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NO. 57831-6-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Marriage of:

MICHAEL STEPHEN KING,

Respondent,

and

BRENDA LEONE KING,

Appellant.

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BRIEF OF AMICUS CURIAE
WASHINGTON STATE BAR ASSOCIATION

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TABLE OF CONTENTS

I.	Identity and Interest of Amicus Curiae	1
II.	Issues of Concern to Amicus	2
III.	Statement of the Case.....	2
IV.	Argument	4
	A. Some Parties Are Simply Unable To Present Their Cases Effectively Pro Se.....	5
	B. Out-of-Courtroom Support Does Not Eliminate the Problem	9
	C. Pro Bono Service by the Private Bar Cannot Meet the Need.	12
	D. Guardians Ad Litem Do Not Meet the Need.	14
	E. The “Floodgates” Argument Rests on False Assumptions as to the Practical Dimensions of the Issue.	15
	F. Courts Have a Duty to Determine Whether Meaningful Access to Justice Requires Counsel, and They Have the Authority To Provide Counsel Where Necessary.....	16
V.	Conclusion	19

TABLE OF AUTHORITIES

CASES

<i>Brotherhood of RR Trainmen v. Virginia</i> , 377 U.S. 1, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964)	6
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)	18
<i>State v. Balzer</i> , 91 Wn. App. 44, 954 P.2d 931 (1998)	4
<i>State v. Perala</i> , 132 Wn. App. 98, 130 P.3d 852 (2006)	18
<i>Tennessee v. Lane</i> , 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)	17-18
<i>Wyman v. Wallace</i> , 94 Wn.2d 99, 615 P.2d 452 (1980)	4

STATUTES

RCW 26.12.240	10
RCW 26.33.020(10).....	14

OTHER AUTHORITIES

<i>An Analysis of Pro Se Litigants in Washington State, 1995-2000</i> (undated).....	10-11, 15, 16, 17
Bonnie Hough, <i>Evaluation of Innovations Designed To Increase Access to Justice for Self-Represented Litigants, in The Future of Self-Represented Litigation: Report from</i>	

<i>the March 2005 Summit</i> (Nat’l Ctr. for State Courts & State Justice Inst. 2005).....	7
Conference of State Court Administrators, <i>Position Paper on Self-Represented Litigation</i> (2000)	5, 8, 15-16
Cynthia Gray, <i>Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants</i> (Am. Judicature Soc’y 2005)	9
Diane N. Lye, <i>Washington State Parenting Plan Study</i> (1999).....	5, 6, 7, 13, 14, 15
Jennifer Juhler & Mark Cady, <i>Morality, Decision-Making, and Judicial Ethics</i> (A.B.A. 2004).....	7
John M. Greacen, <i>Framing the Issues for the Summit on the Future of Self-Represented Litigation</i> , in <i>The Future of Self-Represented Litigation: Report from the March 2005 Summit</i> (Nat’l Ctr. for State Courts & State Justice Inst. 2005).....	6, 10, 17, 12
John M. Greacen, <i>Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know</i> (Calif. Judicial Council 2002)	10, 11, 16
<i>Joint Task Force on Pro Se Litigation, Conference of Chief Justices and Conference of State Court Administrators, Final Report of the Joint Task Force on Pro Se Representation</i>	11
Jona Goldschmidt, <i>The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance</i> , 40 FAM. CT. REV. 1 (Jan. 2002)	9
Madelynn Herman, <i>Pro Se Statistics</i> (Nat’l Ctr. for State Courts 2006).....	16

<i>New Hampshire Supreme Court Task Force on Self-Representation, Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts</i> (2004)	8
Rebecca A. Albrecht, et al., <i>Judicial Techniques for Cases Involving Self-Represented Litigants</i> 42 THE JUDGES' JOURNAL 16 (A.B.A. 2003).....	8
<i>Report of the 1988 Pro Bono Task Force</i> (Wash. State Bar Ass'n 1988)	13, 14
<i>Report of the Nebraska Supreme Court Committee on Pro Se Litigation</i> (2002).....	6
<i>Revised Pro Se Policy Recommendations</i> (Am. Judicature Soc'y 2002)	9, 11, 15
Richard Zorza, <i>Trends in Self-Represented Litigation Innovation</i> (Nat'l Ctr. for State Courts 2006)	11, 12
Russell Engler, <i>And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks</i> , 67 FORDHAM L. REV. 1987 (1988).....	9
State Court Administrators, <i>Position Paper on Self-Represented Litigation</i> (2000).....	5
<i>Supporting Justice: A Report on the Pro Bono Work of America's Lawyers</i> (A.B.A. 2005).....	12
Susan Ledray & Chase, <i>The Courtroom Environment for the Self-Represented: Where We Are and Where We Should Be Going</i> , in <i>The Future of Self-Represented Litigation: Report from the March 2005 Summit</i> (Nat'l Ctr. for State Courts & State Justice Inst. 2005).....	17
<i>The Future of Self-Represented Litigation: Report from the March 2005 Summit</i> 22 (Nat'l Ctr. for State Courts & State Justice Inst. 2005).....	6

The Washington State Civil Legal Needs Study 33-34
(Washington State Supreme Court Task Force on Civil
Legal Justice Funding 2003)1

Washington State Supreme Court, *Task Force on Civil Equal*
Justice Funding 2 (2004).....5

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Bar Association (“WSBA”) is an administrative arm of the Washington Supreme Court and a professional organization for members of the Washington Bar. The WSBA is authorized to take positions on issues affecting the administration of justice and the practice of law, and to serve as a state-wide voice to the public and to “the branches of government” on matters relating to its purposes. GR 12(a)(11); GR 12(a)(2); GR 12(b)(16); *see* GR 12(c)(2). These purposes include promotion of “an effective legal system, accessible to all.” GR 12 (a)(2).

The WSBA has a long-standing concern with issues of access to justice and the unmet legal needs of persons of limited or moderate income. Family-law matters make up a disproportionate share of these unmet legal needs, particularly those that require court appearances. *See The Washington State Civil Legal Needs Study* 33-34 (Washington State Supreme Court Task Force on Civil Legal Justice Funding 2003).¹

¹ Available at <http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf>.

II. ISSUES OF CONCERN TO AMICUS

1. Whether the Superior Court erred in failing to decide whether or not state and federal constitutional assurances of access to the courts and due process of law required the provision of counsel under the circumstances.

2. Whether the Superior Court erred in concluding that it lacked authority to provide an attorney for Ms. King at public expense even if the proceedings before it were constitutionally deficient without such representation for her.

Amicus takes no position on what parenting arrangements should have been made for the parties' minor children.

III. STATEMENT OF THE CASE

With regard to the issues of concern to *amicus*, the critical facts are these:

This was an action for dissolution of marriage, in which custody of the parties' three minor children was the principal matter in dispute. Ms. King accused her husband of anger management issues that sometimes had violent manifestations; Mr. King maintained that his wife was psychologically impaired. 2 RP 868:4-

87:23; 4 RP 102:4-108:20. Both accusations were disputed; the Trial Court made findings on neither.

Mr. King was represented by private counsel throughout the proceedings. CP 141-48. Ms. King, who had only a ninth-grade education, RP 5:17-6:7, 6:24-7:3, was unrepresented at the five-day trial. Following trial, the Superior Court (the Honorable George Bowden) ruled substantially in favor of Mr. King, awarding him primary residential care of the couple's children, sharply limiting their time of residence with their mother, and granting Mr. King sole decision-making authority with regard to the upbringing of the children while they resided with him. CP 29.

Ms. King sought a new trial where she could be represented by counsel provided at public expense. CP 41-76. Although the briefs of Mr. King and of Snohomish County suggest that Ms. King had the economic ability to obtain private counsel, that her efforts to obtain legal representation were less than diligent, and that proceeding pro se may have been a tactical decision on her part, the Trial Court made no findings on any of these issues. Instead, the Court decided not to address the constitutional issues in any

meaningful way and denied the request for counsel “simply because we don’t have the resources” to pay appointed counsel. RP Feb. 27, 2006 at 3:6-7. “[A]bsent funding from the legislature or some authorization that would permit the Court to appoint lawyers without compensation, I must deny the motion.” RP Feb. 27, 2006 at 3:15-18.

IV. ARGUMENT

In keeping with the direction of RAP 10.3(e) to avoid repetition of matters in other briefs, the WSBA will not repeat the constitutional arguments of the parties. Rather, the WSBA primarily wishes to bring to the attention of the Court some of the recent literature on pro se representation, especially in family-law cases, and on the unavailability of private counsel to undertake such cases pro bono.² The Court may properly take judicial notice of “legislative facts” such as those set forth in these materials. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980); *State v. Balzer*, 91 Wn. App. 44, 58-59, 954 P.2d 931 (1998).

² The materials discussed are cited to Internet Web sites where possible. Where such Web sites were not located, the WSBA is providing electronic copies to counsel for the parties. Hard copies of these materials are not being filed with the Court because of their bulk; but they will be made available to the Court promptly upon its request.

A. Some Parties Are Simply Unable To Present Their Cases Effectively Pro Se.

Without legal assistance, the poor lack meaningful access to [the courts]. Access to the justice system is a fundamental right. The state is charged with affirmative responsibilities to ensure that this right is fully realized

Washington State Supreme Court, *Task Force on Civil Equal Justice Funding 2* (2004).³

[T]he judicial system has the affirmative duty to ensure that all citizens have meaningful access to the courts. A court system that declines to respond to or makes access difficult for litigants without lawyers violates this duty and effectively renders the right to represent oneself meaningless Moreover, given that many litigants appear without counsel out of necessity rather than choice – and that many do so in times of crisis, where home or family is at stake – fundamental principles of fairness and due process mandate that courts ensure meaningful access for redress.

Conference of State Court Administrators, *Position Paper on Self-Represented Litigation 1* (2000) (footnote omitted).⁴

“For many pro se litigants the civil justice system was clearly overwhelming and extremely difficult to use.” Diane N. Lye,

³ Available at http://www.courts.wa.gov/newsinfo/content/taskforce/task_force_report_final_draft.doc.

⁴ Available at <http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf> (hereafter, “*COSCA Position Paper*”).

Washington State Parenting Plan Study 1-11 (1999).⁵ “[T]he very nature of the system through its complexities creates an environment that virtually demands that an individual be represented by a lawyer.” *Report of the Nebraska Supreme Court Committee on Pro Se Litigation* 7 (2002).⁶

Emotionally distraught parents in crisis are particularly ill-equipped to navigate the civil justice system against their former spouses, who may enjoy a substantial imbalance of power. *See Parenting Plan Study, supra* n.5, at 1-40 to 1-41. This is especially true in cases in which the disadvantaged party is self-represented while the dominant party has a lawyer. “Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries” *Brotherhood of RR Trainmen v. Virginia*, 377 U.S. 1, 7, 84 S. Ct. 1113, 12 L. Ed. 2d 89 (1964).

A large majority of these pro se litigants are women.⁷ Many are survivors of domestic violence. Such survivors, who are often

⁵ Available at <http://www.courts.wa.gov/committee/pdf/parentingplanstudy.pdf> (hereafter, “*Parenting Plan Study*”).

⁶ Available at http://court.nol.org/community/pro_se_report.pdf.

⁷ John M. Greacen, *Framing the Issues for the Summit on the Future of Self-Represented Litigation*, (hereafter, “Greacen, *Framing the Issues*”) in *The*

pro se while facing abusers represented by counsel, see *Parenting Plan Study*, *supra* n.5, at 2-15, provide a well-documented and compelling example of the dangers to the search for truth:

The power imbalance between the parties creates a climate of fear that can impede a full, accurate disclosure of the facts. . . . Further, victims experiencing traumatic reactions will frequently present fragmented and disorganized information.

Jennifer Juhler & Mark Cady, *Morality, Decision-Making, and Judicial Ethics* 9 (A.B.A. 2004).⁸ Power imbalance, and the inability to present cases effectively pro se because of emotional or other issues, are not limited to survivors of domestic violence, however. See Bonnie Hough, *Evaluation of Innovations Designed To Increase Access to Justice for Self-Represented Litigants*, in *NCSC Summit Report*, *supra* n.7, at 118.

These difficulties are exacerbated at the trial stage, especially when the opposing party has a lawyer, as in the present case. The trial judge in such situations is caught between the obligation to

Future of Self-Represented Litigation: Report from the March 2005 Summit 22 (Nat'l Ctr. for State Courts & State Justice Inst. 2005) (hereafter, "NCSC Summit Report") http://www.ncsconline.org/WC/Publications/Res_ProSe_FutSelfRepLitfinalPub.pdf.

⁸ Available at http://www.abanet.org/judicialethics/resources/comm_code_cady_undated.pdf.

remain neutral and the obligation to ensure that each party's case is fairly considered. See *COSCA Position Paper*, *supra* n.4, at 2; New Hampshire Supreme Court Task Force on Self-Representation, *Challenge to Justice: A Report on Self-Represented Litigants in New Hampshire Courts* 23 (2004).⁹

Rebecca A. Albrecht, et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*,¹⁰ described the dilemma well:

When a party is unable to present its case to the court, how can the judge facilitate the resolution of the matter without in effect becoming the party's lawyer? When there is an imbalance of knowledge in the courtroom, particularly if one party is represented by counsel and the other is not, how can the judge manage the trial or hearing impartially? The judge appears to be caught in a dilemma. If the judge does *not* intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.

While various suggestions have been made, in the quoted article and elsewhere,¹¹ for mitigating the dilemma, few have gone

⁹ Available at <http://www.nh.gov/judiciary/supreme/prosereport.pdf>.

¹⁰ 42 THE JUDGES' JOURNAL 16 (A.B.A. 2003) <http://www.zorza.net/JudicalTech.JJWi03.pdf>.

so far as to suggest that a judge should call and examine witnesses on behalf of the self-represented party or exclude *sua sponte* hearsay evidence offered by counsel for the represented party or by a guardian ad litem for the children.¹² Yet in this case the Trial Court's oral opinion denying the motion for a new trial suggested that the Court's inability to engage in such measures may have affected the outcome. RP Feb. 27, 2006 at 2:6-19. Judges should not be put to the dilemma of either violating their ethical obligation of neutrality or presiding over a miscarriage of justice.

B. Out-of-Courtroom Support Does Not Eliminate the Problem.

In recent years there has been substantial growth in means to accommodate self-represented litigants, through courthouse facilitators, court rules permitting "unbundled" legal services, increased

¹¹ See, e.g., Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants* (Am. Judicature Soc'y 2005) <http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf>; *Revised Pro Se Policy Recommendations* (Am. Judicature Soc'y 2002) <http://www.ajs.org/prose/pdfs/Policy%20Recom.pdf>; Guidelines and Protocols listed on American Judicature Society Web site, http://www.ajs.org/prose/pro_resources.asp.

¹² But see, e.g., Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 1 (Jan. 2002); Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1988).

use of standardized forms and the Internet, and the like.¹³ For some litigants, such measures are adequate to permit them to present their cases effectively without a lawyer. *See, e.g.,* John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know* 3-5, 32 (Calif. Judicial Council 2002) (hereafter, “Greacen, *What We Know*”)¹⁴ (“For the most part, it appears that persons choosing to represent themselves are making rational and accurate assessments that their cases are not complex enough to warrant retaining counsel”); *AOC Pro Se Analysis, supra* n.13, at 6 (“[T]he evidence from both our sample and from an earlier empirical study does not support the view that the *typical* pro se

¹³ *See generally* NCSC *Summit Report, supra* n.7. Many of these measures are already in place in Washington. *See, e.g.,* RPC 1.2(c), CR 70.1(b) (authorizing “unbundled” legal services through the device of a limited appearance); RCW 26.12.240 (authorizing courthouse facilitators). A report by the Washington State Administrative Office of the Courts suggested that measures such as pattern forms and Internet resources may have contributed to the modest increase (one percent to two percent per year) in the proportion of *pro se* litigants in family law cases during the period studied. There was no comparable increase in other types of cases. *Judicial Services Division, Administrative Office of the Courts, An Analysis of Pro Se Litigants in Washington State, 1995-2000* 2-3 (undated) (hereafter, “*AOC Pro Se Analysis*”).

¹⁴ Available at www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf.

litigant is unable to afford professional legal services”).¹⁵ However, these measures are not sufficient in every case, particularly in those that go to trial.

The different models of pro se assistance programs appear to be quite successful at helping litigants overcome the initial hurdle of filing a case in court But these programs are not designed to help litigants successfully resolve cases once they have been filed. Few courts have thought critically about how to help litigants prepare for and conduct themselves in court proceedings

CCJ/COSCA Final Report, supra n.15, at 9.

“In the case of self-represented litigants who are unfamiliar with the law, the rules of procedure and the rules of evidence, out-of-court assistance programs alone may be inadequate to assure their right to a meaningful hearing.” *Revised Pro Se Policy Recommendations, supra* n.11, at 4.

¹⁵ See also *id.* at 5 (finding little or no difference in residential neighborhood economics between cases in which both parties were represented by counsel and cases in which one or both parties were *pro se*); Greacen, *What We Know, supra* n.14, at 3-5, 32; *Joint Task Force on Pro Se Litigation, Conference of Chief Justices and Conference of State Court Administrators, Final Report of the Joint Task Force on Pro Se Representation* 5 (2002) http://www.ncsconline.org/WC/Publications/Res_ProSe_FinalReportProSeTaskForcePub.pdf); Richard Zorza, *Trends in Self-Represented Litigation Innovation* (Nat’l Ctr. for State Courts 2006) <http://www.ncsconline.org/WC/Publications/Trends/2006/ProSeTrends2006.pdf> (hereafter “*CCJ/COSCA Final Report*”).

C. Pro Bono Service by the Private Bar Cannot Meet the Need.

It is unrealistic to expect the need to be met solely by reliance on legal services organizations or on increased pro bono efforts of the private bar. “[T]he vast majority of low-income people cannot in fact find a lawyer to represent them,” and increased funding is unlikely to fill the need. Greacen, *Framing the Issues*, *supra* n.7, at 22. *Accord*, e.g., *CCJ/COSCA Final Report*, *supra* n.15, at 11.

The ABA Standing Committee on Pro Bono and Public Service reported in August 2005 on the results of a National Pro Bono Survey. The results had a three percent margin of error at the 95 percent confidence level. According to the report, more than two-thirds of the responding lawyers stated that they provided some level of free pro bono services to people of limited means or to organizations serving the poor or to both. On average, the attorneys surveyed stated that they already provide nearly 40 hours of free pro bono services annually to such clients, and a like amount to charities, civil rights organizations, and efforts to improve the legal system. *Supporting Justice: A Report on the Pro Bono Work of America’s*

Lawyers 4-5, 9 (A.B.A. 2005).¹⁶ It is questionable whether more can realistically be expected.

A 1988 WSBA *Pro Bono Task Force Report* identified several reasons why the supply of pro bono lawyers falls well short of fulfilling the unmet needs in the family law area. Among them:

- Lawyers who regularly handle family law matters feel that they already do far more than their share of uncompensated work (and have more than their share of bar complaints and of malpractice claims). They do not feel that they should have to make up the gap in meeting the legal needs of the indigent by themselves.
- Lawyers who do not practice in the area are strongly disposed to find other means of discharging their pro bono obligations, for a variety of reasons, including the nature of family-law cases, the risks of liability, and the complexity of the subject matter and procedures.¹⁷
- Large firms frequently avoid practicing family law, as a risk management decision. They often have few if any partners experienced in this area, lack the software and trained legal assistants necessary to handle matters efficiently, and are unwilling to take on a large volume of cases that, as a practical matter, will impose a substantial and disproportionate burden on a few of their number.

¹⁶ Available at <http://www.abanet.org/legalservices/probono/report.pdf>.

¹⁷ The list of downloadable forms on the Washington Supreme Court Web site is 25 pages long. <http://www.courts.wa.gov/forms/?fa=forms.static&staticID=14>. Identifying the ones to be used, and determining how to fill them out, are daunting tasks for anyone not experienced in family law, much less for laypersons who may have limited education and facility in written English and are operating under the stress of a family dissolution. *See generally Parenting Plan Study, supra* n.5, at 1-16 to 1-17, 2-11 to 2-12.

- Government and corporate lawyers worry about all of the above, as well as about lack of malpractice coverage and the possibility of conflicts of interest.

Report of the 1988 Pro Bono Task Force 5-8 (Wash. State Bar Ass'n 1988). Nineteen years later, very little has changed for the better.

D. Guardians Ad Litem Do Not Meet the Need.

An independent guardian ad litem for the children is not an adequate substitute for legal representation of an unrepresented party. By definition, such a guardian is not an advocate for either parent. RCW 26.33.020(10). Further, the *Washington State Parenting Plan Study*, *supra* n.5, reported that many professional participants in the family-law justice system believe that guardians are inadequately trained and that some interject their own cultural and class-based expectations about parenting into their reports, inappropriately include second-hand information, and sometimes assume an advocacy role for one party rather than presenting evidence dispassionately. *Id.* at 2-13 to 2-14. Some of these issues are illustrated by the record in the court below.

E. The “Floodgates” Argument Rests on False Assumptions as to the Practical Dimensions of the Issue.

Many court personnel and others involved with the civil justice system believe that the number of pro se parties in family-law cases has been increasing rapidly and is reaching crisis levels. *See, e.g., Parenting Plan Study, supra* n.5, at 2-9 (1999); *Revised Pro Se Policy Recommendations, supra* n.11, at 1; *COSCA Position Paper, supra* n.4, at 1. Available data, though imperfect, provide little or no support for this perception. As pointed out in the *AOC Pro Se Analysis, supra* n.15, at 14:

[T]here is simply no evidence to support the beliefs that the trends in pro se litigation are reaching crisis proportions. The trends are either quite modest or in most cases flat.

In Washington family-law cases specifically, the Administrative Office of the Courts found that “pro se litigant incidence in dissolutions with children has increased by less than one percent per year on average (42.7 percent in 1995-Q3 to 46.7 percent in 2001-Q1); dissolutions without children has a slightly higher trend (55.8 percent in 1995-Q3 to 62.3 percent in 2001-Q1).” *Id.* at 2.

The *AOC Pro Se Analysis* also showed that of dissolutions involving children, only seven percent involved the situation before the Court, where one side appeared pro se and the other appeared through counsel. In many such cases the dissolution was uncontested from the outset; only about one in five of these already uncommon cases went to trial. *Id.* at 4-5, 16.¹⁸

These results appear generally consistent with most research elsewhere. See Madelynn Herman, *Pro Se Statistics* (Nat'l Ctr. for State Courts 2006),¹⁹ and sources cited; Greacen, *What We Know*, *supra* n.14 (surveying the literature as of 2002). The research also reflects that many pro se litigants are able to present their cases effectively without the assistance of counsel. See, e.g., Greacen, *What We Know*, *supra* n.14, at 3-5, 32. The issue before the Court is whether the state and federal constitutions provide any protection to the minority of litigants who are unable to do so pro se.

F. Courts Have a Duty to Determine Whether Meaningful Access to Justice Requires Counsel,

¹⁸ Most of the cases in which one or both parties lack counsel are uncontested, either because the respondent joins in the petition or because the respondent fails to appear. See *AOC Pro Se Analysis*, *supra* n.13, at 4-5, 16.

¹⁹ Available at <http://www.ncsconline.org/WC/Publications/Memos/ProSeStatsMemo.htm>.

**and They Have the Authority To Provide Counsel
Where Necessary.**

For a minority of litigants, meaningful access to the court without legal representation is as illusory as if the building itself were physically inaccessible to them. *Cf. Tennessee v. Lane*, 541 U.S. 509, 532-533, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). Such parties may be relatively rare; but they exist, particularly among “the least powerful, . . . racial minorities, immigrants, those with limited English proficiency, domestic violence victims and the poor.” Greacen, *Framing the Issues*, *supra* n.7, at 23 (footnote omitted).

We do not believe that a State can simultaneously (a) prohibit nonjudicial resolution of issues involving child custody, (b) establish judicial procedures so complicated that some parties cannot realistically be expected to follow them without assistance, and then (c) refuse to provide them with such assistance.²⁰ “The core of the problem . . . is the mismatch between the design of the system, and the reality of who must function in that system.” Susan Ledray &

²⁰ These facts, along with the importance of the issues at stake, distinguish custody disputes from other civil disputes. In any event, research evidence indicates that *pro se* litigants are rare in most areas of law other than family-law. See *AOC Pro Se Analysis*, *supra* n.13, at 2-3; Greacen, *Framing the Issues*, *supra* n.7, at 23.

Chase, *The Courtroom Environment for the Self-Represented: Where We Are and Where We Should Be Going*, in *NCSC Summit Report*, *supra* n.7, at 45.

If despite all the help that the Court can properly and ethically give, a particular unrepresented litigant in a custody dispute is unable to present his or her case effectively without legal assistance, despite diligent and good-faith efforts, then the Court should hold that the State and the Federal Constitutions require that such representation be provided. “[C]onsiderations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.” *Lane*, 541 U.S. at 512; *see State v. Perala*, 132 Wn. App. 98, 130 P.3d 852 (2006).

Under *Lassiter v. Department of Social Services*, 452 U.S. 18, 31-32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), whether the absence of representation for Ms. King left the proceedings constitutionally deficient is a largely factual determination to be made by the trial judge in the first instance. The Trial Court failed to make this necessary determination because of its mistaken belief that the Court

lacked the authority to provide representation even if it was constitutionally required.

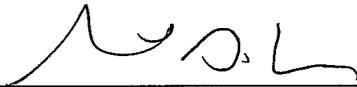
V. CONCLUSION

For some pro se litigants, the justice system in the area of family law is so complex as to be overwhelming, particularly at the trial stage. The private bar cannot meet the need for family law pro bono assistance. This Court should interpret the State and Federal Constitutions to require that representation be provided when necessary, so that all individuals enjoy a meaningful right of access to the courts.

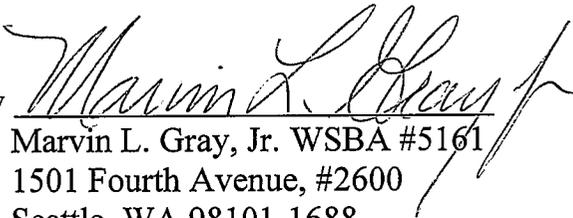
The case should be remanded to the Superior Court for a determination whether, despite diligent and good-faith efforts, Ms. King was unable to present her case effectively without legal representation. The Trial Court must directly address this issue. Where there is a demonstrated need, it cannot be ignored.

RESPECTFULLY SUBMITTED this 20th day of March,
2007.

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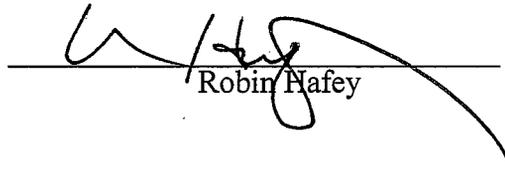
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I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

Signed at Seattle this 20th day of March, 2007.


Robin Hafey

CERTIFICATE OF SERVICE- 2

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