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No. 57831-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

In re the Marriage of:

MICHAEL STEVEN KING, Respondent,

v.

BRENDA LEONE KING, Appellant.

BRIEF OF APPELLANT

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CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	1
III.	ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	2
IV.	STATEMENT OF THE CASE	2
	A. Brenda and Her Children	2
	B. Michael Petitions for Dissolution of the Marriage	3
	C. Brenda’s Efforts to Obtain a Lawyer	4
	D. The Trial	5
	E. The Judgment	13
	F. Brenda’s Motion for a New Trial	14
V.	SUMMARY OF ARGUMENT	15
VI.	STANDARD OF REVIEW	16
VII.	ARGUMENT.....	17
	A. The Required State Action Occurred Here	17
	B. The Washington Constitution’s Protection of Meaningful Access to the Courts Required the Trial Court to Appoint Counsel for Brenda.....	18
	1. Article I, § 10 Gives Brenda a Right of Meaningful Access to the Courts.....	18
	2. Meaningful Access to the Court Required Appointment of Counsel for Brenda.....	22
	C. The Court’s Duty to Administer Justice Impartially Required the Trial Court to Appoint Counsel for Brenda.....	28

D.	Due Process Required the Trial Court to Appoint Counsel for Brenda.....	31
1.	The Trial Court Should Have Appointed Counsel for Brenda Under the Federal Due Process Clause	33
2.	Article I, § 3 Provides Greater Protection to Brenda Than the Federal Approach.....	35
E.	Article I, § 12 of the Washington Constitution Required the Trial Court to Appoint Counsel for Brenda.....	40
1.	The Trial Court Denied the Privilege of Meaningful Access to Brenda.....	41
2.	The Trial Court Should Have Appointed Counsel for Brenda Under Federal Equal Protection Analysis.....	43
3.	Article I, § 12 Provides Greater Protection to Brenda Than the Federal Approach.....	45
F.	Courts Have the Authority to Appoint Counsel at Public Expense	46
VIII.	CONCLUSION.....	50

TABLE OF AUTHORITIES

Cases

<i>Airey v. Ireland</i> , 32 Eur. Ct. H.R. (ser. A) 305 (1979)	22
<i>Alton V. Phillips Co. v. State</i> , 65 Wn.2d 199, 396 P.2d 537 (1964)	42
<i>Andersen v. King County</i> , __ Wn.2d __, 2006 WL 2073138 (July 26, 2006)	41, 43
<i>Boddie v. Connecticut</i> , 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971)	17, 42
<i>Bullock v. Superior Court</i> , 84 Wn.2d 101, 524 P.2d 385 (1974)	23, 47
<i>Chambers v. Baltimore & Ohio R.R.</i> , 207 U.S. 142, 28 S. Ct. 34, 52 L. Ed. 143 (1907)	23, 32
<i>Cooper v. Runnels</i> , 48 Wn.2d 108, 291 P.2d 657 (1955)	21
<i>Corfield v. Coryell</i> , 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230)	42
<i>Doe v. Puget Sound Blood Ctr.</i> , 117 Wn.2d 772, 819 P.2d 370 (1991)	18, 19, 20
<i>Eggert v. City of Seattle</i> , 81 Wn.2d 840, 505 P.2d 801 (1973)	23
<i>Ford Motor Co. v. Barrett</i> , 115 Wn.2d 556, 800 P.2d 367 (1990)	32
<i>Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004)	41, 45
<i>Harper v. Va. State Bd. of Elections</i> , 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966)	43
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997)	49

<i>Honore v. Wash. State Bd. of Prison Terms & Paroles</i> , 77 Wn.2d 660, 466 P.2d 485 (1970)	47
<i>Hous. Auth. v. Saylor</i> , 87 Wn.2d 732, 557 P.2d 321 (1976).....	32, 41
<i>In re Custody of RRB</i> , 108 Wn. App. 602, 31 P.3d 1212 (2001)	37
<i>In re Dependency of Grove</i> , 127 Wn.2d 221, 897 P.2d 1252 (1995)	38, 50
<i>In re Disability Proceeding Against Diamondstone</i> , 153 Wn.2d 430, 105 P.3d 1 (2005)	38
<i>In re Disciplinary Proceeding Against Schafer</i> , 149 Wn.2d 148, 66 P.3d 1036 (2003)	24, 28, 29
<i>In re Salary of Juvenile Dir.</i> , 87 Wn.2d 232, 552 P.2d 163 (1976)	48
<i>In re Welfare of J.M.</i> , 130 Wn. App. 912, 125 P.3d 245 (2005)	24
<i>In re Welfare of Luscier</i> , 84 Wn.2d 135, 524 P.2d 906 (1974)	38, 40
<i>In re Welfare of Myricks</i> , 85 Wn.2d 252, 533 P.2d 841 (1975)	24, 27, 32, 38
<i>In re Welfare of Sumey</i> , 94 Wn.2d 757, 621 P.2d 108 (1980)	32
<i>Iverson v. Marine Bancorp.</i> , 83 Wn.2d 163, 517 P.2d 197 (1973)	28
<i>Kay v. Ehrler</i> , 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991)	24
<i>King v. Olympic Pipeline Co.</i> , 104 Wn. App. 338, 16 P.3d 45 (2000)	19
<i>Lassiter v. Dep't of Soc. Servs.</i> , 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).....	passim

<i>Lund v. Dep't of Ecology</i> , 93 Wn. App. 329, 969 P.2d 1072 (1998)	16
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)	44
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	33, 35
<i>Matter of K.L.J.</i> , 813 P.2d 276 (Alaska 1991).....	39
<i>McInturf v. Horton</i> , 85 Wn.2d 704, 538 P.2d 499 (1975).....	47
<i>Meyer v. Nebraska</i> , 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)	32
<i>Miranda v. Sims</i> , 98 Wn. App. 898, 991 P.2d 681 (2000)	23, 38, 45
<i>New Brunswick v. J.G.</i> , [1999] 3 S.C.R. 46	22
<i>Pliler v. Ford</i> , 542 U.S. 225, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004)	30
<i>Plyler v. Doe</i> , 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)	44
<i>Rabb v. Estate of McDermott</i> , 60 Wn. App. 334, 803 P.2d 819 (1991)	17
<i>Reitman v. Mulkey</i> , 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)	17
<i>Saenz v. Roe</i> , 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999)	44
<i>Seattle Sch. Dist. No. 1 v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978)	46
<i>Seattle Times Co. v. Eberharter</i> , 105 Wn.2d 144, 713 P.2d 710 (1986)	19
<i>Seeley v. State</i> , 132 Wn.2d 776, 940 P.2d 604 (1997).....	19, 20

<i>Shelley v. Kraemer</i> , 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)	17
<i>Sniadach v. Family Fin. Corp.</i> , 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969).....	17
<i>State v. Foster</i> , 135 Wn.2d 441, 957 P.2d 712 (1998)	36
<i>State v. Fritz</i> , 21 Wn. App. 354, 585 P.2d 1731 (1978)	24
<i>State v. Gunwall</i> , 106 Wn.2d 84, 720 P.2d 808 (1986).....	19, 35, 36, 45
<i>State v. Perala</i> , 132 Wn. App. 98, 130 P.3d 852 (2006)	48
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994)	35
<i>State v. Vance</i> , 29 Wash. 435, 70 P. 34 (1902)	41
<i>Tennessee v. Lane</i> , 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)	22, 32
<i>Tetro v. Tetro</i> , 86 Wn.2d 252, 544 P.2d 17 (1975)	37
<i>Troxel v. Granville</i> , 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)	32
<i>Whitney v. Buckner</i> , 107 Wn.2d 861, 734 P.2d 485 (1987)	23
<i>Zablocki v. Redhail</i> , 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978)	43

Statutes

11 Hen. 7, c. 12 (1494), An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, <i>reprinted in 2 Statutes of the Realm</i> 578 (1993).....	21
RCW 4.04.010	21
Ch. 10.101 RCW	49
RCW 10.101.005	16, 50
RCW 13.34.090	24

RCW 26.33.110	24
Ch. 26.09 RCW	42
RCW 26.44.030	24

Regulations and Rules

CJC Canon 1	30
CJC Preamble	30
RPC Preamble (effective Sept. 1, 2006).....	29

Constitutional Provisions

Const. art. I, § 1	28, 36
Const. art. I, § 3	passim
Const. art. I, § 10	passim
Const. art. I, § 12	passim
Const. art. I, § 29	21, 36, 46
Const. art. I, § 32	20, 36
Const. art. IV, § 1.....	28
Const. art. IV, § 30.....	28
Const. art. XXVII, § 2.....	21
U.S. Const., amend. XIV	passim

Other Authorities

ABA, Comm. on Standards of Judicial Administration, Standards Relating to Trial Courts 2.23 (1976).....	31
Barrie Althoff, <i>Ethics and the Law: Ethical Considerations for Lawyers and Judges When Dealing with Unrepresented Persons</i> , Wash. St. B. News 50 (Jan. 2000).....	31

William Blackstone, 1 Commentaries	20
Paula Hannaford-Agor & Nicole Mott, <i>Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations</i> , 24 Just. Sys. J. 163 (2003)	31
Judicial Servs. Div., Admin. Office of the Courts, <i>An Analysis of Pro Se Litigants in Washington State 1995-2000</i>	25
Note, <i>Child Neglect: Due Process for the Parent</i> , 70 Colum. L. Rev. 465 (1970)	40
Brian Snure, <i>A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution</i> , 67 Wash. L. Rev. 669 (1992)	21
Rosalie R. Young, <i>The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter</i> , 14 Touro L. Rev. 247 (1997)	34

I. INTRODUCTION

In the words of appellant Brenda King (“Brenda”), “I’m a good mother; I’m a lousy lawyer.” 2 RP 131:15-16. In fact, Brenda is not a lawyer at all, but having been denied the right to counsel, she was forced to represent herself during the trial at which her fundamental right to the care, custody, and control of her children was decided. Without counsel, Brenda was denied meaningful access to the courts, due process, and the privilege of using the courts. After this unfair process, the trial court transferred primary residential care and sole decision-making power over the parties’ three children to Brenda’s ex-husband, Respondent Michael King (“Michael”), who was represented by counsel throughout the proceedings. Brenda seeks reversal and the appointment of counsel on remand to protect her fundamental right of access to the courts and to ensure the integrity of the judicial process.

II. ASSIGNMENT OF ERROR

The trial court erred in its failure to appoint counsel for Brenda and in its entry of judgment against her.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the State obligated to provide Brenda an attorney under Article I, § 10 of the Washington Constitution?
2. Does the courts' duty to administer justice fairly and impartially encompass the provision of counsel to Brenda?
3. Was the State obligated to provide Brenda an attorney under Article I, § 3 of the Washington Constitution?
4. Was the State obligated to provide Brenda an attorney under Article I, § 12 of the Washington Constitution?
5. Was the State obligated to provide Brenda an attorney under the Fourteenth Amendment to the United States Constitution?
6. Did the trial court have the authority to appoint counsel at public expense for Brenda?

IV. STATEMENT OF THE CASE

A. Brenda and Her Children

Brenda and Michael King married in 1994 and lived together for almost ten years. CP 226; 1 RP 16:17.¹ They have three children: Aaron (11 years old at the time of trial), Jonathon (seven), and Katie (six).

¹ The transcript of trial is cited by volume number. Transcripts of other hearings below are cited by date.

CP 225-26; 1 RP 17:20-23. Brenda also has two older children. CP 226; 4 RP 93:13.

Michael strongly believed that Brenda should not work outside the home once they were married.² 1 RP 18:9-15, 40:22-41:2; Ex. 5 at 3-4. Brenda was the caregiver for her five children. CP 84, 86, 103. She handled all the day-to-day tasks of parenting, such as school, meals, and the children's activities. CP 89; 5 RP 41:9-10. Michael, on the other hand, worked long hours outside the home. CP 89; 4 RP 94:3-5.

B. Michael Petitions for Dissolution of the Marriage

The Kings separated initially in October 2003 and permanently in June 2004. 1 RP 16:17, 17:5-8. During the parties' separation, the children remained at home with Brenda. CP 103; 2 RP 52:6-19. In September 2004, Michael, through an attorney, petitioned for dissolution of the marriage. CP 225. Michael was represented by counsel throughout the proceedings below. Initially, Michael did not seek a change in residential arrangements for the children; he asked only for the court to set the amount of child support. CP 227-28. Ultimately, however, Michael sought to become the primary residential parent for the Kings' three

children. 3 RP 31:23-32:8. During the proceedings, the children remained at home with Brenda until a few months before trial. CP 103.

C. Brenda's Efforts to Obtain a Lawyer

From the outset, Brenda sought the assistance of an attorney and asked that the action not proceed until she had an attorney. CP 221-22. Unable to afford counsel, Brenda sought help from the Northwest Justice Project ("NJP"), a statewide provider of civil legal aid. CP 42, 61-62. Unable to take her case at that time, NJP referred Brenda to Snohomish County Legal Services, a volunteer lawyer program. CP 42, 56, 62. Brenda visited their advice clinic in December 2004. CP 42, 57.

In January 2005, Brenda used her rent money to retain a private attorney, Aimee Trua. CP 42; 5 RP 53:6-9. However, after Brenda was unable to make additional payments, Ms. Trua withdrew. CP 181-84; 5 RP 53:12-14. As of mid-April 2005, Brenda was again unrepresented.

Brenda resumed her quest for an attorney who would represent her free of charge. She made several calls and visits to Snohomish County Legal Services, CP 42, 56-59, and each time the program determined that Brenda needed representation, CP 57-58. Snohomish County Legal

² Prior to her marriage to Michael, Brenda worked cleaning fire-damaged homes, selling health club memberships, on a fishing boat, and as a maid, bartender and waitress. Ex. 5 at 3-4; 1 RP 6:8-10.

Services tried unsuccessfully over many months to find a lawyer willing to provide pro bono representation, even of limited scope, to Brenda.

CP 57-58. Several private attorneys reviewed the file but declined to take on the case, citing the complexity of the parenting plan issues, the amount of discovery required, and the time involved. CP 58; *see also* CP 39-40.

Brenda repeatedly informed the court that she needed counsel, noting in several declarations and pleadings that she could not obtain a lawyer because she could not afford one. For example, she wrote: “I am pro SE Because I am broke.” CP 49; *see also* CP 51, 149-50, 155.

D. The Trial

The trial, conducted in January 2006, lasted five days. CP 141-48. The only contested issue at trial was the primary residential care of Aaron, Jonathon, and Katie. CP 116; RP Feb. 27, 2006 at 2:21-3:2. The stakes were huge and emotional for Brenda. *See, e.g.*, 5 RP 43:6-13.

The case included a variety of complex issues, including expert psychological issues and allegations of domestic violence. Brenda faced the hurdle of a Guardian ad Litem (“GAL”) who expressed views adverse to Brenda. *E.g.*, 2 RP 104:8-107:2. This was especially frustrating to Brenda because the GAL did not contact several persons that Brenda recommended as having knowledge about the children and Brenda, but she

talked to numerous persons recommended by Michael. 2 RP 128:11-135:18. Further, the GAL never prepared a final report, which would have helped Brenda prepare for trial. *See* Ex. 8 (GAL's last report states it is "interim" and notes it was completed prior to the completion of Michael's anger management evaluation). Brenda found herself in the difficult position of trying to figure out how to impeach the GAL and other witnesses who presented a picture of Brenda and her care for her children that Brenda felt was untrue.

As a pro se litigant, Brenda faced many challenges. She had to wear multiple hats simultaneously: party, witness, lawyer, scrivener. *See* 1 RP 3:24-4:3. She had to do so during highly emotional testimony, *see* 1 RP 37:5-38:1; 2 RP 143:24-144:1; 5 RP 43:6-13, 131:11-15, and in the presence of Michael who had been abusive toward her and the children, *see* 4 RP 102:4-108:20; RP Jan. 3, 2006 at 4:2. She faced these challenges with a background of little formal education, having left school in ninth grade when she was sixteen years old. 1 RP 5:17-6:7, 6:24-7:3.

These difficulties were compounded by Brenda's lack of legal training. She could not master the difference between offering testimony, questioning witnesses, and making argument. 1 RP 132:9-27; 2 RP 135:15-22, 150:24-152:4; 3 RP 96:21-97:6; 5 RP 21:23-22:15, 27:12-28:9,

39:4-10. She did not know until the second day of trial that the judge would not consider as evidence pretrial reports, motions or other submissions, except the GAL's interim reports. 2 RP 31:13-35:10. The hearsay rule was a mystery to her. 3 RP 150:5-151:19. She did not formulate appropriate questions for witnesses. 1 RP 88:19-89:24; 2 RP 19:14-21:19, 111:3-19, 135:15-22, 138:21-139:7, 152:18-153:4, 155:15-22; 3 RP 154:25-155:19. She was unable to have some exhibits admitted, or introduce the evidence they contained through other means. 3 RP 58:22-59:20; 5 RP 49:18-19, 56:1-3. Brenda struggled to handle issues that lawyers normally address through expert testimony, such as whether she has Attention Deficit Disorder and if so its impacts. 5 RP 44:11-45:17. She had not subpoenaed witnesses. RP Feb. 27, 2006 at 2:9-11. She had not obtained documents that a lawyer could have obtained through discovery, including Michael's financial records and the GAL's notes. 1 RP 22:22-23:12; 5 RP 10:7-10. Noting her own limitations, at one point, she told the court, "I know that I'm not an attorney, Your Honor. But I wrote this—with so many different legal jargons on it just trying to cover all my bases." 4 RP 119:13-15.

The court "tried to be patient and extend some courtesies to the mother because she [was] without counsel." CP 84; *see, e.g.*, 5 RP

35:10-14. The trial court gave explanations of how to admit exhibits, 3 RP 101:15-104:4; 5 RP 63:18-64:21, the hearsay rule, 3 RP 117:9-118:5, exceptions to the rule, 2 RP 42:1-2; 3 RP 150:20-151:19, cross-examining hostile witnesses, 2 RP 21:10-19, 25:7-21, the scope of cross-examination, 5 RP 101:3-21, and what evidence a court can consider, 2 RP 31:13-35:10. But as a layperson, Brenda was unable to follow the judge's instructions. *See, e.g.*, 2 RP 138:10-139:7, 146:17-147:25, 151:21-152:4.

The court's efforts to accommodate for Brenda's lack of a lawyer had limits. The judge stated:

Ms. King, Ms. King Please ask questions and avoid the commentary *or I won't permit you to ask questions*. I mean, I've tried to give you some direction, some advice of how to do this so we can get through the exercise. But if you can't adhere to that, those instructions, then I'll simply have to deny you the opportunity to question. I don't want to do that.

2 RP 111:11-19 (emphasis added).

[Y]ou need to ask questions that are going to help shed some light on the issues that I need to make decisions on. Otherwise it just gets me frustrated, and I'd rather not be upset with you because of the way in which you're questioning a witness.

2 RP 20:3-8.

Ms. King, I'm a fairly patient person, and you're taxing my patience greatly

3 RP 108:15-16; *see also* 2 RP 110:18-22, 113:13-114:8, 135:19-22, 138:21-139:7, 147:19-23, 150:4-152:4, 155:15-22; 3 RP 107:25-110:11; 5 RP 15:1-7, 32:15-33:17.

On its own initiative, the court frequently disallowed questions, testimony and exhibits offered by Brenda. 1 RP 87:15; 2 RP 25:7-21, 113:14-24, 135:19-22, 150:22-151:5, 160:14-15; 3 RP 59:3-19, 61:1-6, 69:4-10, 88:12-16, 91:23-92:12, 94:14-22, 95:16-20, 98:21-25, 107:19-108:9, 116:4-117:24; 5 RP 13:8-11. Midway through the proceedings, the court requested that Michael's attorney object more: "And if counsel will object when [Brenda's] questions are so grossly inappropriate, I'd appreciate it." 3 RP 92:10-12.

The court's frustrations were compounded by its concerns over the amount of time the case was taking because of Brenda's lack of familiarity with courtroom procedure. 3 RP 94:16-22, 118:1-5. The court warned Brenda that it would limit her time, and eventually did so several times. 2 RP 111:16-19, 135:19-22, 147:1-5, 157:7, 160:17-25; 3 RP 119:12-13, 129:8; 5 RP 31:15-17, 35:8-14, 62:4-6.

Some highly relevant evidence never came before the court because Brenda lacked the skills that lawyers have. CP 125; RP Feb. 27, 2006 at 2:1-19. For example, the GAL never prepared a final report. The

court noted it had “only sketchy information” regarding the children’s school life although such information was critical to its decision. CP 87. The court never heard from witnesses at the children’s school who had filed reports with Child Protective Services about Michael’s physical treatment of Brenda’s oldest daughter, 3 RP 78:20-79:5, 170:1-171:18; CP 139; Ex. 12, or a therapist who would have testified that, in contrast to the statements of other witnesses, the children were clean, 4 RP 136:6-16; 5 RP 43:14-44:9. The court never heard from some witnesses who had provided declarations favorable to Brenda earlier in the case, CP 165-71, likely because Brenda went into trial believing that previously filed declarations would be considered as evidence, 3 RP 31:13-16, 32:17-33:8. Similarly, the court never heard from independent witnesses to Michael’s confrontation with a neighbor and Renton police officers involving a shotgun, and the police report about the incident was not entered into evidence. 2 RP 71:12-72:21; 3 RP 84:4-15; CP 139; RP Feb. 27, 2006 at 2:7-9.

Michael’s case included inadmissible evidence because Brenda did not know to object, or how to impeach witnesses, or was unable to do so because she was simultaneously testifying. *See* RP Feb. 27, 2006 at 2:5-19. For example, Michael’s case relied heavily on hearsay. *See, e.g.,*

1 RP 54:23-25, 56:13-20, 110:12-17; 2 RP 27:15-17, 63:3-22, 78:18-80:7, 95:1-9, 97:5-20, 97:24-98:7, 101:4-21, 110:6-17, 127:8; 5 RP 4:25-6:24;

Exs. 5, 6, 8, 10; CP 138. Michael's attorney led witnesses on direct, 1 RP 70:5-8, 12-14, 78:21-23; 2 RP 69:21-23, 70:11-14, 89:10-14, 23-25; 3 RP 20:19-21; 5 RP 77:16-79:16; had witnesses speculate, 1 RP 103:17-19; elicited legal conclusions, 2 RP 89:10-13; and had evidence admitted without foundation, 2 RP 83:14-84:6, 85:7-87:8; Exs. 5, 6. Michael's witnesses were not excluded from the courtroom while other witnesses were testifying and Michael's attorney asked witnesses to comment on the testimony of other witnesses. 1 RP 74:6-11, 117:25-118:5.

One particular piece of hearsay is of note. The GAL testified that school officials told her that the King children came to school hungry while they were in Brenda's care. 2 RP 98:5-7; Ex. 10 at 5. Brenda did not object to this inadmissible testimony and the court gave it great weight in its decision. CP 88:8-13, 22-23. Direct testimony from school personnel would have flatly contradicted the GAL's testimony, but Brenda failed to subpoena and offer such testimony at trial. Instead, after the court had already ruled, a school official delivered a letter to the court refuting

that anyone at the school had ever said that the children came to school unfed. CP 232.³

The GAL and the court also relied on an anger management report about Michael, which was admitted into evidence even though the professional who prepared it did not testify. 2 RP 83:22-85:6; Ex. 6. But the report states that it is “to be considered null and void if the client failed to provide or intentionally withheld any pertinent developmental or legal history” Ex. 6 at 6. Michael had not disclosed a resisting arrest conviction or charges for violating a protection order, 2 RP 71:9-73:7; 3 RP 85:5-18; 4 RP 131:19-25, ongoing troubles with finances and employment, CP 84-86, or being required by an employer to take an anger management course because of threats he had made, 2 RP 68:14-70:25.

Brenda’s self-representation also factored into the court’s final decision. The judge warned Brenda that her manner of cross-examination made him “feel [like] I’m in the middle of a marital argument between you and your husband that is initiated solely by you.” 3 RP 108:19-21; *see also* 2 RP 19:16-20:8. The judge even stated that Brenda’s cross-examination of the GAL showed why she was not a capable parent,

³ This letter also notes that the court’s conclusion that school personnel said the children were dirty is incorrect.

stating that Brenda had “not accepted the message, and instead . . . tried to shoot the messenger.” CP 102; *see also* CP 94-95.

E. The Judgment

The judgment removed Brenda from her primary parenting role, the role she had served for every one of her children, and essentially reversed the parents’ roles in their children’s lives. The court awarded Michael primary residential care of the children as well as sole decision-making authority. CP 29. Brenda’s time with the children was limited to every other weekend. CP 25.

The court also ordered Brenda, who had been unable to afford her own attorney, to pay for Michael’s attorney. CP 11. The court stated that this \$7,500 judgment was “intended to reimburse the husband, in part, for his share of the guardian ad litem fees that he has incurred and for some of his attorney fees, all of which, it seems to me, have been incurred for the benefit of the children of the parties.” CP 115-16. The court also stated that the fee-shifting was warranted because of “the increase in time and expense that these proceedings have generated simply through delay and the lack of cooperation on [Brenda’s] part. It’s become much more expensive than it needed to be.” CP 116.

F. Brenda's Motion for a New Trial

Following the trial, a private attorney appeared for Brenda pro bono for the limited purpose of presenting a motion for a new trial and appointment of counsel at public expense. CP 41-76. The court denied the motion. The court acknowledged that Brenda was at an extreme disadvantage without an attorney, but concluded that it was powerless to appoint counsel, stating:

[A]lthough respondent was at a significant disadvantage through her inability to retain counsel to represent her at trial and her inability to secure pro bono representation, despite her requests for such representation, which circumstances mirror the access to justice crisis throughout the State, regrettably there are no public resources available with which to compensate counsel if an attorney were to be appointed to represent respondent and the court is unwilling to go beyond the present ethical encouragement that attorneys accept pro bono service and designate a family law practitioner to represent Brenda without compensation.

CP 39-40. In addition, the court commented:

[C]andidly I agree with you insofar as your arguments about Mrs. King not being well served because she was pro se. I think the record will bear that out. That she had a very difficult time at trial that there were objections that she was unfamiliar with, did not respond. [sic] Evidence that she apparently had consisting, I think, in some cases, of police reports that didn't see the light of day because there were proper objections based on hearsay. And she didn't know enough about the

rules to secure the presence of a witness to testify to what facts she thought might have been relevant. And I think in the materials that you submitted, you've also pointed out from the daycare or the school, rather, some information that did come in to evidence because it appears there was no objection. And some of that information was hearsay and may have been inaccurate, which is why we have hearsay objections, which Mrs. King did not raise at trial or I would have sustained an objection and kept some of that evidence out.

So, in principle, I agree with you that she should have been represented by an attorney. I think *when there are issues of parenting and, in this case, a change from primary residential parenting at least in fact from the mother to the father, these are critical issues. They're no less serious to the litigants, it seems to me, than the potential loss of liberty that comes from criminal proceedings.*

RP Feb. 27, 2006 at 2:1-3:2 (emphasis added).

Brenda appealed. CP 7-38. On this appeal she is represented by pro bono counsel, limited to the issues involved in this appeal.

V. SUMMARY OF ARGUMENT

The court rejected Brenda's motion for a new trial for one reason only: the court wrongly concluded that it lacked the power to appoint counsel for Brenda in the absence of a defined system or legislative appropriation to do so. CP 39. This reasoning puts the cart before the horse. The threshold question is whether Brenda has a constitutional right to counsel in a civil case of this nature. If so, the court was obligated to

remedy the violation of that right. The Legislature has concluded that “effective legal representation must be provided for indigent persons . . . , consistent with the constitutional requirements of fairness, equal protection, and due process *in all cases where the right to counsel attaches.*” RCW 10.101.005 (emphasis added). Thus, when there is a constitutional right to counsel, the Legislature has already acknowledged that counsel “must be provided.” *Id.*

Brenda had a constitutional right to counsel in the dissolution proceedings below, a right based on Article I, §§ 3, 10, and 12 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution. Given the existence of this constitutional right, the trial court had the duty and authority under statute and Washington case law to appoint counsel for Brenda.

VI. STANDARD OF REVIEW

Whether the trial court erred “on the merits of [Brenda’s] constitutional claims is reviewed de novo.” *See Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 334, 969 P.2d 1072 (1998).

VII. ARGUMENT

A. The Required State Action Occurred Here

Constitutional claims require State action. Court adjudication and enforcement of private rights has repeatedly been found to involve sufficient State action to invoke constitutional protections. *E.g.*, *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338-39, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 381, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); *Shelley v. Kraemer*, 334 U.S. 1, 19, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In each of these cases, the United States Supreme Court concluded that there was State action when a private party used the courts to pursue private remedies. Although this Court once questioned whether a private paternity action involves State action, it proceeded to address the merits of the due process claim at issue. *See Rabb v. Estate of McDermott*, 60 Wn. App. 334, 342-43, 803 P.2d 819 (1991). Further, given that the State authorizes marriage and demands that courts be the exclusive forum for dissolution and assignment of residential time and decision-making regarding children, use of the courts to adjudicate a custody dispute involves State action. *See Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971).

B. The Washington Constitution’s Protection of Meaningful Access to the Courts Required the Trial Court to Appoint Counsel for Brenda

Article I, § 10 of the Washington Constitution guarantees Brenda a right of access to the courts.⁴ That right was violated when the trial court conducted the proceedings below without appointing a lawyer for Brenda.

1. Article I, § 10 Gives Brenda a Right of Meaningful Access to the Courts

Article I, § 10 of the Washington Constitution provides for the right of meaningful access to the courts. This provision states: “Justice in all cases shall be administered openly, and without unnecessary delay.”

Const. art. I, § 10. The Washington Supreme Court has concluded that the language of Article I, § 10 is

not an abstract theory of constitutional law, but rather is the bedrock foundation upon which rest all the people’s rights and obligations. In the course of administering justice the courts protect those rights and enforce those obligations.

Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370

(1991). In *Doe*, the court interpreted Article I, § 10 as creating a “*right of access to the courts*,” meaning a right to use court procedures and participate fully in litigation. 117 Wn.2d at 780 (emphasis added); *see*

also *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 361-62, 16 P.3d 45 (2000) (“[In *Doe*], the court held that article I, section 10 of the state constitution guarantees a right of access to the courts . . .”). The specific issue for the court in *Doe* was the plaintiff’s right to certain discovery that the defendant asserted to be confidential. *Doe*, 117 Wn.2d at 776. In affirming the trial court’s order that the information be disclosed, the court concluded that Article I, § 10 protected a litigant’s right to carry out discovery because that right was “concomitant” to the right of access to the courts. *Id.* at 783.

There is no available Washington constitutional history regarding Article I, § 10 specifically. See *Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 156, 713 P.2d 710 (1986). Nonetheless, there is other guidance regarding the provision.

Article I, § 10 stems from the Magna Carta. As Blackstone explained:

Since the law is in England the supreme arbiter of every man’s life, liberty, and property, *courts of justice must at all times be open to the subject*, and the law be duly administered therein. The emphatical words of magna carta, spoken in the

⁴ No analysis under *State v. Gunwall*, 106 Wn.2d 84, 720 P.2d 808 (1986), is necessary for a constitutional provision that, like Article I, § 10, has no federal counterpart. See *Seeley v. State*, 132 Wn.2d 776, 809, 940 P.2d 604 (1997).

person of the king, who in judgment of law (says Sir Edward Coke) is ever present and repeating them in all his courts, are these; “nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam (to none will we sell, to none deny, to none delay either right or justice).”

William Blackstone, 1 Commentaries *142 (emphasis added) (spelling modernized). The purpose of government, including the courts, is to protect the rights of its citizens. As the Washington Supreme Court observed in *Doe*, the “very first enactment of our state constitution” provides for the protection of those rights. *Doe*, 117 Wn.2d at 780; *see also* Const. art. I, § 1 (“All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.”).

Additional guidance for the interpretation of Article I, § 10’s right of access can be found in Article I, § 32, which provides: “A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.” Section 32 provides guidance regarding the scope of substantive rights and the interpretation of other provisions of the Washington Constitution. *Seeley v. State*, 132 Wn.2d 776, 811, 940 P. 2d 604 (1997) (explaining that at a minimum, this provision can be used “as an interpretive mechanism” and it may also be a source of substantive rights); *see also id.* at 809-10

(citing Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669 (1992)); Const. art. I, § 29 (“The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”).

Relevant fundamental principles include the common law right to counsel for indigent civil litigants and international recognition that appointment of counsel is required to effectuate the right of access to the courts.

A right to counsel in civil cases was recognized over 500 years ago. At common law, some indigent litigants in civil cases were entitled to the assistance of counsel without charge. 11 Hen. 7, c. 12 (1494), An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, *reprinted in 2 Statutes of the Realm* 578 (1993). Washington adopted the common law when it became a State. RCW 4.04.010; *see also* Const. art. XXVII, § 2. The common law incorporated by RCW 4.04.010 “includ[es] the English statutes in force at the date of the Declaration of Independence.” *Cooper v. Runnels*, 48 Wn.2d 108, 112, 291 P.2d 657 (1955).

More recently, international courts have recognized the right to counsel for some civil litigants as a basic component of access to the

courts.⁵ See *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 305 (1979). In *Airey*, the European Court of Human Rights interpreted the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides for a “fair and public hearing,” to mandate the appointment of counsel for an Irish woman seeking a judicial separation from her abusive husband. *Id.* at ¶ 21; see also ¶ 24 (stating it is “most improbable that a person in Mrs. Airey’s position . . . can effectively present his or her own case . . . the possibility to appear [pro se] before the High Court does not provide the applicant with an effective right of access”); see also *New Brunswick v. J.G.*, [1999] 3 S.C.R. 46 (Canada) (counsel constitutionally required in child custody hearing).

2. Meaningful Access to the Court Required Appointment of Counsel for Brenda

A right of access is hollow if the right does not provide *meaningful access*. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 533, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) (“[O]rdinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.”) (holding that Title II of

⁵ Washington courts have looked to international law sources, such as the Magna Carta and the Declaration of Human Rights of the United Nations, in interpreting

the Americans with Disabilities Act constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment). The right to access the courts is so fundamental that it is deemed the "right conservative of all other rights." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S. Ct. 34, 52 L. Ed. 143 (1907). Even prisoners must "be afforded *meaningful* access to the courts." *Whitney v. Buckner*, 107 Wn.2d 861, 866, 734 P.2d 485 (1987). The same fundamental right protects the parties in a dissolution trial: "Full access to the courts in a divorce action is a fundamental right." *Bullock v. Superior Court*, 84 Wn.2d 101, 104, 524 P.2d 385 (1974).

Meaningful access in many adversarial cases is impossible to achieve without a lawyer. As Judge Ellington once observed, "[M]eaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason." *Miranda v. Sims*, 98 Wn. App. 898, 909, 991 P.2d 681 (2000) (Ellington, J., concurring); *see also In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 160,

constitutional provisions. *See Eggert v. City of Seattle*, 81 Wn.2d 840, 841, 505 P.2d 801 (1973) (right to travel).

66 P.3d 1036 (2003) (“[T]o maintain the adversarial system, parties must utilize lawyers to resolve disputes . . .”).⁶

A right to counsel as a component of meaningful access to the courts, especially where the right at stake is the custody and care of one’s children, has been recognized in Washington in other contexts. A parent facing the potential termination of her parental rights has the right to counsel, which includes the “effective representation of counsel.” *In re Welfare of J.M.*, 130 Wn. App. 912, 915, 125 P.3d 245 (2005). An indigent parent in dependency actions also has the right to counsel—even if the case involves a “nonpermanent deprivation of the child.” *In re Welfare of Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975).⁷

Washington also recognizes that the right to counsel extends to cases initiated and maintained by private parties. RCW 26.33.110(3)(b) (right to counsel for parents of children to be adopted).

⁶ “Even a skilled lawyer who represents himself is at a disadvantage in contested litigation.” *Kay v. Ehrler*, 499 U.S. 432, 437, 111 S. Ct. 1435, 113 L. Ed. 2d 486 (1991). “The adage that ‘a lawyer who represents himself has a fool for a client’ is the product of years of experience by seasoned litigators.” 499 U.S. at 437-38; *see also State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 1731 (1978).

⁷ In this case, the GAL’s statements about Brenda’s parenting at times bordered on accusations of neglect. 2 RP 98:2-7, 116:20-117:2; Ex. 10 at 4:20-23. The school professionals, who supposedly made such claims to the GAL, have a mandatory duty to report neglect, RCW 26.44.030, but never did. Allegations of neglect can lead to the filing of a dependency proceeding and, if that had occurred, ironically, counsel would have been appointed for Brenda. *Myricks*, 85 Wn.2d at 254; RCW 13.34.090(2).

At a minimum, counsel should be appointed under Article I, § 10 when (a) the proceeding is adversarial; (b) critical interests are at stake; (c) the unrepresented litigant is indigent and has made reasonable, but unsuccessful, efforts to obtain counsel; and (d) the unrepresented litigant is unable to adequately or effectively advocate for his or her interests.⁸ Such a multifactor test would not require appointment of counsel in every adversarial matter, but would require the trial court to carefully consider whether a pro se litigant is being denied meaningful access to the court proceedings in that particular case.

This dissolution action, in which Brenda risked impairment of her fundamental right to the care, custody, and control of her children, is exactly the type of complex dispute involving the potential loss of critical interests in which a lawyer's assistance is necessary. The stakes, for Brenda, were enormously high. Indeed, the trial judge observed that the "issues of parenting" involved in this trial are "critical issues . . . no less

⁸ That the opposing party is represented by counsel is one factor to consider under the fourth prong of this test. The decision to obtain counsel, when made by a party with the means to do so, indicates that the matter is complex enough and the stakes are high enough that attorney involvement is necessary. See Judicial Servs. Div., Admin. Office of the Courts, *An ` in Washington State 1995-2000* 15 (discussing incidence of self-representation and concluding that "litigants have an understanding of which actions require hired expertise. In other words, the choices and trends reveal that litigants are informed and that their choices are rational and consistent over time—with one caveat.

serious to the litigants, it seems to me, than the potential loss of liberty that comes from criminal proceedings.” RP Feb. 27, 2006 at 2:21-3:2. Going to trial, Brenda risked—and ultimately lost—her parental authority over the parties’ three children. Instead of being the children’s primary residential caregiver, she now is permitted only limited visitation, CP 25, and does not even share decision-making authority, CP 29. This means she is prohibited from participating in the most important decisions in her children’s lives, including those about their religious upbringing, medical care, and education.

Without the assistance of counsel, Brenda was denied her right to meaningfully access the courts. In fact, the “trial” in which Brenda lost her parenting authority was little more than a parody of the adversarial process upon which we rely for truth-finding. Brenda was able to enter the courtroom and attend and speak during the trial. But she had little concept of what it meant to argue or testify or question witnesses and she continually confused these concepts. She did not recognize what evidence was admissible and thus did not know how to timely object. She did not even know what evidence the court would consider in that she did not know that pre-trial declarations were not a part of “the record” at trial.

The caveat is that for low-income litigants, the economic factor may constrain the choice

Accordingly, she failed to subpoena important witnesses who would have testified favorably to her.

As a result, the court did not hear highly relevant evidence, reviewed without objection much questionable evidence (including hearsay and other testimony not based on personal knowledge), and saw Brenda flounder while trying to cross-examine the hostile witnesses called in support of Michael.⁹ Even the trial court recognized that Brenda's lack of familiarity with the legal world put her "at a significant disadvantage through her inability to retain counsel to represent her at trial and her inability to secure pro bono representation." CP 39. That is an understatement. The reality is that Brenda did not have "meaningful" access to the courts.

such that self-representation appears as the only possible option.").

⁹ Brenda faced exactly the same litany of horrors that the Washington Supreme Court identified in *Myricks* as why state-provided counsel is necessary in dependency proceedings: Brenda was a "defendant-parent, who . . . lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with social workers, counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the . . . court." 85 Wn.2d at 254.

**C. The Court's Duty to Administer Justice Impartially
Required the Trial Court to Appoint Counsel for
Brenda**

The appointment of counsel for indigent civil litigants in the circumstances set forth above, *see supra* at 25, directly protects the core integrity of the judiciary, which is necessary to the validity of our government. Article IV, §§ 1 and 30, create Washington's courts and vest judicial power in them. "Upon creation, these courts assumed certain powers and duties[, including] . . . the fair and impartial administration of justice and the duty to see that justice is done in the cases that come before the court." *Iverson v. Marine Bancorp.*, 83 Wn.2d 163, 167, 517 P.2d 197 (1973). If meaningful access to the courts is not available to all, that power will be eroded. "[G]overnments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Const. art. I, § 1.

Attorneys play a critical role in an impartial judicial system. The Washington Supreme Court recently acknowledged the importance of attorneys to the vitality of the adversarial system in *In re Schafer*. Considering the attorney-client privilege, the court explained that the privilege "has been sustained for centuries because of the fundamental benefits that accrue to society at large" and "is pivotal in the orderly

administration of the legal system, which is the cornerstone of a just society” in part because “*to maintain the adversarial system*, parties must utilize lawyers to resolve disputes.” *In re Schafer*, 149 Wn.2d at 160 (emphasis added). Similarly, the Rules of Professional Conduct for lawyers acknowledge that justice in an adversarial proceeding requires lawyers on both sides. *See* RPC, Preamble ¶ 8 (effective Sept. 1, 2006) (“[W]hen an opposing party is well represented, a lawyer can be a conscientious and ardent advocate on behalf of a client and at the same time assume that justice is being done.”).

That certain individuals must attempt to navigate complex adversarial matters on their own, while others can afford to retain counsel to help them, erodes society’s confidence in the fairness of judicial outcomes. *See* Judicial Servs. Div., Admin. Office of the Courts, *An Analysis of Pro Se Litigants in Washington State 1995-2000* (hereinafter “*Analysis of Pro Se Litigants in Washington*”) 1 (“Real and perceived barriers to self-representation diminish the confidence [pro se] litigants place in the court system.”). This erosion of public trust is particularly dramatic when critical interests like parenting are involved. The perception, let alone the reality, of unfairness puts undue strain on the

social contract by which we all have agreed to resolve our disputes through the courts.

The presence of pro se litigants often puts judges in untenable circumstances. Judges' obligation to be independent and fair is "indispensable to justice in our society." CJC Canon 1; *see also* CJC Preamble. When a pro se litigant is present, a judge must try to balance on a tightrope between helping the pro se litigant enough to give that party a fair chance at the hearing or trial, but not so much as to create an appearance of partiality. Especially when one party is pro se, the judge can no longer fully rely on the parties to put their best cases forward. If the court acts as instructor or fact-developer, it may undermine its independence. *See Piler v. Ford*, 542 U.S. 225, 231, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004) (holding that a trial court did not err when it did not explain procedural rules, including the statute of limitations, to a pro se habeas petitioner because these "tasks [are] normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a *pro se* litigant in such a manner would undermine district judges' role as impartial decisionmakers."). If the court does not assist the pro se litigant, it creates a real risk that injustice is done as the facts necessary for an equitable or legal result are never presented. Either

way, the appearance of fairness is at grave risk. *See, e.g., Analysis of Pro Se Litigants in Washington 1* (“When dealing with inexperienced pro se litigants, judicial officers face dilemmas in attempting to treat all litigants fairly.”).¹⁰

The record here shows that the judge recognized that Brenda’s lack of counsel erected a conflict between two of the core principles of our judicial system: maintaining the appearance of impartiality and obtaining a just result. CP 39; RP Feb. 27, 2006 at 2:1-21. Appointment of counsel is the indispensable response to this dilemma.

D. Due Process Required the Trial Court to Appoint Counsel for Brenda

Both Article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution require the State to provide due process before depriving an individual of liberty. “Liberty” includes not just freedom from physical restraint but other interests that have been deemed fundamental. *See Meyer v. Nebraska*, 262 U.S. 390,

¹⁰ *See* ABA, Comm. on Standards of Judicial Administration, Standards Relating to Trial Courts 2.23, at 45-47 (1976); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 Just. Sys. J. 163, 165 (2003); *see also* Barrie Althoff, *Ethics and the Law: Ethical Considerations for Lawyers and Judges When Dealing with Unrepresented Persons*, Wash. St. B. News 50 (Jan. 2000) (stating that “it is difficult for a judge [attempting to balance the appearance of fairness with assisting a pro se litigant] to know

399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). Two such fundamental rights are involved here. First, Brenda faced an impairment of her right of access to the courts. See *Tennessee v. Lane*, 541 U.S. at 533-34 (discussing “the fundamental right of access to the courts”); *Chambers*, 207 U.S. at 148.¹¹ Second, Brenda’s right to the care, custody, and control of her children was at stake. See *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”) (plurality opinion); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (right to care, custody, and companionship of children is a “sacred right”); *Myricks*, 85 Wn.2d at 254 (right to custody of children is “so rooted in the traditions and conscience of our people as to

where between the Scylla of seeking a level playing field and the Charybdis of presiding over a litigation massacre the judge may safely sail”).

¹¹ *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 562, 800 P.2d 367 (1990), states that the right of access to the courts is not fundamental. However, *Barrett* was decided prior to *Tennessee v. Lane*. Federal law on constitutional questions sets a floor below which the Washington Constitution cannot fall. Thus, after *Tennessee v. Lane*, Washington courts must consider the right of access to be fundamental. Moreover, the court in *Barrett* cited *Housing Authority v. Saylor*, 87 Wn.2d 732, 557 P.2d 321 (1976), in support of its statement that access to the courts is not a fundamental right, *Barrett*, 115 Wn.2d at 562, but *Saylor* made no such ruling. Rather, as relevant here, *Saylor* simply held that Article 1, § 4 does not protect a right of access to the courts. *Saylor*, 87 Wn.2d at 742 (“Access to the courts is amply and expressly protected by other provisions.”).

be ranked as fundamental”) (internal quotation marks and citation omitted).

1. The Trial Court Should Have Appointed Counsel for Brenda Under the Federal Due Process Clause

Under the Fourteenth Amendment, there is a “presumption” that appointed counsel for indigent litigants is limited to cases involving possible deprivation of physical liberty. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 26-27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). In a case involving a nonphysical liberty interest, counsel is required if this “presumption” is outweighed by an examination of the factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). *Lassiter*, 452 U.S. at 27. In a case involving parenting, like *Lassiter*, those factors are: (1) the private interests of the parent, which “warrant[] deference and, absent a powerful countervailing interest, protection”; (2) the State’s interest in a correct decision, as well as the State’s financial interests; and (3) the complexity of the proceedings and the risk of an erroneous deprivation of parental rights. 452 U.S. at 27-29 (internal quotation marks and citation omitted).

The continuing validity of *Lassiter* may be in question.¹² Even under the *Lassiter* test, however, Brenda was entitled to counsel. All three factors weigh in Brenda's favor, thereby overcoming any presumption against appointment of counsel. First, her interest in maintaining the care, custody, companionship, and control of her children is extremely high. She faced the risk of significant interference with and restrictions on her ability to parent her children, for whom she had been the primary caregiver. Second, the State—like the parties—has a significant interest in a correct decision protecting the best interests of the children. And, while the State may have a “weak pecuniary interest” in not paying for counsel, *Lassiter*, 452 U.S. at 30, it also has an interest in the monetary savings that result from more efficient proceedings handled by counsel.¹³ Finally, unlike Ms. *Lassiter*, *see id.* at 32-33, Brenda at all times continued to parent her children and vigorously attempted to protect her rights and

¹² Few states actually follow *Lassiter*'s presumption against appointment of counsel and case-by-case approach in termination proceedings. *See* Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 *Touro L. Rev.* 247, 276-77 (1997) (16 states require counsel to be appointed; in 28 counsel is available upon request).

¹³ The Court in *Lassiter* suggested without explanation that proceedings handled by counsel would be “lengthened.” 452 U.S. at 27-28. But lawyers play an important filtering role and their knowledge of procedure and evidence rules makes hearings and trials proceed more smoothly and quickly. *See Analysis of Pro Se Litigants in Washington 1* (“Pro se litigants require additional court resources and create

articulate her position to the court. Under these circumstances, the risk that an indigent and unrepresented litigant will be erroneously denied her parental rights is so high that the process is sufficient only if an attorney is appointed.

Brenda is also entitled to counsel under *Lassiter* not only the basis of her fundamental parenting rights, but also to protect her fundamental right of access to the courts. Her interest in meaningful access is significant, and the other two *Mathews* factors also point in her favor just as they do when parental rights are the basis of the claim.

2. Article I, § 3 Provides Greater Protection to Brenda Than the Federal Approach

Article I, § 3 of the Washington Constitution provides more protection here than the Fourteenth Amendment. Under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), at least six factors guide the Court in this inquiry. Although the language of the federal and State due process clauses is identical (the first factor in *Gunwall*), all the other factors weigh in favor of a more protective interpretation of Article I, § 3.¹⁴

inefficiencies in case management.”). The trial court below concluded that Brenda’s pro se efforts lengthened the proceedings. CP 116; *see also* 3 RP 94:16-22, 118:1-5.

¹⁴ Although there are cases containing *Gunwall* analyses of Article I, § 3, they do not concern a right to counsel, and thus they are not determinative here. *See State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747 (1994) (stating that under *Gunwall*, “when the

On the second *Gunwall* factor, the Court is to consider differences not only between the respective due process clauses, but between *other* provisions in the federal and State constitutions. Article I, §§ 1, 10, 29, and 32 of the Washington Constitution are without parallel in the federal constitution and require procedural protections for litigants not expressed in the federal Constitution. With respect to the third and fourth *Gunwall* factors, as mentioned above, the common law, incorporated into Washington law, provided for a right to counsel in civil cases.

The fifth *Gunwall* factor, differences in structure between the federal and State constitutions, always points toward interpreting the Washington Constitution as being more protective of individual rights than the federal constitution. *State v. Foster*, 135 Wn.2d 441, 458, 957 P.2d 712 (1998). Unlike the federal constitution, the very first article of the Washington Constitution declares that the duty of government is to secure individual rights. Const. art. I, § 1. Moreover, the federalism concerns that animate federal decisions are not present when examining the State constitution.

The sixth *Gunwall* factor is whether the subject matter is of particular State or local interest or concern. The strong history of State

court rejects an expansion of rights under a particular state constitutional provision in one

variation in court procedure, combined with the invitation in *Lassiter* for States to develop their own policies regarding the right to counsel, indicates that the right to counsel in civil cases—particularly cases involving traditional State matters such as child custody—is of more local than national concern. *See Lassiter*, 452 U.S. at 33 (“A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.”); *In re Custody of RRB*, 108 Wn. App. 602, 620, 31 P.3d 1212 (2001) (“[I]ssues of [child] custody . . . are matters of state or local concern.”).

Thus, Article I, § 3 is more protective of the civil right to counsel than is the federal constitution. This result is supported by existing Washington case law. Under Article I, § 3, the appointment of counsel is constitutionally required “when procedural fairness demands it.” *Tetro v. Tetro*, 86 Wn.2d 252, 253, 544 P.2d 17 (1975) (holding that indigent litigants charged with contempt are entitled to appointed counsel when facing incarceration). The right exists in all termination of parental rights proceedings, *In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906

context, it does not necessarily foreclose such an interpretation in another context”).

(1974),¹⁵ and also extends categorically to parents involved in dependency and child neglect proceedings, *Myricks*, 85 Wn.2d at 254. Citing to *Luscier* and *Myricks*, the Washington Supreme Court has stated broadly that the right to counsel extends to cases in which “a fundamental liberty interest, similar to the parent-child relationship, is at risk,” rejecting *Lassiter*’s case-by-case balancing approach. *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995); *see also Miranda*, 98 Wn. App. at 902.¹⁶ Article I, § 3 even requires the appointment of counsel for attorneys in disciplinary proceedings who are unable to represent themselves due to mental incapacity. *In re Disability Proceeding Against Diamondstone*, 153 Wn.2d 430, 445, 105 P.3d 1 (2005).

Under the analysis of *In re Grove*, the trial court should have appointed counsel for Brenda on the basis of either of the two different fundamental rights that were at stake, Brenda’s right of access to the courts

¹⁵ Although *Luscier*’s holding was based on both the Fourteenth Amendment and Article I, § 3, *Luscier*, 84 Wn.2d at 138, Washington continues to follow its categorical approach to terminations post-*Lassiter*.

¹⁶ In *In re Grove*, the court rejected a due process claim because the threatened interest (worker’s compensation benefits) was “only a financial one,” which the court viewed as not “‘fundamental’ in a constitutional sense.” 127 Wn.2d at 238. The court did not consider the due process claim from the basis of the litigant’s right of access to the courts. *Miranda*, which held there is no due process right to counsel for parents in an inquest proceeding, 98 Wn. App. at 903, similarly did not consider the right of access, and further it is inapposite because it did not involve a party to an adversarial proceeding.

and her parenting rights. Even if this were not the case, the Court should reject adoption of the *Lassiter* balancing test under Article I, § 3. The structure of that test—a balancing of three factors which then must be weighed against a presumption—is unworkable and impracticable. In nearly all cases, a pro se litigant will be unable to understand and marshal facts and argument to demonstrate to the trial court that the factors balance in her favor, especially when the scales begin heavily tilted as a result of a presumption against counsel. *See Matter of K.L.J.*, 813 P.2d 276, 282 n.6 (Alaska 1991) (explaining inadequacies of *Lassiter*'s case-by-case balancing approach and adopting more protective interpretation of state due process clause). Instead, the Court should consider the same factors outlined above, *see supra* at 25, in determining whether due process mandates appointment of counsel.

Applying such a test here demonstrates that fundamental fairness required the appointment of counsel for Brenda. She faced an adversarial trial proceeding; she faced a significant curtailment of her fundamental parenting rights; she was unable to find counsel who would represent her free of charge; the proceedings and issues were emotional and complex and as the trial judge recognized, she was unable to effectively navigate the proceedings on her own.

That Michael was represented by counsel and Brenda was not is significant, as Brenda was particularly unable to effectively navigate the proceeding in light of the imbalance in the courtroom. In *Luscier*, the court considered the inequity of one party proceeding pro se while the other party is represented by counsel. 84 Wn.2d at 137. Particularly compelling to the court was a law review note that concluded:

“[A] significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.”

Id. at 138 (quoting Note, *Child Neglect: Due Process for the Parent*, 70 Colum. L. Rev. 465, 476 (1970)). Thus, the court considered it “readily apparent that the lack of counsel, in itself, may lead improperly and unnecessarily to deprivation of one’s children.” *Id.*

E. Article I, § 12 of the Washington Constitution Required the Trial Court to Appoint Counsel for Brenda

The Washington Supreme Court’s most recent decision involving Article I, § 12 (the privileges and immunities clause), *Andersen v. King*

County, ___ Wn.2d ___, 2006 WL 2073138 (July 26, 2006), contains no majority decision as to the contours of an Article I, § 12 claim or the relationship between this clause and the federal Equal Protection Clause. But under any of the possible tests, Brenda’s rights were violated.¹⁷

1. The Trial Court Denied the Privilege of Meaningful Access to Brenda

Under the independent privileges and immunities clause approach discussed by four justices in *Andersen*, Article I, § 12 is violated when the State grants a citizen, class, or corporation a privilege and that privilege is not available equally to all. *Andersen*, 2006 WL 2073138, at *30 (J.M. Johnson, J., concurring in judgment only, joined by Sanders, J.), *79 (Chambers, J., dissenting, joined by Owens, J.). Use of the courts to resolve disputes over personal rights is a “privilege.” *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) (stating that the “usual remedies . . . to enforce . . . personal rights” are a “privilege”); *see also Andersen*, 2006 WL 2073138, at *31 (J.M. Johnson, J., concurring in judgment only) (stating that “privileges” include the right to “institute and maintain

¹⁷ In *Saylors*, 87 Wn.2d at 739-40, the court held that federal equal protection and Article I, § 12 did not require the State to waive filing fees on appeal for indigent litigants. The court started its analysis from the premise that Article I, § 12 is always identical to the federal Equal Protection Clause, a proposition it subsequently rejected. *See Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419 (2004).

actions of any kind in the courts of the state”’) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230)).¹⁸

In addition, the State’s requirement that parents settle custody disputes in court, Ch. 26.09 RCW, illustrates how strong the privilege involved in this case is. The State does not merely provide a venue where parties can resolve personal disputes, it *requires* them to dissolve marriages and determine parenting authority in a State-controlled court. *See Boddie*, 401 U.S. at 376.

The privilege to use the courts to resolve personal disputes is not available equally to all when, in a complex adversarial proceeding involving a critical interest, a poor person such as Brenda has unsuccessfully attempted to locate pro bono counsel and the court has not appointed counsel. As is so aptly demonstrated by this case, a parent with counsel is more likely to navigate the complexities of a dissolution trial involving decisions about children and prevail than an otherwise similarly situated parent who has not obtained counsel. Michael was the only party in the case below who had *meaningful* access to the court. Therefore, the

¹⁸ *See also Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 202, 396 P.2d 537 (1964) (violation of privileges and immunities clause to provide certain persons “special recourse to the courts—a privilege which does not belong equally on the same terms to all persons and corporations in the state”).

State's failure to provide counsel for Brenda constitutes a denial of a privilege.

2. The Trial Court Should Have Appointed Counsel for Brenda Under Federal Equal Protection Analysis

Brenda was also entitled to the appointment of counsel under federal equal protection analysis. Under the three-justice plurality opinion in *Andersen*, it is appropriate to apply federal equal protection analysis to an Article I, § 12 claim in the absence of a privilege having been extended to a "minority class." 2006 WL 2073138, at *2 (plurality opinion). Under federal equal protection, a court must strictly scrutinize a State act that burdens a fundamental right. *See, e.g., Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). As discussed above, access to the courts; as well as parents' rights to the care, custody, and control of their children; are fundamental rights.

To survive strict scrutiny, a compelling State interest must outweigh the interference with the fundamental interest. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978). No State interest is compelling enough to outweigh the harm to a litigant such as Brenda when the four factors outlined above are present. *See supra* at 25. Budgetary concerns are not compelling enough to justify burdening a

fundamental right. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down restriction on welfare benefits because of burden on fundamental right to travel); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 123-24, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996) (pecuniary interests of a State are not compelling enough to justify a requirement that indigent parents pay for transcript fees on appeal, which burdens fundamental right of parenting). In fact, the State’s strongest interests in this case between Michael and Brenda—ensuring that the court reaches a just decision and that the best interests of the children are protected—are harmed unless Brenda has a lawyer too. The trial judge acknowledged as much when he stated that Brenda was “at a significant disadvantage” because of her lack of representation. CP 39; *see also* RP Feb. 27, 2006 at 2:1-3:2. In short, rather than there being a compelling State interest that would justify interfering with Brenda’s important rights, here the State’s interests—as well as Brenda’s—require appointment of counsel.¹⁹

¹⁹ Even if a standard lower than strict scrutiny were applicable, federal equal protection compels appointment of counsel for Brenda under rational basis review. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 223-24, 227, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (“In determining the rationality of [a law that denied undocumented school-age children free public education], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the challenged law] can hardly be considered rational unless

3. Article I, § 12 Provides Greater Protection to Brenda Than the Federal Approach

The last majority holding of the Washington Supreme Court regarding Article I, § 12 occurred in *Grant County Fire Protection District No. 5 v. City of Moses Lake* (“*Grant County IP*”), 150 Wn.2d 791, 83 P.3d 419 (2004). That case applied *Gunwall* and determined that Article I, § 12 should be interpreted independently of the federal Equal Protection Clause in a case involving annexation. 150 Wn.2d at 811. As in *Grant County II*, the first five *Gunwall* factors here also favor an independent interpretation of Article I, § 12.²⁰ *See id.* at 806-12. The sixth factor, whether the matter is an issue of local or state concern, also favors an independent interpretation because court systems and family law are State or local concerns. *See supra* at 36. Thus, under the factors set forth above, *see supra* at 25, Brenda was entitled to appointment of counsel if the structure of an Article I, § 12 claim tracks the federal analytic approach but has a more protective outcome.

it furthers some substantial goal of the State. . . . Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.”). When the factors set forth, *supra* at 25, are present, it is not rational for the State to refuse to provide counsel.

²⁰ Four years before *Grant County II*, this Court applied a *Gunwall* analysis to the privileges and immunities clause in the context of the right to counsel for parents in an inquest proceeding. *Miranda*, 98 Wn. App. at 903. *Grant County II*'s analysis supersedes that set forth in *Miranda*, and further, the court in *Miranda* did not consider the right to counsel or parental rights when addressing the sixth *Gunwall* factor.

F. Courts Have the Authority to Appoint Counsel at Public Expense

It is the duty of the courts to interpret the Washington Constitution. “[I]t is emphatically the province and duty of the judicial department to say what the law is even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.” *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (internal quotation marks and citations omitted).

When an individual constitutional right is at stake, courts must interpret and apply the constitution, notwithstanding the possibility of an impact—even a significant one—on the public fisc. 90 Wn.2d at 503 n.7 (“The power of the judiciary to enforce rights recognized by the constitution, even in the absence of implementing legislation, is clear.”); *see also* Const. art. I, § 29 (the provisions of the Washington Constitution are “mandatory” unless expressly made not so).²¹ Most if not all constitutional rulings by courts will have some fiscal impact on the State, but that cannot determine the courts’ underlying constitutional analysis.

On prior occasions, Washington courts have recognized a right to counsel appointed at public expense notwithstanding the lack of

preexisting appropriations from the Legislature or a statutory scheme creating a program to administer counsel in that setting. For example, in *McInturf v. Horton*, 85 Wn.2d 704, 705, 538 P.2d 499 (1975), the Washington Supreme Court for the first time extended the right to counsel for indigent criminal defendants to misdemeanor cases. The court extended the right without addressing how counsel for these cases would be administered, or that the Legislature had not already made an appropriation. 85 Wn.2d at 706.

The Washington Supreme Court explained one mechanism by which counsel can be paid in such circumstances in *Honore v. Washington State Board of Prison Terms & Paroles*, 77 Wn.2d 660, 466 P.2d 485 (1970). In that case, the court held that appointed counsel was required in civil habeas appeals by indigent petitioners. 77 Wn.2d at 673. The court recognized that it was “faced with a situation in which neither statute nor court rule specifically provides for compensation of counsel appointed.” *Id.* at 677. After deciding that a system of unpaid appointed counsel would be unworkable and would provide inadequate representation, the court held:

²¹ See also *Bullock*, 84 Wn.2d at 105 (“It is within the inherent power of a court exercising common-law jurisdiction, which the superior court does, to make such orders as are necessary to protect the rights of the poor to access to the judicial system.”).

Accordingly, we now hold that (1) an attorney who is so appointed and prosecutes the appeal is entitled to compensation for his services from public funds; (2) the amount of compensation in each case shall, upon appropriate application by the appointee, be fixed by the court hearing the appeal; and (3) pending the enactment of enabling legislation and the provision of the requisite appropriations, payment of such compensation will of necessity have to be secured through the process of filing a claim with the legislature.

Id. at 680. The court alluded to the possibility that the Legislature would enact a statutory scheme, *id.* at 679, but it did not put the individual's constitutional right on hold until such time as the Legislature acted.

As an alternative mechanism, and based on the Court's need to appoint counsel for Brenda to protect the administration of justice and the appearance of fairness as well as her individual constitutional rights, the Court has the power to compel public funds directly. *See In re Salary of Juvenile Director*, 87 Wn.2d 232, 249-50, 552 P.2d 163 (1976). Division Three of the Court of Appeals recently applied this principle when it held that a superior court had the power to set the amount of compensation to be paid by the county to attorneys appointed to represent indigent criminal defendants. *State v. Perala*, 132 Wn. App. 98, 118, 130 P.3d 852 (2006).

The court explained:

Even assuming that there was no appropriation of funds to compensate appointed

counsel, the court was acting within constitutional authority in making these awards. The judicial function can sometimes extend beyond the determination of questions in controversy to include other functions that are necessary if the courts are to carry out their constitutional mandate.

* * *

. . . Because there is clear, cogent, and convincing proof that the appointment and compensation of appointed counsel was reasonably necessary for the holding of court, the administration of justice, and the fulfillment of constitutional duties, the trial court was acting within its inherent power to award compensation to appointed counsel.

Id. at 118-19; *see also Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 390, 932 P.2d 139 (1997) (explaining that the court could not order the appropriation of funds for a case “not involving constitutional rights or judicial functions”). As explained above, this case implicates numerous constitutional rights.

Finally, the Legislature has already by statute provided a mechanism for the appointment of counsel. Chapter 10.101 RCW creates a system of appointed counsel for the defense of indigent litigants. The law begins, “The legislature finds that effective legal representation must be provided for indigent persons and persons who are indigent and able to contribute, consistent with the constitutional requirements of fairness, equal protection, and due process *in all cases where the right to counsel*

attaches.” RCW 10.101.005 (emphasis added). Thus, the Legislature recognized that whenever the Washington Constitution requires the appointment of counsel, the Legislature is obligated to provide it. *See In re Grove*, 127 Wn.2d at 233 (“While RCW 10.101 does not create a substantive right to counsel in specific cases, it does express the Legislature’s determination that public policy is best served by providing effective legal representation to indigent litigants in all cases in which there is a right to counsel.”).

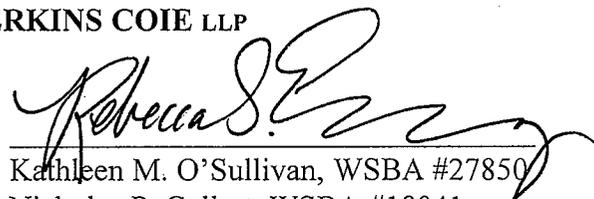
VIII. CONCLUSION

For the foregoing reasons, this Court should reverse and remand this matter for a new trial with instructions for the Superior Court to provide counsel for Brenda King.

RESPECTFULLY SUBMITTED this 10th day of August, 2006.

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CERTIFICATE OF SERVICE

I certify that on the 10th day of August, 2006, I caused a true and correct copy of the foregoing BRIEF OF APPELLANT to be served on the following counsel in the manner indicated below:

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