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STATE OF WASHINGTON

No. 79978-4

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SUPREME COURT BY RONALD R. CARPENTER
OF THE STATE OF WASHINGTON

CLERK

In re the Marriage of

MICHAEL STEPHEN KING,

Respondent

v.

BRENDA LEONE KING,

Appellant

and

STATE OF WASHINGTON,

Involved Party

TRANSFERRED FROM
COURT OF APPEALS, DIVISION I

BRIEF OF AMICUS CURIAE THE
WASHINGTON STATE LEGISLATURE

Erik D. Price
WSBA No. 23404
LANE POWELL PC
Attorneys for Amicus Curiae
The Washington State Legislature

Lane Powell PC
111 Market Street N.E., Suite 360
Olympia, Washington 98501
Telephone: (360) 754-6001
Facsimile: (360) 754-1605

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. ISSUE	1
III. ARGUMENT.....	2
A. Neither the Federal nor the State Constitution Requires That Counsel Be Provided to Indigent Parties to Dissolution Proceedings.....	2
B. Whether Counsel Should Be Provided to Indigent Parties in Dissolution Proceedings at Taxpayer Expense Is a Public Policy Issue That Is Within the Province of the Legislature	4
IV. CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

<u>Andersen v. King County</u> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	3
<u>Burkhart v. Harrod</u> , 110 Wn.2d 381, 755 P.2d 759 (1988).....	7, 8
<u>Campbell v. Department of Social & Health Services</u> , 150 Wn.2d 881, 83 P.3d 999 (2004).....	5
<u>Dependency of Grove</u> , 127 Wn.2d 221, 897 P.2d 1252 (1995).....	4, 5
<u>In re Custody of Halls</u> , 126 Wn. App. 599, 109 P.3d 15 (2005).....	3
<u>In re Welfare of Luscier</u> , 84 Wn.2d 135, 524 P.2d 906 (1974).....	3
<u>In re Welfare of Myricks</u> , 85 Wn.2d 252, 533 P.2d 841 (1975).....	3
<u>Island County v. State</u> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	6
<u>Lassiter v. Department of Social Services of Durham County</u> , 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).....	2, 3
<u>Matthews v. Eldridge</u> , 424 U.S. 319, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).....	2
<u>Miranda v. Sims</u> , 98 Wn. App. 898, 991 P.2d 681 (2000).....	4

<u>Phipps v. Sasser</u> , 74 Wn.2d 439, 445 P.2d 624 (1968).....	6
<u>Sedlacek v. Hillis</u> , 145 Wn.2d 379, 36 P.3d 1014 (2001).....	6, 7
<u>State v. Gunwall</u> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	3
<u>State v. Jackson</u> , 137 Wn.2d 712, 976 P.2d 1229 (1999).....	6
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	3
<u>Zempel v. Twitchell</u> , 59 Wn.2d 419, 367 P.2d 985 (1962).....	6

STATUTES AND COURT RULES

Wash. Const. art. II, § 1	1
RCW 13.34.090	5
RCW 26.09.140	5

I.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Legislature (the "Legislature") is the constitutionally created legislative branch of the government of the State of Washington. Wash. Const. art. II, § 1. From time to time, the Legislature takes positions on issues before the Court when necessary to represent the collective interests of the institution of the Legislature.

The Legislature submits this brief in support of the positions taken by the State of Washington and the Attorney General of the State of Washington ("Attorney General"), and to further expand on the principle that determinations of policy are properly within the province of the Legislature.

II.

ISSUE

Does the state or federal constitution obligate the State to provide counsel at taxpayer expense for indigent private parties to dissolution actions when the parenting or custody of a child is at issue and, if not, which branch of government should resolve the policy question of whether such counsel should be provided?

III.

ARGUMENT

A. Neither the Federal nor the State Constitution Requires That Counsel Be Provided to Indigent Parties to Dissolution Proceedings.

The Legislature supports the positions taken by the State of Washington and the Attorney General that indigent private parties have no constitutional right to counsel at taxpayer expense in dissolution actions.

No such right is afforded by the federal constitution under the authority of Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 33, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). The Lassiter Court began with the presumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." Id. at 26-27. To rebut this presumption, a showing must be made under the three elements of the due process analysis set forth in the seminal case, Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976). Lassiter, 452 U.S. at 27 (citing Mathews' three elements, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions). Application of these factors to appellant's demand for counsel in a dissolution proceeding shows that the request cannot withstand Lassiter's strong presumption against it. See Brief of Amicus Curiae

Robert M. McKenna, Attorney General ("Brief of Attorney General") at 7-12.

Further, no such right is afforded under the state constitution either. See Brief of Attorney General at 12-20. In arguing otherwise, appellant urges the extension of the Luscier and Myricks decisions beyond their specific confines of terminations and dependencies. See Appellant's Answer to Amicus Brief of Attorney General at 5-6 (citing In re Welfare of Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974), and In re Welfare of Myricks, 85 Wn.2d 252, 533 P.2d 841 (1975)).

This creation of a new constitutional entitlement would be a leap previously unmade by any court in this State. See In re Custody of Halls, 126 Wn. App. 599, 611 n.4, 109 P.3d 15 (2005) ("No Washington case has held that a party to a child custody dispute is entitled to representation at State expense"). As ably discussed by the State of Washington and amicus Attorney General, the authorities and analysis found in federal and Washington jurisprudence provide no support for invention of this claimed new right. See, e.g., Lassiter, 452 U.S. 18 (presumption under due process clause that parties to a civil action enjoy no constitutional right to counsel); State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992) (after engaging in Gunwall analysis, court concludes that federal and state due process analysis is the same); Andersen v. King County, 158 Wn.2d 1, 138

P.3d 963 (2006) (unless favored minority is granted special privilege, privileges and immunities clause analysis is the same as federal equal protection clause); Miranda v. Sims, 98 Wn. App. 898, 991 P.2d 681 (2000) (civil litigant's right to access to courts does not provide a right to counsel at public expense in all proceedings).

Without repeating their discussions here, the Legislature urges the Court to adopt the rationale put forward by the State of Washington and amicus Attorney General and hold that indigent parties have no constitutional right to counsel at taxpayer expense in dissolution proceedings. See Brief of Attorney General and State's Response to Amici. The fact that certain members of the public would benefit from such counsel does not change the constitutional analysis.

B. Whether Counsel Should Be Provided to Indigent Parties in Dissolution Proceedings at Taxpayer Expense Is a Public Policy Issue That Is Within the Province of the Legislature.

Considering that neither the federal nor state constitution requires taxpayer-provided counsel to indigent parties in dissolution proceedings, the wisdom of such provision is a pure question of public policy. Separation of powers vests the Legislature with the responsibility for making such determinations, weighing the competing policy merits and budget constraints of such choices. Cf. Dependency of Grove, 127 Wn.2d

221, 228, 897 P.2d 1252 (1995) ("[The Legislature] is answerable to the public for the expenditures of taxes collected").

While appellant does not base her claimed right on existing statutes, this scheme represents the current public policy of this State. In the context of family and parental relations, the Legislature's current determination is to statutorily provide indigent parties with counsel in the circumstances of dependency and terminations. RCW 13.34.090. But there is no similar statutory provision for dissolution cases.¹ These boundaries of the provision of taxpayer-provided counsel represent the current public policy in the judgment of the Legislature. Inherent in the Legislature's role in Washington's tripartite structure of government is the responsibility to make the difficult decisions of where to draw these lines. See Grove, 127 Wn.2d at 228 ("The question of who pays for the efficient use of the appellate system is a difficult one. Where fundamental constitutional rights are not threatened, the answer to this question properly belongs with the Legislature"); cf. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 901, 83 P.3d 999 (2004) ("This court has

¹Within the statutory scheme created for dissolution proceedings, indigent parties in dissolution proceedings are not left without recourse. The lower court may, "after considering the financial resources of both parties," order a party to a dissolution proceeding to pay reasonable defense costs, including attorney fees, for the other party. RCW 26.09.140.

recognized the necessity for legislative line drawing where favorable legislation is enacted, observing that the line must be drawn somewhere").

The Legislature's approach to these issues is entitled to great deference. "[L]egislative judgments merit, even require, the exercise of judicial self-restraint of a very high order. It is [the court's] duty when confronted with a valid act . . . to give effect to the legislative intent embodied therein, refraining from substituting [the court's] judgment in the matter, whatever that may be, for that of the legislature." Phipps v. Sasser, 74 Wn.2d 439, 444, 445 P.2d 624 (1968); see also Island County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998) ("We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment"); Zempel v. Twitchell, 59 Wn.2d 419, 431, 367 P.2d 985 (1962) ("This court should not lightly brush aside determinations as to public policy duly and officially made by the legislative branch of government").

Any expansion of this current statutory scheme should be left to the Legislature. "An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature." Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001); see also State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (a public policy argument, which does not reflect the current status

of the law in Washington, "is better addressed to the Legislature"). Since no constitutional right is involved, whether to extend the reach of taxpayer-provided counsel is a policy/budget choice to be reviewed by duly elected legislators. "[T]he Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington." Sedlacek v. Hillis, 145 Wn.2d at 390.

The Legislature is not unmindful of the arguments made by other amici as to the potential merits of counsel under the circumstances of dissolution. Indeed, the Legislature is in the business of balancing the comments and arguments of partisans urging adoption of a particular position. Burkhart v. Harrod, 110 Wn.2d 381, 385, 755 P.2d 759 (1988) ("The Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing societal interests"). For example, amicus Retired Judges no doubt have valuable experience that gives them an important role in debates about the administration of our judicial system. Similarly, the perspective of amicus Northwest Women's Law Center is valuable on issues related to domestic violence. Moreover, the actions of European nations explained by amicus International Law Scholars, the recommendations of the American Bar Association explained by amicus National Coalition for a Civil Right to

Counsel, and the concerns of unmet legal need stated by amicus Washington State Bar Association are all points of view that would be relevant to a thoughtful public policy discussion. To be sure, each of these voices would find receptive ears among individual members in the Legislature. However, the Legislature respectfully submits that it, not this Court, is the proper audience for these arguments. Burkhart, 110 Wn.2d at 385 ("[O]f the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions on a societal consensus") (quoting Bankston v. Brennan, 507 So. 2d 1385, 1387 (Fla. 1987)).

IV.

CONCLUSION

The Legislature urges this Court to affirm the decision of the superior court with regard to the question presented in this appeal.

RESPECTFULLY SUBMITTED this 1st day of May, 2007.

LANE POWELL PC

By 

Erik D. Price

WSBA No. 23404

Attorneys for Amicus Curiae

The Washington State Legislature

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I certify that on May 1, 2007, I caused a true and correct copy of 05
the foregoing Brief of Amicus Curiae The Washington State Legislature to
be served on the following counsel via First Class U.S. Mail: D. R. CARPENTER

Attorneys for Respondent Michael King
Bradley K. Crosta
Crosta and Bateman
999 Third Avenue, Suite 2525
Seattle, WA 98104

Attorneys for Amicus Curiae
~~Robert M. McKenna, Attorney General:~~
Jeffrey T. Even
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Attorneys for Involved Party State of Washington:
Robert Tad Seder
Bridget E. Casey
Snohomish County Prosecuting Attorney, Civil Division
Admin. East 7th Floor, M/S 504
3000 Rockefeller Avenue
Everett, WA 98201

Attorneys For Amicus Curiae National Coalition for a Civil Right to Counsel:
Debra Gardner
Janet Hostetler
Public Justice Center
500 East Lexington Street
Baltimore, Maryland 21202

Attorneys for Amicus Curiae International Law Scholars:
Martha F. Davis
The Program on Human Rights and the Global Economy
Northeastern School of Law
400 Huntington Avenue
Boston, Massachusetts 02115

Clare Pastore
ACLU/LA
1616 Beverly Boulevard
Los Angeles, CA 90026

Raven Clark Lidman
International Human Rights Clinic
Ronald A. Peterson Law Clinic
Seattle University School of Law
1112 E. Columbia Street
Seattle, WA 98122-4458

Vanessa Soriano Power
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101

*Attorneys for Amicus Curiae
Northwest Women's Law Center:*
Raegen N. Rasnic
Skellenger Bender, P.S.
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101-2605

Russell Engler
New England School of Law
46 Church Street
Boston, Massachusetts 02116

*Attorneys for Amicus Curiae
Retired Washington Judges:*
David S. Udell
Laura K. Abel
Brennan Center for Justice
161 Avenue of the Americas
New York, New York 10013

Robert D. Welden
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-1158

Fredric C. Tausend
Kirkpatrick & Lockhart Preston
Gates Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158

Sidney S. Rosdeitcher
Michael N. Berger
Paul, Weiss, Rifkind, Wharton
& Garrison LLP
1285 Avenue of the Americas
New York, New York 10019-6064

Attorneys for Appellant:
Kathleen M. O'Sullivan
Rebecca S. Engrav
Perkins Coie LLP
1201 3rd Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Amicus Curiae
Marvin Lee Gray, JR
Davis Wright Tremaine LLP
1501 4th Avenue, Suite 2600
Seattle, WA 98101-1688

Attorneys for Appellant:
Nicholas Peter Gellert
Attorney at Law
1201 3rd Avenue, Floor 40
Seattle, WA 98101-3029

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

SIGNED at Olympia, WA this 1st day of May, 2007.



Kelley Strickland