***[Please note: This is a “losing” petition for rehearing in Adoption of Helen before the SJC. We did, however, convince the SJC to delete a very damaging footnote, see Argument I. The document was created using WordPerfect; please excuse formatting issues. Beware old, outdated law!]***

***[Counsel’s Letterhead]***

IMPOUNDED

July 9, 1999

The Honorable Herbert P. Wilkins

Supreme Judicial Court

1400 New Courthouse

Boston, MA 02108

Re: Adoption of Helen, SJC-07947 and SJC-07875

Dear Chief Justice Wilkins:

This Court has, in a footnote to the above opinion, profoundly altered the landscape of child welfare law in this Commonwealth by denying party status and standing to children in proceedings to dispense with consent to adoption. This was done without briefing of the issue or argument to this Court, without any indication to the parties that the Court was concerned with this issue, and without any supportive legal reasoning by this Court for such a result. As such, it blindsided the parties and the child welfare bar as a whole. This footnote is the most significant child welfare ruling of this decade, and will result in the immediate deprivation of children’s rights to be heard at the trial and appellate levels. For this and other reasons, we write as attorneys for the appellant mother (“Mother”) to request, pursuant to Rule 27 of the Massachusetts Rules of Appellate Procedure, that this Honorable Court reconsider and re-hear her appeals in this matter, issued as Adoption of Helen, Docket Nos. SJC-07875 and SJC-07947 (June 29, 1999), and cites the following grounds:

**A. This Court’s statement that children are not parties to proceedings to dispense with parental consent to adoption has no foundation in statute, case law or public policy.**

In a footnote to Adoption of Helen, this Court states:

The child purports to join in the appeal of the judgment dispensing with the mother’s consent to adoption and from the denial of the mother’s request for a review and redetermination hearing. Because the child was not a party to the proceeding dispensing with consent or a party to the mother’s petition for review and redetermination, the child does not have standing to challenge these decisions.

Adoption of Helen, Slip Op. at 2 n. 2. This Court’s assertion that a child is not a party to proceedings under G.L. c. 119, § 26 and lacks standing to appeal adverse orders thereunder (i) contradicts the plain language of c. 119, (ii) contravenes prior rulings by this Court, and (iii) has serious public policy ramifications that transcend the instant case. Here, this determination deprived the Child of a meaningful opportunity to be heard and prevented this Court from issuing a ruling that is truly in the Child’s best interests.

The Child filed a notice of appeal from the decree dispensing with consent. (A:230).[[1]](#footnote-1) Although the Child did so after the 60-day limit set forth in Rule 4(a) of the Massachusetts Rules of Appellate Procedure, she was permitted to file the notice late by a single justice of the Appeals Court. (A:226, 229). Accordingly, an appellate court of this Commonwealth determined that the Child had standing to challenge the decree dispensing with consent. The Child filed a timely notice of appeal from the order denying mother’s petition for a review and redetermination.[[2]](#footnote-2) (A:225).

The subject child in a care and protection proceeding or proceeding to dispense with consent under c. 119, § 26 is a party to such proceedings according to the express language of the statute, and therefore has standing to appeal adverse rulings thereunder. Chapter 119, § 27 provides, in relevant part:

A *child* . . . may appeal from the adjudication of the court and from any order of commitment made as a result of the adjudication under the provisions of section twenty-six to the appeals court. . . . The court shall notify the *child* . . . of the right to appeal at the time of the adjudication and also at the time of commitment.

G.L. c. 119, § 27 (emphasis added). The statute expressly grants standing to a child to appeal from adverse orders under c. 119, § 26. In the instant matter, both the decree dispensing with consent *and* the order denying mother’s petition for review and redetermination arose under c. 119, § 26 -- the former under c. 119, § 26(4), the latter under c. 119, § 26 (last para.). Accordingly, the Child had standing to appeal both orders.

Other portions of c. 119 make clear that the child is a party to proceedings under that chapter, with standing to petition the trial court and appeal adverse orders. The final paragraph of c. 119, § 26 gives the child standing to petition the court for a “review and redetermination” of an order under that section. Chapter 119, § 28 expressly grants standing to the child to commence an action for child support during the pendency of an action under c. 119. The child is also expressly given standing to appeal an adverse order of the court entered pursuant to the third paragraph of c. 119, § 29B (substitute care reviews). Finally, the child has a right to the appointment of counsel in matters under c. 119 pursuant to c. 119, § 29. The right to counsel would be meaningless if child’s counsel lacked party standing to participate in the proceedings and appeal adverse orders. See Adoption of Erica, 426 Mass. 55, 63 (1997) (child is entitled to “zealous” representation).

This Court has recently heard appeals filed by children in proceedings to dispense with consent. In Care and Protection of Manuel, 428 Mass. 527 (1998),[[3]](#footnote-3) in which the eponymous child was the appellant, this Court held that the child has a right to a “72-hour hearing” under c. 119, § 24. According to the Court, “[t]he parties, *including the child named in the petition*, have the right to be heard[.]” Id. at 533; see Adoption of Erica, 426 Mass. 55 (1997) (appeal by child); Adoption of Inez, 428 Mass. 717 (1999) (petition of child for further appellate review).

Failure to acknowledge the child’s status as a party and standing to challenge adverse orders has serious policy implications. Primarily, it will deprive children of a voice in proceedings with important constitutional ramifications. See, generally, Santosky v. Kramer, 455 U.S. 745 (1982). The child, the parents and DSS often have different positions in child welfare cases. Therefore, no other party can be counted upon to advocate zealously for the child’s position. Without party status, the child’s voice will go unheard. Failure to acknowledge the child’s position violates the child’s right to due process. See Care and Protection of Manuel, 428 Mass. at 535 (child has “vital interests at stake” in these proceedings). Moreover, the child loses the right to effective assistance of counsel, guaranteed under c. 119, § 29, if child’s counsel lacks standing to petition the court for relief or challenge adverse rulings. See Adoption of Erica, 426 Mass. at 63.

In the instant case, the Court’s failure to acknowledge the appellant status of the Child or Child’s arguments on appeal deprived the Child of a meaningful opportunity to be heard. The Child, age six, wanted contact with her mother, with whom she had lived for the first four and one-half years of her life. (T:475, 499). She also wanted an opportunity to be reunited with her mother either pursuant to a new trial or a review and redetermination. Brief of Child at 7, 42. Footnote 2 of the opinion makes clear that this Court denied the Child a meaningful opportunity to present her arguments to the Court and challenge the trial court’s decision, and denied Mother the benefit of having a unity of position with the Child. Due process, the right to effective assistance of counsel, and proper concern for the best interests of the child require that this Court re-hear this appeal to allow for meaningful consideration of her arguments.

**B. This Court’s statement that a review and redetermination of a decree dispensing with consent is not permitted is contrary to the plain language of the statute.**

This Court stated that c. 119, § 26 allows for review and redetermination of care and protection decisions but not of decrees dispensing with parental consent. Adoption of Helen, Slip Op. at 9.[[4]](#footnote-4) This language is contrary to the express language of the statute, and deprives the parties of an essential mechanism to review the developing needs of the child. The final paragraph of c. 119, § 26 provides:

On *any* petition filed in any court pursuant to this section, the department, parents, person having legal custody of, counsel for a child, the probation officer, guardian or guardian ad litem may petition the court not more than once very six months for a review and redetermination of the current needs of such child whose case has come before the court, except that any

person *against whom* a decree to dispense with consent to adoption has been entered pursuant to [§ 26(4) or c. 210, § 3(b)] shall not have such right of petition for review and redetermination.

G.L. c. 119, § 26 (emphasis added). The statute specifies that the right to review and redetermination applies to *any* petition filed under section 26. The right is not, as the Court suggested, limited to petitions for care and protection. Slip Op. at 9. It applies as well to petitions to dispense with parental consent to adoption filed under c. 119 (as amended by c. 303, § 2(4) of the Acts of 1992), rather than under G.L. c. 210, § 3.

The decree dispensing with consent in the instant case was entered pursuant to c. 119, § 26(4), rather than pursuant to c. 210, § 3(b). (A:119, 134). Insofar as the right to a review and redetermination attaches to *any* petition under c. 119, § 26, such a right attaches to a petition dispensing with consent filed under § 26(4), as in the instant case.

In addition, the final clause quoted above excludes from the right to petition for review and redetermination any party “against whom” a decree dispensing with consent has entered.[[5]](#footnote-5) A decree dispensing with consent is never entered “against” a child. Thus, the statute does not exclude a child (or DSS, a probation officer or guardian ad litem for that matter) from bringing such a petition after a parent’s right to consent has been dispensed with. This Court’s statement that there is no right to a review and redetermination *for any party* after entry of a decree dispensing with consent improperly excludes the child and other statutorily enumerated parties from such a review, contrary to the plain language of the statute.

Policy considerations require that parties have the ability to seek review and redetermination decrees dispensing with consent. The child’s needs may change; the pre-adoptive home selected by DSS may lose interest; or, the need for sibling contact may require a shifting of placements. A ruling that was in the best interests of the child after trial may no longer be in that child’s best interests six months later. The child (or DSS, a guardian ad litem or a probation officer) must be able to bring these developments to the trial court’s attention.

**C. This Court affirmed the termination of visitation rights based, in part, on an improper interpretation of language in Santosky v. Kramer.**

On appeal, Mother and Child argued that a decree dispensing with a parent’s right to consent to adoption does not automatically terminate visitation rights. This Court disagreed, and for support cited Petition of Catholic Charitable Bureau of the Archdiocese of Boston, Inc. to Dispense with Consent to Adoption, 392 Mass. 738, 741 (1984), for the proposition that “[t]ermination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.” Slip Op. at 11.

Use of this quote from Petition of Catholic Charitable Bureau is misguided, and imports into the Massachusetts legislative scheme a concept of termination of parental rights otherwise absent from the statutes. The quote from Petition of Catholic Charitable Bureau originates in Santosky v. Kramer, 455 U.S. 745, 749 (1982). In Santosky, the Supreme Court used this language to describe certain statutory procedures under *New York* law, specifically Fam. Ct. Act. §§ 631(c) and 634; it was not enunciating general principles. The cited provisions of New York law do provide for the “termination” of parental rights. In contrast, neither G.L. c. 119, § 26 nor G.L. c. 210, § 3(b) provides for “termination” of parental rights or visitation rights. The quote from Santosky, wrongly applied in Petition of Catholic Charitable Bureau, does not provide support for the holding that a decree dispensing with consent automatically terminates visitation rights. Such a holding violates the plain language of the Massachusetts statutes. This Court should re-hear this matter in order to address appellants’ arguments without the incorporation of New York law into this commonwealth’s statutory scheme.

For these reasons, Mother respectfully urges this Court to (a) re-hear this matter, and (b) strike footnote 2 and the language at issue on page 9 of the opinion and otherwise reconsider the opinion in light of the arguments set forth herein.

Respectfully submitted,

**MOTHER**

By her attorneys,

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1. Citations in the form of (A:\_\_) and (T:\_\_) reference the Joint Consolidated Appendix of Appellant Mother and Appellant Child and the Transcripts and Exhibits, respectively, submitted to this Court with Mother’s and Child’s briefs. [↑](#footnote-ref-1)
2. The fact that the Child did not file her own petition for review and redetermination is not relevant to the issue of her standing to participate in that action. The Child’s interests were directly affected by Mother’s petition, and the Child must be able to seek review of an adverse order on Mother’s petition. In civil litigation, participation in an appeal as an appellant is not limited to parties who filed the initiating complaint; it is limited to parties who filed a notice of appeal. The Child did so here. [↑](#footnote-ref-2)
3. Although Manuel is titled as a care and protection matter, that case (as was the instant appeal) was a proceeding to dispense with parental consent to adoption pursuant to c. 119, § 26. Care and Protection of Manuel, 428 Mass. at 531. [↑](#footnote-ref-3)
4. The issue of a *parent’s* right to petition the court for such a hearing after issuance of a decree dispensing with that parent’s consent was briefed by the parties to this appeal. The issue of the rights of other persons enumerated in § 26 to petition for such a hearing, however, including DSS, probation officers, guardians ad litem, and (most important to the instant proceeding) the child, was never raised by the parties below or briefed or argued to this Court. [↑](#footnote-ref-4)
5. Mother argued on appeal that the stay pending appeal issued by a single justice of the Appeals Court preserved her right to petition for a review and redetermination. [↑](#footnote-ref-5)