after the father was convicted of misdemeanor sexual abuse of an unrelated child (later reversed and dismissed) without giving the father any opportunity to contest those facts or any conclusions about his parental fitness in the neglect case. *Id.* at 416-18. The father objected to the goal change, but could not appeal because of *K.M.T.*

The adoption trial began in May 2007, 19 months after the permanency goal change. The Family Court issued its final adoption decree 14 months later, in July 2008. The father appealed, and this Court vacated the adoption decree and remanded because the Family Court had not properly applied the parental presumption that the children were best served by placement with the natural parent. *Id.* at 420. By then, however, the children had been out of the father's custody for six years, and they had lived with the would-be adoptive parents for more than three years. *Id.* The Court noted that because the lives of the children are "ongoing event[s]" the Family Court would have to reassess the situation in light of the changed circumstances that flowed from the Family Court's error. *Id.*

The father's inability to appeal the 2005 permanency goal change, therefore, set up a difficult and emotionally fraught decision on remand: return the children to a presumably fit father (but one who had been allowed only limited contact with his sons during the six years they had been in foster care), or to grant adoption by the foster parents who raised the children for over three years—the longest span in the boys' lives that they had steady parental figures. Because the best interest of the children is the paramount consideration, this Court's decision did not preclude the Family Court from again allowing the adoption despite the earlier errors.

In re A.O.T., 10 A.3d 160 (D.C. 2010), likewise illustrates the harmful effect that delay causes. In that case, the father and the District of Columbia stipulated to an adjudication of

neglect because the father had been sentenced to a term of imprisonment with an agreed permanency goal of reunification.[7] *Id.* at 161. Yet six months after the adjudication, in November 2005 a magistrate judge changed the goal to adoption because of the length of the father's incarceration—although that was known at the time of the original adjudication—and because the foster parent was "willing to adopt." *Id.* at 162. The father objected to the change in permanency goal and later refused consent to an adoption trial before the magistrate judge. The father appealed. Without reaching the father's other challenges to the eventual adoption decree, this Court reversed and remanded for a new trial. *Id.* at 167. By then, however, more than five years had passed since the permanency goal change.

In re S.M. and *In re A.O.T.* show that even if an appeal to this Court long after a permanency goal change can restore custody to the parents, such an appeal is no substitute for prompt review of the goal change. The real world consequences—and the corresponding "best interests" analysis—of a decision changing custody after a child has spent several years living as a member of a different family, typically while having limited or no contact with the parents, are very different from the remedial options soon after a permanency goal change is first made.

2. Delayed and ineffective review weakens the protection of constitutional and statutory requirements.

Compromising appellate review weakens the statutory and constitutional safeguards for parents in neglect proceedings. The right of parents to raise their own children "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530

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[7] Legal Aid represented the father in a subsequent appeal in this matter. *In re N.R.*, 41 A.3d 1219 (D.C. 2012) (order pending opinion).

U.S. 57, 65 (2000) (plurality opinion).[8] As the Supreme Court stated in a decision holding that an indigent parent is entitled to a free transcript to appeal a termination of her parental rights, "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U. S. 371, 376 (1971)). The right of parents to make decisions for a child is firmly rooted in "[t]he history and culture of Western civilization" and is "established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Indeed, the right is so fundamental, that the Supreme Court has characterized it as nothing less than a matter of "intrinsic human rights." *Smith v. Org. of Foster Families*, 431 U.S. 816, 845 (1977).

Potentially life altering effects on children and families stemming from permanency goal changes necessitate meaningful and timely appellate review. The termination of parental rights is "an exercise of awesome power," which is "tantamount to imposition of a civil death penalty." *A.J.G. v. State*, 148 P.3d 759, 763 (Nev. 2006) (quotations omitted). As the Supreme Court

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[8] In cases dating back to the 1920s, the Court has recognized that the Due Process Clause protects the fundamental right of parents to control the care and upbringing of their own children. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (holding that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that "the liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that . . . the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce*)).

recognized in *M.L.B. v. S.L.J.*, the gravity and importance of the interests at stake require that appellate review be meaningful and effective. Like review without benefit of the record, appellate review that comes so late that it cannot protect parents from errors leading to termination cannot be deemed effective or meaningful.

B. Experience in Other States Shows that Appellate Review of Permanency Goal Changes Is Valuable and Will Not Inundate the Courts with Multiple Appeals.

There is no reason to adopt a parsimonious approach to finality in the neglect context for fear of inviting a deluge of inconsequential or repetitive appeals. Allowing appeals of orders changing the permanency goal from reunification to adoption would not also require the Court to allow appeal from housekeeping orders following routine review hearings that do not alter the neglect disposition, *see In re Billy W.*, 874 A.2d 423, 433 (Md. 2005) (no appeal of permanency reviews maintaining the status quo), so there will rarely be more than one new opportunity to appeal in a neglect case. It is also quite likely that allowing more appeals at an earlier stage—the change in permanency goal—will mean fewer appeals at the later adoption or termination stage.

Reviewing permanency goal changes would allow this Court to provide guidance to the Family Court and the CFSA regarding the "reasonable efforts" requirement. As discussed above, under both federal and District of Columbia law, the CFSA is required to make reasonable efforts to reunify the family while the permanency goal is reunification. *See* 42 U.S.C. § 671 (a)(15)(B) (2006); D.C. Code § 4-1301.09a (b) (2001); *see also* 45 C.F.R. § 1356.21 (2011) (conditioning federal funding on compliance with the reasonable efforts requirement). Neither federal law nor decisions of this Court have addressed the application of the reasonable efforts requirement to particular situations. However, other states have provided important guidance in decisions reviewing permanency goal changes. *See, e.g., In re Shirley B.*,

18 A.3d 40, 53-59 (Md. 2011) (addressing whether the state satisfied the reasonable efforts requirement during an appeal of a permanency goal change); *In re Williams*, 130 P.3d 801, 806-07 (Or. Ct. App. 2006) (same). By the time an adoption decree or termination order has been entered and an appeal can be taken under *K.M.T.*, it is too late. This Court has held that CFSA's compliance with the reasonable efforts requirement is not a prerequisite to the termination of parental rights, so the Court need not determine whether reasonable efforts were made. *See, e.g., In re J.M.C.*, 741 A.2d 418, 426-27 (D.C. 1999); *In re F.W.*, 870 A.2d at 87 (same as to termination by means of adoption).

Only four states and the District of Columbia have expressly barred immediate appellate review of permanency goal changes across the board. *See* A8-9.[9] The rationale offered by some of these courts is that allowing parents to appeal the change of permanency goal will delay finding a permanent placement for children who have been neglected. *See, e.g., In re L.E.C.*, 94 S.W.3d 420, 425-26 (Mo. Ct. App. 2003); *Rita J. v. Arizona Dep't of Econ. Sec.*, 1 P.3d 155, 158 (Ariz. 2000). But an appeal would not (absent a stay) delay implementation of a permanency goal change. *Cf. In re H.S.W.C.-B*, 836 A.2d at 911. Error correction earlier in the proceedings can actually shorten the time needed for permanent placement because appeals may resolve issues that would otherwise be determined years later after an adoption trial. Earlier appeals also ensure that the child welfare agency does not waste time and resources working towards a permanency goal that is not in the best interest of the child. And the articulation of clearer and more specific standards will reduce the number and gravity of errors in the future.

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[9] A survey of state law regarding the appealability of permanency goal changes is included as Addendum A to this brief, and cited as "A __."

Three times as many (16) states allow parents immediately to appeal permanency goal change as of right. *See* A1-2. For example, the Georgia Court of Appeals has recognized that an order changing the permanency goal "should be regarded with the same degree of finality as the placement order it modifies." *In re S.A.W.*, 491 S.E.2d 441, 443 (Ga. Ct. App. 1997). The Wyoming Supreme Court has explained that changing the permanency goal away from reunification "certainly affects [the parent's] substantial rights as it has the effect of halting reunification attempts." *H.P. v. State*, 93 P.3d 982, 989 (Wyo. 2004). And the Pennsylvania intermediate appellate court has explained that a change in the permanency goal is a final appealable order because it "is not merely a minor decision permitting a slight shift in the emphasis of the [child welfare agency's] social services. . . . [It] is the decision that allows [the child welfare agency] to give up on the parent." *In re M.B.*, 565 A.2d 804, 807-08 (Pa. Super. Ct. 1989). None of those states has subsequently declared the burdens of review to be unmanageable.

Moreover, 26 states allow for interlocutory review of permanency goal changes, either at the discretion of the appellate court or by certification of the family court. *See* A3-7. The Illinois Supreme Court has held that this approach ensures that "permanency orders which need examination can, and will, be reviewed by the appellate court" while the others "can proceed in a more timely fashion to determine the permanent placement status of the child." *In re Curtis B.*, 784 N.E.2d 219, 225 (Ill. 2002). Two states allow appeals as of right only from certain types of permanency goal changes. *See* A3. And two states do not have clearly defined law on this issue. *See* A8.

C. *K.M.T.* Was Decided Incorrectly, Because an Order Modifying the Permanency Goal Established in the Original Neglect Disposition Is a Final Order.

The Court has jurisdiction over "all final orders and judgments of the Superior Court" including in neglect cases. D.C. Code § 11-721 (a)(1) (2001). *K.M.T.*'s holding that an order changing the permanency goal is not "final" for purposes of that provision rests on the erroneous premises that "finality" in a neglect case after the initial neglect adjudication is limited to orders restoring custody to the parents, terminating parental rights, or decreeing an adoption, and that permanency goal changes merge into and can be reviewed on appeal from one of those resolutions.

1. A Change in Permanency Goal Alters the Final Neglect Disposition, Which Is a Final Order.

The permanency goal is a mandatory part of the dispositional order in a neglect case. D.C. Code § 16-2320 (f) (2001); Super. Ct. Neg. R. 25 (e). The dispositional order in a neglect case is an appealable final order. *In re J.W.*, 837 A.2d 40, 43 (D.C. 2003) (appeal taken from dispositional order); *In re Dom. L.S.*, 722 A.2d 343, 345-46 (D.C. 1998) (explaining difference between neglect adjudication and disposition); *In re A.B.*, 486 A.2d 1167, 1168 (D.C. 1984) (time to appeal runs from dispositional order). Orders modifying appealable judgments are generally appealable as well. For example, an order granting (or even denying) relief from judgment in a civil case pursuant to Super. Ct. Civ. R. 60 (b) is appealable,[10] as is a modification of a child support order, *Wilkins v. Bell*, 917 A.2d 1074 (D.C. 2007), or the custody provision of

[10] *E.g., Puckrein v. Jenkins*, 884 A.2d 46 (D.C. 2005) (reversing order granting Rule 60 (b) motion); *Brown v. Kone, Inc.*, 841 A.2d 331 (D.C. 2004) (reversing denial of Rule 60 (b) motion); *Campbell v. Campbell*, 58 A.2d 825 (D.C. Mun. App. 1948) (order vacating default judgment is appealable); *see also Horne v. Flores*, 557 U.S. 433 (2009) (reversing denial of motion for relief from judgment pursuant to Fed. R. Civ. P. 60 (b)); *Agostini v. Felton*, 521 U.S. 203 (1997) (same).

a divorce settlement. *Wilson v. Craig*, 987 A.2d 1160 (D.C. 2010). Therefore, an order modifying the original neglect disposition pursuant to D.C. Code § 16-2323 (c) is no less a final order than the disposition itself.[11]

To be sure, final orders in neglect cases are different from those in ordinary civil cases. Neglect dispositions are by design much easier to modify, recognizing the likelihood that the needs and circumstances of the child may change. *See* D.C. Code § 16-2322 (2001) (limiting duration of neglect disposition subject to extension); *id.* § 16-2323 (modification of neglect disposition). As this Court's predecessor explained in *In re Lem*, 164 A.2d 345 (D.C. Mun. App. 1960), the trial court in a neglect case (then called the Juvenile Court) exercises continuing jurisdiction over children removed from their homes, recognizing that the needs and circumstances of children evolve over time: "We feel that Congress, realizing that the needs and welfare of a child committed under any conditions fluctuate rapidly, intended that the court have continuing jurisdiction in all child commitment cases in which it had original jurisdiction." *Id.* at 348.

The possibility that an order will be later modified does not make it non-final. As the Court stated in *Lem*: "the fact that the Juvenile Court does have the power of continuing jurisdiction does not bar the right of appeal. If the order appealed from is intended to be a final order and would adjudicate the rights of the parties with finality if effectuated, we feel that it is none the less appealable because the party aggrieved could petition the Juvenile Court to exercise

[11] In *In re D.A.*, 990 A.2d 530 (D.C. 2010), this Court decided an appeal from an order denying reconsideration of a prior order terminating parental rights. The Court explicitly noted that the mother had waived her direct appeal of the termination, and sought review only of the denial of her motion to reconsider. *Id.* at 532. Neither the District of Columbia, as appellee, nor the Court questioned its appellate jurisdiction, even though the Court closely scrutinized whether a motion for reconsideration of an order terminating parental rights was permissible in the first instance.

its continuing jurisdiction under certain conditions." *Id.* at 349. The Court in *Lem* held that a mother could appeal from a new dispositional order as well as from the initial order, and that her appeal from the new order was therefore timely. *Id.* at 348-49. By the same token, an order revising the permanency goal is appealable.

2. Some Permanency Goal Changes Are the Last and Final Rulings Because They Are Not Followed by Adoptions or Terminations of Parental Rights, Yet They Cannot Be Reviewed Under K.M.T.

Contrary to the assumption in *K.M.T.*, that a change in the permanency goal merges into and can be reviewed on appeal of a later adoption decree or an order terminating parental rights, in many neglect cases the court will not issue any of the orders deemed final in *K.M.T.* 795 A.2d at 690. *See* Gupta-Kagan, *supra*, at 32 (noting that where no adoption, permanent guardianship, or other termination of parental rights is finalized, no final permanency trial is held). In these cases, a permanency goal change is the Family Court's last word on the parent's rights, but without an opportunity to appeal to this Court.

For example, review might never occur if the Family Court changes the permanency goal from reunification to "other permanent living arrangement," which means the child is to remain in foster care until he reaches the age of majority. *See* 42 U.S.C. § 675 (1)(E) (2006); D.C. Code § 4-1301.02 (3)(E)(iii) (2001). When the child eventually ages out of foster care, errors preventing reunification become moot, and the parents lose custody without an opportunity to appeal a final order. The Utah Supreme Court accordingly ruled that such an order is appealable. *In re K.F.*, 201 P.3d 985, 996 (Utah 2009) (holding that appellate review should be allowed when the permanency goal is changed to long-term foster care because otherwise "it is possible the mother will not have another opportunity to appeal the court's order"). Review might also be thwarted when the Family Court changes a child's permanency plan to adoption or guardianship, but no adoption or guardianship ever takes place. If, for example, the CFSA is unable to find an

adoptive family or guardian, the parents will never have the right to appeal. *See* Gupta-Kagan, *supra*, at 33.

Unfortunately, a significant number of foster children nationwide fall into one of these two situations. According to federal data, 12 percent of all foster children—48,828 total—have a permanency goal of "emancipation" or "long term foster care." *See* 2010 AFCARS Report, *supra.* An additional 29% of foster children—111,346 total—have a permanency goal of adoption or guardianship, *see id.*; however, this is no guarantee that an adoption or guardianship will ever take place. In 2010, more than 96,772 children had a permanency goal of adoption, but only about 52,340 children were actually adopted. *Id.* The remainder waited in foster care—a wait that can last for years.

The situation is even worse in the District of Columbia. In 2010, the most recent year for which data are available, 28 percent of all foster children—587 total—had a permanency goal of "alternative planned permanent living arrangement" (*e.g.*, long-term foster care, independent living/emancipation). *See* 2010 D.C. Report, *supra*, at 21. And more than 22 percent of all children in the District who left foster care did so via emancipation. *Id.* at 27. For the parents of these children, the permanency goal change effectively terminates their parental rights, and yet, under *K.M.T.*, there is no right of appeal.

3. Like Other Final Orders, Permanency Goal Changes Have Immediate Consequences.

A permanency goal change is not merely a procedural step towards a final disposition taking the form of reunification, adoption, or termination of parental rights. *K.M.T.*, 795 A.2d at 690. Such an order has an immediate effect on the parties. A permanency goal change from reunification to adoption immediately shifts CFSA's resources from nurturing the parent child relationship to undermining it.

K.M.T. relied heavily on the Court's decision in *In re S.J.*, 772 A.2d 247, 248 (D.C. 2001), which held that an order "waiving" a birth parent's consent to an adoption is not appealable. But the situation in *S.J.* was very different. *First*, a "waiver" decision is not a change in a neglect disposition, but rather a step in a distinct (albeit related) adoption proceeding. As the Court held in *S.J.*, even though the factors weighed in deciding whether to waive parental consent to an adoption are similar to those applied to terminate parental rights, a waiver order applies only to a particular adoption petition and therefore has no effect on the parent's continuing legal relationship to the child unless and until an adoption decree is entered. *Id.* And a "waiver" order does not affect the child's custody or visitation, or the duties of CFSA *vis-à-vis* the parent. *Second*, because the "waiver" decision is tied to a particular adoption petition, such orders are generally issued close in time to the adoption decree, so that the Court's remedial powers will not be negated by waiting for the decree.

This Court's precedents treat as appealable orders that have real, immediate and final impact on the parties comparable to changes in the permanency goal. For example, in *Jordan v. Jordan*, 14 A.3d 1136, 1152 (D.C. 2011), the Court held that an order in a domestic relations custody case appointing a parenting coordinator to manage conflicts between the parents was final and appealable, even though "the questions of divorce, custody, visitation, and support" had been resolved in an earlier order and were not changed by the appointment of a coordinator. The Court viewed the coordinator as a layer of "additional supervision" making it similar to other final orders that could be reviewed on appeal. *Id.* The fundamental change in CFSA's duties with regard to the parents that occurs when the permanency goal changes from reunification to adoption has a much more substantial impact on the rights of the parties than the appointment of a parenting coordinator.

Murphy v. McCloud, 650 A.2d 202 (D.C. 1994), involved an appeal from an order adjudicating a claimant to be a daughter with an interest in an intestate estate. The Court raised the question of its appellate jurisdiction *sua sponte*. *Id.* at 203. The Court acknowledged that the order determining the claimant's paternity did not "conclusively establish even her own rights, for it did not determine the amount of money or property, if any, that she would ultimately be entitled to receive." *Id.* at 204. Even so, the Court ruled that the decision was final and appealable because it would be "impracticable" to view the process of administering an estate as "some kind of 'umbrella' lawsuit which deprives an order such as the one here at issue of the requisite finality." *Id.* at 206. Similarly, experience has shown that it is "impracticable" to treat an adoption petition as an "umbrella" for review of a new disposition in a neglect case and to wait until after the effects of CFSA's mandate to substitute new bonds for the bonds between parent and child have reached the point that undoing those new bonds may be deemed so harmful to the child that reversal of such an order (even if erroneous) can no longer be considered.

The familial interests at stake when the permanency goal is changed from reunification to adoption are no less significant than the interests involved in *Jordan* or *Murphy*. To the contrary, as this Court has observed in the context of an appeal from the denial of parental visitation in a neglect case, "with adoption proceedings pending, the prohibition against visitation has consequences essentially similar to those of a formal termination of parental rights; under the regime ordered by the court, the mother is likely never to see the children again. Moreover, the mother's ability to contest the prospective adoption and to maintain her relationship with her sons will be severely impaired if, at the time the decision as to adoption is made, she will have had no contact with her children for a protracted period of time." *In re T.L.*, 859 A.2d 1087, 1091 (D.C. 2004). By shifting CFSA's services away from the parents and towards the creation

of new attachments, a change in the permanency plan even more decisively impairs a parent's ability to contest a prospective adoption and to maintain a relationship with the child.

In *In re D.M.*, 771 A.2d 360, 365 (D.C. 2001), the Court held that the denial of visitation, tied to a change in the permanency plan from reunification to adoption was an appealable final order. "To hold that the mother's right to appeal must wait until the completion of hypothetical TPR or adoption proceedings which may or may not be instituted at some time in the future, would permit her fundamental rights as a parent to be denied or impaired indefinitely, and perhaps forever, without appellate review." *Id.* The same is true when a change in the permanency goal pits the parents against the efforts of CFSA to weaken parental bonds in favor of new bonds to an adoptive parent. Even if the permanency goal change is not accompanied by a total denial of visitation, as in *D.M.*, the overall effect of an order directing CFSA to establish a new parental relationship is no less threatening to the fundamental right of a parent, and no less irrevocable if review is postponed until after an adoption or termination of parental rights has been completed than an order denying visitation. Permanency goal changes are final and appealable because they impair fundamental rights of parents, just like denial of visitation.

D. An Order Changing the Permanency Goal from Reunification to Adoption Has the "Practical Effect" of An Injunction, an Issue Not Addressed in *K.M.T.*

This Court also has appellate jurisdiction over orders granting or denying an injunction. D.C. Code § 11-721 (a)(2) (2001). In *McQueen v. Lustine Realty Co.*, 547 A.2d 172 (D.C. 1988) (en banc), the full Court unanimously held that an order in a landlord tenant case requiring the tenant to make "protective payments" into the registry of the Superior Court was appealable pursuant to D.C. Code § 11-721 (a)(2) because the order had the "practical effect" of an injunction. *Id.* at 174. *McQueen* relied on the Supreme Court's holding in *Carson v. American Brands*, 450 U.S. 79 (1981), that jurisdiction to review the grant or denial of injunctions in

federal cases under the analogous federal statute, 28 U.S.C. § 1292 (a), includes orders that have the practical effect of injunctions, although they are not injunctions by name. 450 U.S. at 83-84. *See Brandon v. Hines*, 439 A.2d 496, 509 (D.C. 1981) (explaining that interpretations of 28 U.S.C. §§ 1291-1292 are "persuasive authority").

The test has two parts: "First, the order must have the practical effect of 'refusing' (or granting) an injunction. Second, a litigant must show that the order might have 'a serious, perhaps irreparable, consequence' that can only be effectually challenged by an interlocutory appeal." *B.F. Saul Co. v. Tiefenbacher*, 28 A.3d 1115, 1117 (D.C. 2011) (citation omitted). Orders changing the permanency goal in a neglect case from reunification to adoption easily meet both parts of the test.

1. Permanency Goal Changes Have the Practical Effect of Injunctions.

The practical (and intended) effect of changing the permanency goal in a neglect case is to redirect CFSA's resources. Once reunification is abandoned as a goal, the parents stop receiving services, and lose the ability to call CFSA to account for the adequacy of its efforts at reunification. Consequently, even parents who have made progress towards reunification are likely to lose ground if the court deems the progress insufficient and changes the permanency goal. Thus, the effect of the goal change can be viewed either as the grant of an injunction to CFSA directing the agency to stop providing services to the parents, or as the denial of an injunction that would require CFSA to continue reasonable efforts at reunification. From either perspective, the effect of the order is to bring about an immediate change in the conduct of the parties, and so it is an injunction by another name.[12] *See HBE Leasing Corp. v. Frank*, 48 F.3d

[12] By contrast, *Salazar v. District of Columbia*, 671 F.3d 1258, 1262-63 (D.C. Cir. 2012), held that the district court's rejection of only one of two reasons for dissolving an injunction did not *refuse* to dissolve the injunction, and therefore was not appealable.

623, 632 (2d Cir. 1995) (order directing a party to remove liens had the practical effect of granting injunctive relief); *Sherri A.D. v. Kirby*, 975 F.2d 193, 203-04 (5th Cir. 1992) (order permitting change in handicapped child's educational placement effectively denied injunction against transfer); *Oregon Natural Res. Council, Inc. v. Kantor*, 99 F.3d 334, 337-38 (9th Cir. 1996) (summary judgment order construing the Endangered Species Act had the effect of denying requested injunction to require issuance of regulation).

2. Permanency Goal Changes Have Serious Consequences.

In *McQueen*, the Court based its holding that the imposition of a protective order had "serious, perhaps irreparable consequences" for the tenant on the risk that a tenant might lose a defense to eviction (and thereby, his or her home) because of an inability to make a protective order payment, even if the defense was meritorious. *McQueen*, 547 A.2d at 179. Just so, a parent may lose the ability to mount an effective challenge to a termination of parental rights or to defend a refusal to consent to an adoption if a change in the permanency goal leads a termination of CFSA's services to the parent and limits the parent's relationship with the child. The parent will also typically lose access to the child entirely or in part. Those consequences are undoubtedly serious in light of the emotional stakes for both the parent and the child and the constitutional stature of their relationship. And experience has shown them to be irreparable as a practical matter on appeal sometimes years later from an adoption decree. In many instances, it is simply too late to undo the effects of the permanency goal change and the creation of new bonds in place of those between parent and child.

3. The Court Did Not Consider Appealability as An Injunction in In re K.M.T.

As the Court has often stated, "*stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed upon the

precise question." *United States v. Debruhl*, 38 A.3d 293, 298 & n.38 (D.C. 2012) (citation omitted). The decision in *In re K.M.T.* addressed appealability of a permanency goal change only as a final order. 795 A.2d at 689-90. Because the Court did not consider whether the mother could have appealed the order as an injunction pursuant to D.C. Code § 11-721 (a)(2), the decision in *K.M.T.* did not resolve that distinct issue as a matter of *stare decisis*, as would be required to bind subsequent divisions. *Debruhl*, 38 A.3d at 298 ("This court has equated binding precedent under *M.A.P. [v. Ryan*, 285 A.2d 310 (D.C. 1971)] with the rule of *stare decisis*." (footnote omitted)). *See Richman Towers Tenants' Ass'n v. Richman Towers LLC*, 17 A.3d 590, 609-10 (D.C. 2011) (court is not bound by prior decisions "implicitly assuming" scope of statute).

CONCLUSION

The Court should rule that changes in the permanency goal provision of a neglect disposition from reunification to adoption or permanent guardianship are appealable either as final orders pursuant to D.C. Code § 11-721 (a)(1) or as orders having the practical effect of an injunction, pursuant to D.C. Code § 11-721 (a)(2).

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ADDENDUM A

50 State Survey of Law Regarding Appealability of Permanency Goal Changes

SURVEY OF STATE LAWS ON APPEALABILITY OF ORDERS CHANGING PERMANENCY GOALS

States That Allow Appeals as of Right

1. Alabama—*D.P. v. Limestone County Dep't of Human Res.*, 28 So.3d 759, 764 (Ala. Ct. Civ. App. 2009) ("This court has long considered dependency determinations to be final and appealable, but there is nothing magic about dependency determinations as opposed to permanency orders. . . . If the order addresses crucial issues that could result in depriving a parent of the fundamental right to the care and custody of his or her child, whether immediately or in the future, the order is an appealable order."); *D.B. v. Madison County Dep't of Human Res.*, 937 So.2d 535, 538-41 (Ala. Ct. Civ. App. 2006) (affirming permanency goal change from reunification to permanent relative placement).

2. Connecticut—*In re Victoria B.*, 829 A.2d 855, 866 n.15 (Conn. App. Ct. 2003) ("[A] decision . . . finding that further reunification efforts are not appropriate is an immediately appealable final judgment . . . ."); *In re Javon R.*, 858 A.2d 887, 891 (Conn. App. Ct. 2004) (same).

3. Florida—*In re T.F.*, 8 So.3d 474, 475 (Fla. Dist. Ct. App. 2009) (reversing permanency goal change from reunification to adoption).

4. Georgia— *In re M.H.*, 554 S.E.2d 616, 616 (Ga. Ct. App. 2001) (reversing permanency goal change); *In re S.A.W.*, 491 S.E.2d 441, 443 (Ga. Ct. App. 1997) ("A subsequent order of the court [*i.e.*, after the dispositional order] finding that reunification is not possible and further attempts at returning the child to the mother will be futile and disallowing any further panel review hearings in the case should be regarded with the same degree of finality as the placement order it modifies.").

5. Louisiana—La. Child. Code Ann. art. 710 (2011) (granting statutory right to appeal). *See, e.g., State ex rel. L.H.*, 951 So.2d 366, 367 (La. Ct. App. 2006) (reversing permanency goal change from reunification to adoption); *State ex rel. L.H.*, No. 2010-0645, 2010 La. App. Unpub. LEXIS 489, *2 (La. App. 1 Cir. Sept. 10, 2010) (affirming denial of child welfare agency's request to change permanency goal to reunification).

6. Maryland—*Compare In re Damon M.*, 765 A.2d 624, 627-28 (Md. 2001) (immediate appeal allowed as a matter of right where permanency goal is changed), *with In re Billy W.*, 874 A.2d 423, 433 (Md. 2005) (no right to appeal where status quo permanency goal is maintained).

7. Massachusetts—Mass. Gen. Laws ch. 119, § 29B (e) (2012) (granting statutory right of appeal).

8. Montana—*In re L.M.*, No. 03-288, 2003 Mont. LEXIS 787, *2 (Mont. Nov. 25, 2003) (affirming permanency plan of planned permanent living arrangement).

9. Nebraska—*Compare In re Marcus C.*, No. A-11-565, 2012 Neb. App. LEXIS 74, *1 (Neb. Ct. App. Apr. 3, 2012) (affirming permanency goal change from reunification to adoption/guardianship), *and In re Shelby L.*, No. A-02-900, 2003 Neb. App. LEXIS 109, *1 (Neb. Ct. App. Apr. 29, 2003) (affirming permanency goal change from reunification to guardianship with relatives), *with In re Rebeca B.*, 612 N.W.2d 289, 299 (Neb. 2000) (no right to appeal where status quo permanency goal maintained), *and In re Sarah K.*, 601 N.W.2d 780, 785 (Neb. 1999) (same), *and In re Tayla R.*, 767 N.W.2d 127, 135 (Neb. Ct. App. 2009) (order changing permanency goal from reunification to adoption not appealable where the order also called for services to be provided to the mother despite the goal change).

10. Oklahoma—Okla. Stat. tit. 10A, § 1-5-101 (2012) (granting statutory right to appeal). *See, e.g., In re BTW*, 241 P.3d 199, 201 (Okla. 2010) (affirming permanency goal change from reunification to long-term foster care).

11. Oregon—Or. Rev. Stat. § 419B.476 (7) (2012) (granting statutory right to appeal). *See, e.g., In re J.K.*, 175 P.3d 976, 979 (Or. Ct. App. 2007) (affirming permanency goal change from reunification to adoption); *State ex rel. Dept. of Hum. Servs. v. Shugars*, 145 P.3d 354, 367 (Or. Ct. App. 2006) (reversing goal change from reunification to adoption).

12. Pennsylvania—*In re H.S.W.C.-B*, 836 A.2d 908, 910-11 (Pa. 2003) (any order granting or denying a permanency goal change shall be "deemed final when entered"). *See e.g., In re D.P.*, 972 A.2d 1221, 1221 (Pa. Super. Ct. 2009) (affirming goal change from reunification to adoption or permanent foster care); *In re R.P.*, 956 A.2d 449, 450-51 (Pa. Super. Ct. 2008) (affirming goal change from reunification to adoption).

13. South Carolina—*South Carolina Dep't of Soc. Servs. v. Mother*, 720 S.E.2d 920, 926 (S.C. Ct. App. 2011) (reversing goal change from reunification to termination of parental rights).

14. Vermont—*In re L.S.*, 772 A.2d 1077, 1078 (Vt. 2001) (reversing change in permanency goal from reunification to long-term foster care); *In re D.H.*, 2008 Vt. Unpub. LEXIS 287, *1 (Vt. Oct. 2008) (discussing earlier summary affirmance of order denying goal change from long-term foster care to reunification).

15. Virginia—*Derr v. Va. Beach Dep't of Hum. Servs.*, No. 1264-09-1, 2009 Va. App. LEXIS 528, at *1-2 (Va. Ct. App. Dec. 1 2009) (affirming change in permanency goal from foster care to adoption); *Williams v. Hampton Dep't of Soc. Servs.*, No. 1017-02-1, 2002 Va. App. LEXIS 647, at *1 (Va. Ct. App. Oct. 29, 2002) (affirming trial court's order changing permanency goal from reunification to adoption).

16. Wyoming—*H.P. v. State*, 93 P.3d 982, 989 (Wyo. 2004) (holding that an order changing the permanency goal from reunification to termination of parental rights "certainly affects Mother's substantial rights as it has the effect of halting reunification attempts. Therefore, we will treat it as an appealable order.").

States That Allow Appeals as of Right Only When The Permanency Goal is Changed From Reunification to Adoption

1. North Carolina—*Compare In re Weiler*, 581 S.E.2d 134, 476-77 (N.C. Ct. App. 2003) (permanency goal change from reunification to adoption immediately appealable as of right), *and In re Z.J.T.B.*, 645 S.E.2d 206, 208 (N.C. Ct. App. 2007) (vacating order changing permanency goal from reunification to adoption), *with In re B.N.H.*, 611 S.E.2d 888, 890-91 (N.C. Ct. App. 2005) (refusing to extend *Weiler's* holding to any other types of goal change), *and In re N.G.*, No. COA06-101, 2006 N.C. App. LEXIS 2331, *3-4 (N.C. Ct. App. Nov. 21, 2006) (explaining that *Weiler* reminds binding law even after *B.N.H.*, and therefore, orders that change the permanency goal from reunification to adoption remain appealable).

States That Allow Appeals as of Right Only When The Permanency Goal is Changed to Long-Term Foster Care

1. Utah—*In re K.F.*, 201 P.3d 985, 996 (Utah 2009) (permanency goal change to long-term foster care immediately appealable; other types of goal changes cannot be appealed as of right).

States Where Permanency Goal Changes Cannot be Appealed as of Right, But Where Interlocutory Review is Available at The Discretion of The Appellate Court

1. Alaska—*Compare Nicole H. v. State Dept. of Health & Soc. Servs.*, No. S-11974, 2006 Alas. LEXIS 42, *19 (Alaska Apr. 5, 2006) ("Because permanency hearings commonly resolve interlocutory issues, orders resulting from such hearings typically cannot be appealed as a matter of right."), *with* Alaska CINA R. 21 (a) ("An appeal of a final judgment or order [in child welfare matters], or a petition for review of an interlocutory order or decision, may be taken [on an expedited basis]."), *and* Alaska App. R. 402 (b) (allowing discretionary interlocutory appeals where "(1) [p]ostponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or (2) [t]he order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or (3) [t]he trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or (4) [t]he issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest").

2. Arkansas—*See Ark. Dep't of Human Servs. v. Denmon*, 346 S.W.3d 283, 287 (Ark. 2009) (reversing an interlocutory permanency plan order on writ of certirori).

3. California—Cal. Welf. & Inst. Code § 366.26 (l)(1) (specifically authorizing the immediate review of permanency hearing orders by extraordinary writ). *See also Earl L. v. Super. Ct.*, 135 Cal. Rptr. 3d 368, 369 (Cal. App. 2011) (denying writ to challenge termination of reunification services); *Jennifer A. v. Super. Ct.*, 12 Cal. Rptr. 3d 572, 574 (Cal. App. 2004) (granting writ of mandate to challenge trial court order terminating reunification services); *Joyce G. v. Super. Ct.*, 45 Cal. Rptr. 2d 805, 807-08 (Cal. Ct. App. 1995) (discussing the procedures for review of permanency hearing orders by extraordinary writ).

4. Illinois—*See In re Faith B.*, 832 N.E.2d 152, 153 (Ill. 2005) ("'[D]ispositional' orders are final and appealable as of right, but orders setting permanency goals are ordinarily interlocutory, and thus appealable only at the discretion of the appellate court."); *In re Curtis B.*, 784 N.E.2d 219, 225 (Ill. 2002) ("Under Rule 306(a)(5), a party who wishes to petition the appellate court for leave to appeal a permanency order may do so . . . . In this way, permanency orders which need examination can, and will, be reviewed by the appellate court. The majority of cases, by not being subject to immediate interlocutory review, can proceed in a more timely fashion to determine the permanent placement status of the child.").

5. Iowa—*In re T.R.*, 705 N.W.2d 6, 11-12 (Iowa 2005) (holding that discretionary appeals of permanency review orders can be granted pursuant to Iowa App. R. 6.2).

6. Kentucky—*Compare J.O. v. Cabinet for Health & Fam. Servs.*, Nos. 2006-CA-002100-ME & 2006-CA-002138-ME, 2007 Ky. App. Unpub. LEXIS 278, *4-5 (Ky. Ct. App. Nov. 2, 2007) (order changing permanency plan goal from reunification to adoption is not a final order), *and J.H. v. Cabinet for Health & Fam. Servs.*, Nos. 2009-CA-000629-ME & 2009-CA-000630-ME, 2010 Ky. App. Unpub. LEXIS 349, *3-4 (Ky. Ct. App. Apr. 23, 2010) (order changing permanency plan from reunification to adoption not a final order), *with* Ky. Rev. Stat. Ann. § 620-155 (LexisNexis 2012) (allowing any interested party in a child abuse or neglect proceeding to appeal "in the manner provided in the Kentucky Rules of Civil Procedure"), *and* Ky. Civ. R. 76.20 (allowing for interlocutory appeal by leave of the appellate court "when there are special reasons for it.").

7. New Hampshire—In *In re Diane R.*, 777 A.2d 290, 291 (N.H. 2001) (holding that "there is no statutory right to *de novo* appeal from post-final dispositional orders" but explaining that "[t]he [parents] could have filed a petition for writ of certiorari in either the superior court or the supreme court to contest such orders"); *In re Bill F.*, 761 A.2d 470, 473 (N.H. 2000) (discussing the availability of a writ of certiarori to appeal an order directing the state to cease reunification efforts).

8. New Jersey—*See, e.g., In re D.H.*, 942 A.2d 41, 42-43 & n.1 (N.J. Super. Ct. App. Div. 2008) (granting petition for interlocutory appeal and reversing permanency goal of termination of parental rights and adoption).

9. New York—N.Y. Fam. Ct. Acts Law § 1112 (a) (2012) (permitting appeal as of right from any dispositional order and discretionary appeal of any other family court order). *See, e.g., In re Destiny EE.*, 918 N.Y.S.2d 614, 616-17 (App. Div. 2011) (affirming permanency goal change from reunification to adoption); *In re Sean S.*, 926 N.Y.S.2d 230, 231 (App. Div. 2011) (affirming permanency goal change from adoption to long-term foster care); *In re*

Roland Noele B., 886 N.Y.S.2d 831, 831-32 (App. Div. 2009) (affirming permanency goal change from reunification to adoption).

10. Washington—*Compare In re Chubb*, 762 P.2d 352, 353 (Wash. Ct. App. 1988) ("The dependency review orders are interlocutory in character, there being no right of appeal, only discretionary review."), *aff'd en banc*, 773 P.2d 851 (Wash. 1989), *with* Wash. App. R. 2.3 (b) (allowing discretionary review where (1) "[t]he superior court has committed an obvious error which would render further proceedings useless;" (2) "[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or limts the freedom of a party to act;" (3) "[t]he superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court;" or (4) the superior court certifies an interlocutory appeal).

States Where Permanency Goal Changes Cannot be Appealed as of Right, But Where Interlocutory Review is Available When Certified by The Trial Court

1. Colorado—*In re H.R.*, 883 P.2d 619, 620 (Colo. Ct. App. 1994) ("[P]ost-dispositional orders that do not terminate the right to parental custody are generally held not to be final and appealable."); Colo. App. R. 4.2 (a) (authorizing interlocutory appeals where certified by the trial court or stipulated by all parties to the case).

2. Indiana—*In re K.F.*, 797 N.E.2d 310, 314-15 (Ind. Ct. App. 2003) (holding that a permanency plan to terminate parental rights was not appealable because it was not a "final judgment"; parents were not prejudiced by the permanency plan because it did not determine whether termination of parental rights was proper); *In re C.S.*, No. 46A03-0910-JV-465, 2010 Ind. App. Unpub. LEXIS 716, *10-11 (Ind. Ct. App. Jun. 2, 2010) (same), *reported at*, 927 N.E.2d 967 (Ind. Ct. App. 2010); Ind. App. R. 14 (authorizing discretionary interlocutory appeals where certified by the trial court or provided by statute). *But see In re B.D.*, No. 49A02-1005-JC-630, 2010 Ind. App. Unpub. LEXIS 1712, *1 (Ind. Ct. App. Dec. 9, 2010) (affirming permanency goal change from reunification to adoption), *reported at* 939 N.E.2d 128 (Ind. Ct. App. 2010) (summary affirmance).

3. Kansas—*In re E.W.*, 220 P.3d 594, 596 (Kan. Ct. App. 2009) (change in permanency goal not appealable: "The right to appeal is purely statutory. Generally, this court has jurisdiction to hear an appeal of '[a] final decision in any action.' However, the Code specifically limits this right to certain enumerated orders listed in the statute. The Code does not provide a right to appeal from a permanency order." (citations omitted; alteration in original)); Kan. Stat. Ann. § 60-2102 (c) (2011) (interlocutory appeal allowed where certified by trial judge).

4. Maine—Me. Rev. Stat. tit. 22, § 4006 (2011) ("Orders entered under this chapter under sections other than section 4035 [*i.e.*, an order finding a child in jeopardy], 4054 [*i.e.*, an order terminating parental rights], or 4071 [*i.e.*, a medical treatment order] are interlocutory and are not appealable."); *In re Dorris G.*, 912 A.2d 572, 574 n.3 (Me. 2006) ("Both the cease reunification order and the permanency plan as to [the child] are interlocutory orders,

and are thus not appealable . . . ."); *accord In re Dustin C.*, 952 A.2d 993, 994 (Me. 2008). *See also* Me. App. R. 24 (c) (interlocutory appeal allowed where certified by trial court).

States Without Clearly Defined Law on Whether Permanency Goal Changes Are Appealable as of Right, But Where Interlocutory Review is Available at The Discretion of The Appellate Court

1. Delaware—Del. Sup. Ct. R. 42 (b), (d) (authorizing interlocutory appeal at the discretion of the Supreme Court in civil matters where "review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice"; parties must first seek certification from trial court, but certification not required for the Supreme Court to grant discretionary interlocutory review).

2. Idaho—Idaho Code Ann. § 16-1625 (1)(c) (2012) ("An aggrieved party may appeal . . . to the district court, or may seek a direct permissive appeal to the supreme court as provided by rules adopted by the supreme court . . . [from a]ny order subsequent to the adjudicatory decree that authorizes or mandates the department to cease reasonable efforts to make it possible to return to return the child to his home, including an order finding that the parent subjected the child to aggravated circumstances . . . .").

3. Michigan—Mich. Civ. R. 3.993 ("The following orders are appealable to the Court of Appeals by right: (1) an order of disposition placing a minor under the supervision of the court or removing the minor from the home, (2) an order terminating parental rights, (3) any order required by law to be appealed to the Court of Appeals, and (4) any final order. . . . All [other] orders [in child welfare proceedings] . . . are appealable to the Court of Appeals by leave.").

4. Minnesota—Minn. Civ. App. R. 105.01 ("Upon the petition of a party, in the interests of justice the Court of Appeals may allow an appeal from an order not otherwise appealable pursuant to Rule 103.03 except an order made during trial.").

5. Mississippi—Miss. App. R. 5 (a) (allowing interlocutory appeal "if a substantial basis exists for a difference of opinion on a question of law [including application of law to fact] as to which appellate resolution may: (1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or (2) Protect a party from substantial and irreparable injury; or (3) Resolve an issue of genuine importance in the administration of justice.").

6. South Dakota— S.D. Codified Laws § 15-26A-3 (6) (2012) (allowing for the appeal of "any other intermediate order made before trial . . . not [as] a matter of right but of sound judicial discretion . . .when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding"); *id.* § 15-26A-13 (discussing petitions for discretionary interlocutory review).

7. Tennessee—Tenn. App. R. 10 (allowing for discretionary interlocutory appeal if "(1) the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review; or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules").

8. Wisconsin—Wis. Stat. § 808.03 (2) (2012) (allowing for discretionary review of judgments and orders not appealable as a matter of right where review will "(a) [m]aterially advance the termination of the litigation or clarify further proceedings in the litigation; (b) [p]rotect the petitioner from substantial or irreparable injury; or (c) [c]larify an issue of general importance in the administration of justice").

States Without Clearly Defined Law on Whether Permanency Goal Changes Are Appealable as of Right, But Where Interlocutory Review is Available When Certified by The Trial Court

1. Hawaii—Haw. Rev. Stat. § 641-1(b) (allowing for interlocutory appeal by certification of trial court). *Cf. In re Doe*, 883 P.2d 30, 36 (Haw. 1994) (holding that family court's finding of jurisdiction and award of foster custody was immediately appealable: "The very nature of a juvenile proceeding entails an on-going case which does not result in a 'final' order, as that term is generally understood;" however, because of the constitutional interests involved, "an infringement upon parental custody rights is an appealable decision even though the requisite finality normally required for appeals is lacking. . . . [T]he manifest importance of the right of a parent to raise his or her child makes this exception to the finality rule necessary, despite any problems that may be presented by duplicative appeals."); *MDG Supply, Inc. v. Ellis*, 463 P.2d 530, 531 (Haw. 1969) (recognizing the right to appeal certain non-final orders under the collateral order doctrine).

2. New Mexico—N.M. Stat. § 39-3-4 (2012) (allowing interlocutory appeal where certified by the district court judge).

3. North Dakota—N.D. App. R. 47.1 (allowing for interlocutory appeals by certification of the trial court); *cf.* N.D. Cent. Code § 32-34-01 (2012) (authorizing the Supreme Court to issue a writ of mandamus to inferior courts).

4. West Virginia—W. Va. Fam. Ct. R. 28 (a) (authorizing appeals as of right from "final order[s]" of the family court); W. Va. Code § 58-5-2 (2012) (authorizing interlocutory appeals by certification of the trial court). *See also James M.B. v. Carolyn M.*, 456 S.E.2d 16, 19 (W. Va. 1995) ("With rare exception, the 'finality rule' is mandatory and jurisdictional. Thus, to be appealable, an order must be final as discussed above, must fall within a specific class of interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure, or must fall within a jurisprudential exception [*e.g.*, the collateral order doctrine]."); *Durn v. Heck's, Inc.*, 401 S.E.2d 908, 913 (W. Va. 1991) (recognizing a right to appeal in civil matters under the collateral order doctrine).

States Without Clearly Defined Law On Whether Permanency Goal Changes Are Appealable as of Right And Without a Clearly Defined Right to Interlocutory Review

1. Nevada—*Cf.* Nev. App. R. 3A (allowing for interlocutory appeals only of certain enumerated types of cases, which do not include child welfare matters); *Maria L. v. Eighth Judicial Dist. Court (In re N.S.)*, 130 P.3d 657, 659 (Nev. 2006) (granting writ of mandamus where district court erred in denying grandmother's guardianship petition and visitation and no other means of appellate review was available).

2. Rhode Island—*Cf.* R.I. Gen. Laws § 14-1-52 (allowing appeal only [f]rom any final decree, judgment, order, decision, or verdict of the family court"); R.I. Sup. Ct. art. I, R. 13 (authorizing extraordinary writs at the discretion of the Supreme Court).

States Where Permanency Goal Changes Are Not Appealable as of Right And That do Not Allow Interlocutory Review

1. Arizona—*Rita J. v. Ariz. Dep't. of Econ. Sec.*, 1 P.3d 155, 158 (Ariz. Ct. App. 2000) (refusing to allow appeal of permanency goal change approving concurrent goals of adoption and reunification; order not final and appealable); Ariz. Rev. Stat. § 12-2101 (6)-(8) (child welfare cases not listed among cases where interlocutory review is available).

2. District of Columbia—*In re K.M.T.*, 795 A.2d 688, 690-91 (D.C. 2002) (per curiam) (holding that permanency goal change orders are not final for purposes of D.C. Code § 11-721 (a)(1)); D.C. Code § 11-721 (d) (2012) (allowing the Superior Court judge to certify an appeal to the DCCA except in "a case in which a child, as defined in section 16-2301, is alleged to be delinquent, neglected, or in need of supervision").

3. Missouri—*In re L.E.C.*, 94 S.W.3d 420, 425 (Mo. Ct. App. 2003) ("It is clear that a change in the 'permanency plan' is not in itself a final adjudication."); *In re D.D.H.*, 151 S.W.3d 425, 426 (Mo. Ct. App. 2004) (order continuing permanency plan not appealable); Mo. Rev. Stat. § 512.020 (2012) (not including permanency review orders in list of matters appropriate for interlocutory appeal).

4. Ohio—*In re A.P.*, 964 N.E.2d 56, 59 (Ohio Ct. App. 2011) (order modifying a case plan not appealable because the "order is not one affecting a substantial right"); *In re T.M.*, Nos. CA2006-01-001, CA2006-01-004, 2006 Ohio App. LEXIS 6456, *1 (Ohio Ct. App. Dec. 11, 2006) (change in permanency goal from reunification to "a goal other than reunification" not appealable; "An order which affects a substantial right . . . [is] one which, if not immediately appealable, would foreclose appropriate relief in the future." "[I]t is clear that the trial court's order does not decide the case . . . [and] Appellants have not been foreclosed from appropriate relief in the future."); Ohio Rev. Code § 2505.02 (B)(2) (2012) (interlocutory appeal authorized in "special proceeding[s]" such as juvenile court hearings only where "affect[ing] a substantial right").

5. Texas—*In re M.A.H.*, No. 14-06-00190-CV, 2006 Tex. App. LEXIS 3741, *1-2 (Tex. App. May 4, 2006) (permanency hearing order not appealable because no final judgment of

termination had been entered); *In re A.J.*, No. 02-11-00442-CV, 2012 Tex. App. LEXIS 476, *1-2 (Tex. App. Jan. 19, 2012) ("[B]ecause the permanency hearing order is neither a final judgment nor an appealable interlocutory order, we dismiss this appeal for want of jurisdiction." (footnote omitted)); Tex. Civ. Prac. & Rem. Code § 51.014 (a) (2012) (not including permanency review orders in list of appealable interlocutory orders); *id.* § 51.014 (d-1) (prohibiting any discretionary interlocutory appeals in cases arising under the Family Code).

ADDENDUM B

Redacted Family Court Opinion: Adoption Case No. A-172-09 *et al.* (July, 7 2011)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY COURT
DOMESTIC RELATIONS BRANCH – ADOPTION

EX PARTE IN THE MATTER OF	)	
The Petition of E.A.	)	**Adoption Case No. A-172-09**
	)	**Adoption Case No. A-173-09**
FOR THE ADOPTION OF	)	
MINOR CHILDREN	)	**Judge Neal E. Kravitz**

EX PARTE IN THE MATTER OF	)	
The Petition of R.W. and A.W.	)	**Adoption Case No. A-115-09**
	)	**Adoption Case No. A-116-09**
FOR THE ADOPTION OF	)	
MINOR CHILDREN	)	**Judge Neal E. Kravitz**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONCERNING COMPETING ADOPTION PETITIONS

The parties tried these competing adoption petitions to the court on May 2, 3, 4, 9, 10, 23, 24, and 25, 2011. On June 1, 2011, the court informed the parties on the record that it intended to grant the petitions of A[redacted] and R[redacted] W[redacted] and to deny those of E[redacted] A[redacted]. The parties told the court at the hearing on June 1, 2011 that they wished to try to negotiate a settlement agreement containing a post-adoption contact agreement, *see* D.C. Code § 4-361 (2011), before the court issued its formal written findings of fact and conclusions of law. The court set the cases for a status hearing on June 14, 2011 to give the parties time to meet with a mediator, but at the hearing on June 14, 2011 the parties notified the court that their efforts at mediation had been unsuccessful. The court accordingly issued a "short order" on June 21, 2011 waiving the consent of the biological parents to adoption by the W[redacted]s, granting the W[redacted]s' petitions, and denying Ms. A[redacted]'s petitions. The court's formal written findings of fact and conclusions of law follow below. *See* Super. Ct. Adoption R. 52(a).

FINDINGS OF FACT

1. The minor children at issue in this case are A[redacted] L[redacted] (dob [redacted]) (now four years old) and T[redacted] L[redacted] Jr. (dob [redacted]) (now three years old). T[redacted] L[redacted] Sr. and A[redacted] H[redacted] are the biological parents of both children.

2. The Child and Family Services Agency ("CFSA") removed the children from the care and custody of their biological parents on March 24, 2008 following the arrest of both parents for a domestic violence incident in the family's home. An investigation led to findings of neglect, and CFSA placed the children in foster care with A[redacted] and R[redacted] W[redacted].

3. CFSA convened a family team meeting on March 26, 2008, two days after the removal of the children from their biological parents. Mr. L[redacted] and Ms. H[redacted] were present at the meeting, as were two of Mr. L[redacted]'s sisters, K[redacted] A[redacted]-R[redacted] and E[redacted] A[redacted] K[redacted] A[redacted]-R[redacted] volunteered to be a family placement for the children, and E[redacted] A[redacted] indicated a willingness to serve as a backup family placement in the event K[redacted] was unable to care for the children.

4. The government filed neglect petitions in Case Nos. N-234-08 (T[redacted] Jr.) and N-235-08 (A[redacted]) on March 25, 2008. The court held an initial hearing on March 27, 2008, and the biological parents stipulated to findings of neglect in both cases on April 23, 2008. At a disposition hearing on May 1, 2008, Magistrate Judge Tara Fentress ordered the children committed to the custody of CFSA and designated reunification with the biological parents as the permanency goal in each case. The magistrate judge ordered that the biological parents be permitted supervised visitation with the children and directed that the biological parents participate in a range of rehabilitative services, including individual therapy, couples therapy, drug testing, and parenting and domestic violence classes.

5. CFSA determined within a few weeks of the initial family team meeting that K[redacted] A[redacted]-R[redacted] was ineligible to be licensed as a kinship care foster parent because of her husband's criminal record. However, neither Ms. A[redacted] nor the biological parents contacted CFSA or its contract agency, Seraaj Family Homes, to remind the social workers of Ms. A[redacted]'s willingness to serve as a backup caretaker for the children, and no one from either agency got in touch with Ms. A[redacted]. The children thus continued in traditional foster care with the W[redacted]s.

6. The permanency goal remained reunification with the biological parents for more than a year following the removal of the children. At a permanency hearing on May 14, 2009, however, Magistrate Judge Fentress found that the biological parents had made insufficient progress toward reunification, and she changed the permanency goal to adoption.

7. Throughout the nearly 14-month period in which the permanency goal was reunification, the W[redacted]s maintained a positive relationship with the biological parents and cooperated fully with the agency's permanency plan, expecting the children's stay in their home to be only temporary. Once the magistrate judge changed the permanency goal to adoption, however, the W[redacted]s decided to try to adopt the children themselves. With the support of CFSA and the guardian *ad litem*, the W[redacted]s filed petitions on June 12, 2009 in Case Nos. A-115-09 and A-116-09 to adopt both children.

8. The biological parents were very upset by the change in the permanency goal from reunification to adoption. Mr. L[redacted] again suggested to the agency that E[redacted] A[redacted] would be an appropriate caretaker for the children, and, on October 9, 2009, Ms. A[redacted] filed petitions in Case Nos. A-172-09 and A-173-09 to adopt both children. Ms. A[redacted] also requested visitation with the children, and the magistrate judge granted Ms. A[redacted] weekly supervised visits through the neglect cases.

9. Mr. L[redacted] and Ms. H[redacted] have articulated an unequivocal preference that the children be adopted by Ms. A[redacted] rather than by the W[redacted]s. Mr. L[redacted] and Ms. H[redacted] feel strongly that it is in the children's best interest to remain in the family and to be raised by Ms. A[redacted], the children's paternal aunt and effectively the matriarch of Mr. L[redacted]'s family. Both biological parents have formally consented to the adoption of the children by Ms. A[redacted]. They have withheld their consent to adoption by the W[redacted]s.

10. The children have made remarkable progress physically, psychologically, and developmentally since their removal from the biological parents and placement with the W[redacted]s in March 2008. A[redacted] was 16 months old at the time of her removal. Born prematurely at 26 weeks gestation, she was underweight and developmentally delayed when placed with the W[redacted]s, and she suffered from several serious medical conditions: asthma, chronic lung disease, pneumonia, esophageal reflux, obstructive sleep apnea, and a right eye cataract. The biological parents had largely neglected A[redacted]'s extensive medical needs, and it fell to the W[redacted]s to make sure those needs were addressed. Mrs. W[redacted] took five months of family leave from her job to care for A[redacted], and with the help of a large and varied array of medical professionals, she and Mr. W[redacted] implemented a series of treatment plans that have enabled them to nurse A[redacted] back to health over the past three-plus years. A[redacted] has made significant strides while in the care and custody of the W[redacted]s; her medical conditions have stabilized, and as of approximately a year ago, she had reached the 50th percentile among children her age in an assessment of her cognitive development and abilities.

11. T[redacted] Jr. was three months old at the time of his removal from the biological parents. He had been born after a full-term pregnancy, and he did not suffer from anywhere near the range of serious medical conditions that afflicted his sister. He nevertheless weighed only

seven pounds at the time of his removal, and he had asthma and was diagnosed as a "failure to thrive" due to insufficient caloric intake. The biological parents had never once taken him to a doctor or other medical professional since his release from the hospital a day or two after his birth. This all changed dramatically once T[redacted] Jr. was placed with the W[redacted]s. Over the past three-plus years, the W[redacted]s have obtained all necessary medical treatment for T[redacted] Jr. and have carefully monitored his asthma and his weight. T[redacted] Jr. is now an active and healthy child, and approximately a year ago he was assessed at the 75th percentile in cognitive development among children his age.

12. Despite the marked improvements in the medical conditions of both children, consistent at-home care and constant vigilance by adult caretakers are essential to the children's physical well-being and to their continued cognitive, social, and psychological development. In particular, the children's pediatrician, Dr. M[redacted] W[redacted], testified forcefully at trial that both children still suffer from asthma and face potentially fatal consequences if they do not take their asthma medication or are not otherwise consistently monitored in accordance with treatment plans she has prescribed.

13. Mr. and Mrs. W[redacted] are 48 and 49 years old, respectively. They have been married to each other since 1986 without any periods of separation. They have two biological children of their own who live in their home: T[redacted] (age 25) and A[redacted] (age 19). Mr. W[redacted] has been employed full-time as a meat cutter for Giant Food for 28 years. Mrs. W[redacted] is a college graduate who has worked since 2000 as a teacher's assistant in a pre-kindergarten class in the Prince Georges County Public Schools. T[redacted] is employed teaching three-year-olds at an early learning center while she attends college at Prince Georges County Community College. The W[redacted]s own their own home in a Maryland suburb of the District of Columbia. Their

house has ample room inside for A[redacted] and T[redacted] Jr. and a pleasant yard for outdoor play. They have made arrangements for T[redacted] to care for the children in the event anything ever happens to prevent them from performing their parental duties.

14. By all accounts, the W[redacted]s have done a phenomenal job as caretakers for A[redacted] and T[redacted] Jr. over the past three-plus years. In addition to their striking success in monitoring and arranging appropriate care for the children's medical conditions, the W[redacted]s have welcomed the children into their home and treated A[redacted] and T[redacted] Jr. as if they were their own children. The W[redacted]s are attentive and nurturing toward the children, and their love for them is evident to all who have worked with the family. The children view the W[redacted]s as their parents and T[redacted] and A[redacted] as their siblings.

15. Both A[redacted] and T[redacted] Jr. have strong attachments to the W[redacted]s, and in particular to Mrs. W[redacted], their primary caregiver. As determined by an attachment assessment conducted in March 2010 by Dr. J[redacted] V[redacted], a child psychologist retained by the W[redacted]s, A[redacted] has a "secure attachment" to Mrs. W[redacted], and T[redacted] Jr. has an "anxious-avoidant attachment."

16. A secure attachment is the strongest type of attachment recognized in the field of child psychology -- the optimal relationship between child and caretaker. Testing conducted by a team of psychologists at the [redacted], where Dr. V[redacted] works, showed that A[redacted] is very relaxed in Mrs. W[redacted]'s presence, that the interactions between the two are warm and nurturing, and that A[redacted] has a strong internalized sense of Mrs. W[redacted] as a reliable source of comfort for her in times of distress -- a sense that enables A[redacted] to explore the world around her with confidence that Mrs. W[redacted] will be there for her whenever necessary.

17. An anxious-avoidant attachment is the second strongest recognized type of attachment. Although it is not considered a secure attachment, an anxious-avoidant attachment is "organized" and thus still reflects a highly positive relationship between child and caretaker. In this regard, testing at the [redacted] showed that T[redacted] Jr. and Mrs. W[redacted] had playful interactions with each other; that T[redacted] Jr. was able to explore his surroundings on his own, while checking in with Mrs. W[redacted] on occasion (returning to base); and that while separation from Mrs. W[redacted] caused greater stress for T[redacted] Jr. than it would for a child with a secure attachment, Mrs. W[redacted] was able to reorganize and soothe T[redacted] Jr. upon his return to her. Dr. V[redacted] thus described T[redacted] Jr.'s anxious-avoidant attachment to Mrs. W[redacted] as a clearly defined and established attachment relationship between child and caretaker. Dr. V[redacted] testified that an anxious-avoidant attachment can mature over time into a secure attachment, and he said that particularly in light of T[redacted] Jr.'s tender age at the time of the testing (27 months), it was possible that T[redacted] Jr.'s attachment to Mrs. W[redacted] had already done so in the 14 months since the March 2010 testing at the [redacted].

18. As discussed in greater detail in the analysis section that follows, evidence at trial showed that the disruption of a child's strong primary attachment to a caretaker poses substantial risks of harm to the child's short- and long-term development.

19. E[redacted] A[redacted] has been employed as a special police officer at the Smithsonian Institution National Museum of Natural History for 19 years. She also has been licensed as a therapeutic foster parent since March 2010. She owns a five-bedroom house in a quiet residential community in Prince Georges County, Maryland, and she lives there with her 20-year-old son, D[redacted], and A[redacted] H[redacted], Ms. H[redacted]'s youngest child (thirteen months old), who has been placed with Ms. A[redacted] in foster care since the age of four months. Ms. A[redacted] has two

older adult children of her own who have moved out of the house and no longer live with her. She has raised all of her children virtually alone, as the children's father has never played a significant role in the children's lives or supported the children financially. Evidence showed that A[redacted] has done very well in Ms. A[redacted]'s care.

20. Ms. A[redacted] has had supervised visits with A[redacted] and T[redacted] Jr. for one hour per week over much of the past two years. The children are excited to see Ms. A[redacted] when they arrive for the visits, and the children's interactions with Ms. A[redacted] during the visits are appropriate and positive. A court-ordered bonding study conducted in July 2010 by Dr. S[redacted] F[redacted] found that Ms. A[redacted] ably directs the children's play, sets appropriate limits, has a nice manner with the children, and is attuned to their needs.

21. No formal assessment of the children's attachments to Ms. A[redacted] has been conducted. However, evidence at trial, both lay and expert, clearly established that the children's primary attachments are to the W[redacted]s, and in particular to Mrs. W[redacted] -- not to Ms. A[redacted] or to either of the children's biological parents.

ANALYSIS AND CONCLUSIONS OF LAW

Governing Legal Principles

Under District of Columbia law, a petition for adoption may not be granted unless the parents of the prospective adoptee consent to the adoption or the court finds, after a hearing, that the parents are withholding their consent "contrary to the best interest of the child." D.C. Code §§ 16-304(b), 16-304(e) (2001). In determining whether a child's parents are withholding their consent contrary to the best interest of the child, the court must weigh the factors considered in termination of parental rights proceedings under D.C. Code § 16-2353(b) (2001). *In re T.W.M.*, Nos. 10-FS-17, 10-FS-867, 10-FS-882, 10-FS-920, & 10-FS-966, slip op. at 7-8 (D.C. April 28,

2011). Those factors, to the extent relevant here, are: "(1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages; (2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child; [and] (3) the quality of the interaction and interrelationship of the child with his or her parent[s], siblings, relative[s], and/or caretakers, including the foster parent[s.]" D.C. Code § 16-2353(b).[1] The court's finding that the parents are withholding their consent contrary to the child's best interest must be by clear and convincing evidence. *In re J.S.R.*, 374 A.2d 860, 964 (D.C. 1977). Clear and convincing evidence is "evidence that will 'produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" *In re T.J.*, 666 A.2d 1, 17 n.17 (D.C. 1995) (quoting *District of Columbia v. Hudson*, 404 A.2d 175, 179 n.7 (D.C. 1979) (en banc)).

The analysis takes on a constitutional overlay when there are competing adoption petitions and the biological parents express an unequivocal preference for one of the potential custodians. Because biological parents have a fundamental liberty interest in directing the upbringing of their child, *In re T.J.*, 666 A.2d at 11, the court must give their preference "weighty consideration" and "can terminate the parents' right to choose only if the court finds by clear and convincing evidence that the placement selected by the parents is clearly not in the

[1] Other factors set forth in the statute, but not relevant to these cases, are: "(3A) the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child; (4) to the extent feasible, the child's opinion of his or her own best interests in the matter; and (5) evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided pursuant to section 106(a) of the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977 (D.C. Law 2-22; § 4-1301.06(a)). Evidence of continued drug activity shall be given great weight." D.C. Code § 16-2353(b).

child's best interest." *In re T.W.M.*, slip op. at 6-7 (quoting *In re T.W.M.*, 964 A.2d 595, 604 (D.C. 2009)); *see also In re T.J.*, 666 A.2d at 16. The parties who lack the parents' consent have the burden of proof. *In re C.A.B.*, 4 A.3d 890, 900-01 (D.C. 2010); *In re T.W.M.*, 964 A.2d at 604.

Ms. A[redacted] argued at trial that the preference of the biological parents could properly be overcome only through a showing that she is unfit to care for the children. This is an inaccurate statement of the law. The Court of Appeals has made clear that even "a parent's choice of a *fit* custodian for the child . . . can be overcome . . . by a showing, by clear and convincing evidence, that the custodial arrangement and preservation of the parent-child relationship is clearly contrary to the child's best interest." *In re T.J.*, 666 A.2d at 11 (emphasis added).

Ms. A[redacted] also argued that the failure of CFSA and Seraaj Family Homes to contact her in the spring of 2008 when her sister, K[redacted] A[redacted]-R[redacted], was determined to be ineligible for a foster parent license must be considered in determining whether the W[redacted]s have satisfied their burden of proof. This, too, is an inaccurate statement of the law. As the Court of Appeals reiterated in an opinion issued just a few weeks ago, while these cases were in trial, a child "cannot be punished for the alleged wrongs of the bureaucracy," and "the best interests of the child may compel terminating parental rights regardless of the defaults of public agencies." *In re R.E.S.*, No 08-FS-451, slip op. at 20 (D.C. May 19, 2011) (quotations omitted).

In sum, therefore, the court must give weighty consideration to the clearly stated preference of Mr. L[redacted] and Ms. H[redacted] that the children live with Ms. A[redacted], and it may grant the W[redacted]s' petitions for adoption only if it finds that the W[redacted]s have established by clear and convincing evidence (1) that Mr. L[redacted] and Ms. H[redacted] are withholding their consent to adoption by the W[redacted]s contrary to the best interests of A[redacted] and T[redacted] Jr., and (2) that

placement of A[redacted] and T[redacted] Jr. with Ms. A[redacted] is clearly not in the children's best interests.

Discussion

The court will begin its analysis by addressing the three relevant termination-of-parental-rights factors set forth in D.C. Code § 16-2353(b).

(1) The child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages.

The W[redacted]s presented compelling expert testimony from Drs. V[redacted] and F[redacted] on the critical importance of attachment theory to human development, the strength of the children's primary attachments to the W[redacted]s, and the nature of the harm A[redacted] and T[redacted] Jr. would likely suffer were their attachments to the W[redacted]s severed. Dr. V[redacted] described attachment theory as "the most salient variable in child development" and explained that it is central to a person's psychological, social, and cognitive growth. According to Dr. V[redacted], strong primary attachments like those A[redacted] and T[redacted] Jr. have with Mrs. W[redacted] provide a child with a sense of physical and emotional safety and enable the child to venture out and explore the world; a strong primary attachment formed in early childhood, Dr. V[redacted] explained, sets the "template for all other relationships for one's social and emotional development" throughout one's life.

Perhaps more important to the court's consideration, Drs. V[redacted] and F[redacted] testified that a disruption of the children's attachments with the W[redacted]s would pose unacceptably grave risks of harm to the children -- that the removal of the children from the W[redacted]s' care would likely lead, both immediately and in the long term, to anger, despair, oppositional behavior, depression, detachment, an inability to form new attachments and relationships, and regression in

psychological, intellectual, and social development. Dr. V[redacted] testified that all of these already-substantial risks are heightened where, as here, the children have serious medical conditions, a history of developmental delays, and special vulnerabilities due to prior neglect. Dr. V[redacted] conceded that a positive environment in Ms. A[redacted]'s home could have a mitigating effect on the risks of harm, but he vigorously maintained that a positive alternative environment cannot prevent the harms likely to be caused by a severing of a strong primary attachment. Dr. C[redacted] M[redacted], a clinical psychologist called as an expert by the biological parents, testified that children with strong attachments tend to be the most resilient to changes in their lives, and he added that adopted children sometimes experience a loss of a sense of family identity. However, Dr. M[redacted] made no challenge to the attachment study conducted by Dr. V[redacted] and the other psychologists at the [redacted], and he agreed that severing a child's strong primary attachment to a caretaker poses significant risks of short- and long-term harm to the child -- risks that are more severe than the loss of a sense of family identity occasionally experienced by an adopted child.

The court found the expert testimony of Drs. V[redacted], F[redacted], and M[redacted] very persuasive. In the three-plus years the children have been in the W[redacted]s' care, the children have formed strong attachments to the W[redacted]s, and those attachments have enabled the children to reverse their poor pre-removal developmental trajectories and make enormous progress cognitively, psychologically, and socially. A disruption of the attachments would pose a significant risk that all or most of the progress of the past three-plus years would be lost and that the children would regress to their pre-removal developmental trajectories. In this regard, the Court of Appeals has repeatedly noted the importance of stability and continuity when assessing a child's best interests and has made clear that "a stable and desired environment of long standing should not be lightly set aside." *See In re T.W.M.*, slip op. at 9-10 (citing *In re L.L.*, 653 A.2d 873, 883 (D.C. 1995)

("[I]t would be ruthless beyond description to take a child out of a loving home, when she had lived at that home for a substantial period of time as a result of her biological parents' inability or unwillingness to care for her."); *S.S. v. D.M.*, 597 A.2d 870, 883 n.35 (D.C. 1991) ("[T]he interests of the natural parent cannot overcome the interests of the child in physical and mental health and continuity of care.")). This is a particularly poignant concern here, where the children have spent nearly their entire lives in the W[redacted]s' care; even for A[redacted], who was sixteen months old when she was removed from her parents and placed with the W[redacted]s, the W[redacted]s' home is virtually all she has ever known (and certainly virtually all she can remember).

(2) The physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child.

The evidence showed that the W[redacted]s are in good physical,[2] mental, and emotional health and that their strengths in all of these areas have enabled them to provide the consistent love and support the children have so desperately needed. At the same time, the evidence also showed that Ms. A[redacted] is a forceful, healthy, and competent person who has had significant success as a parent, family leader, and government employee. Although Ms. A[redacted] would have to devise a safe way of managing the wishes of the biological parents to maintain relationships with A[redacted] and T[redacted] Jr., the court does not doubt Ms. A[redacted]'s fitness as a caretaker for these two young and vulnerable children.

Most decisive to the court's consideration, though, are the physical, mental, and emotional needs of A[redacted] and T[redacted] Jr. For the reasons stated in the preceding section, it is essential to each child's ability to continue to make progress in all of these areas that the

[2] Mr. W[redacted] does have diabetes and hypertension. However, Mr. W[redacted] sees a doctor for these conditions every two months, and the court credits his testimony that both conditions are closely monitored and under control.

continuity of care provided by the W[redacted]s be maintained and that the child's primary attachment to Mrs. W[redacted] be preserved.

(3) The quality of the interaction and interrelationship of the child with his or her parents, siblings, relatives, and/or caretakers, including the foster parents.

The children have positive interactions with all parties involved in the litigation. Drs. F[redacted] and V[redacted] observed the children interact with the W[redacted]s in several different settings and found that the W[redacted]s are emotionally attuned to the children and on their same wavelength, that the children seek proximity with the W[redacted]s, and that the W[redacted]s set appropriate limits. Dr. F[redacted] also observed the children interact with Ms. A[redacted] and the biological parents and found that they too are attuned to the children, set appropriate limits, and are loving and nurturing. The evidence also showed that A[redacted] and T[redacted] Jr. have close sibling-like relationships with the W[redacted]s' two biological children and that A[redacted] and T[redacted] Jr. also enjoy seeing their half-brother, A[redacted], during their weekly visits with Ms. A[redacted].

It is only Mrs. W[redacted], however, to whom A[redacted] and T[redacted] Jr. have been found to have strong primary attachments. Given the limited time the children have spent with Ms. A[redacted] and the biological parents in the past three-plus years, it is inconceivable that the children have meaningful attachments to any of them.

* * * * * *

The court has given weighty consideration to the clearly stated preferences of the biological parents. The court has great respect for the love Mr. L[redacted] and Ms. H[redacted] have for A[redacted] and T[redacted] Jr. and for their desires to keep the children within their biological family. As to each child, however, the court ultimately concludes that the risks of harm from an order granting Ms. A[redacted]'s adoption petitions are simply too great to accept, notwithstanding the

constitutional presumption favoring the preferences of the biological parents and the court's generally favorable view of Ms. A[redacted] and her caretaking abilities. As to each child, the court thus finds, by clear and convincing evidence, that Mr. L[redacted] and Ms. H[redacted] are withholding their consent to adoption by the W[redacted]s contrary to the child's best interests and that placement of the child with Ms. A[redacted] is clearly not in the child's best interests.

CONCLUSION

For the foregoing reasons, it is this 7th day of July 2011

ORDERED that the W[redacted]s' petitions to adopt A[redacted] and T[redacted] Jr., in Case Nos. A-115-09 and A-116-09, are **granted**. It is further

ORDERED that Ms. A[redacted]'s petitions to adopt A[redacted] and T[redacted] Jr., in Case Nos. A-172-09 and A-173-09, are **denied**. It is further

ORDERED that the cases shall remain set for a status hearing on September 26, 2011 with the expectation that they will be ready for the entry of final adoption decrees at or before that time.

Neal E. Kravitz, Associate Judge
(Signed in Chambers)

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Brief Amicus Curiae of The Legal Aid Society of The District of Columbia in Support of Appellants** to be delivered by first-class mail, postage prepaid, the 6th day of July, 2012, to

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