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SUPREME COURT
STATE OF WASHINGTON

No. 79978-4

2007 MAY 18 P 2: 54

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SUPREME COURT
OF THE STATE OF WASHINGTON

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In re the Marriage of:
MICHAEL STEVEN KING,
Respondent,
v.
BRENDA LEONE KING,
Appellant,
and
STATE OF WASHINGTON,
Involved Party.

APPELLANT'S ANSWER TO AMICUS CURIAE BRIEFS OF
WASHINGTON STATE ASSOCIATION OF COUNTIES
AND
THE WASHINGTON STATE LEGISLATURE

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I. INTRODUCTION

Amicus Curiae Washington State Legislature (“Legislature”) repeats the arguments of the State and the Attorney General and essentially urges the Court to abdicate its duty to decide questions of constitutional law. Amicus Curiae Washington State Association of Counties (“Counties”) presents flawed legal analysis, failing to mention key developments in the bodies of case law to which the Counties cite.¹

II. IT IS FOR THE COURT, NOT THE LEGISLATURE, TO DECIDE QUESTIONS OF CONSTITUTIONAL LAW

The Legislature begins by offering its interpretation of the Washington and United States Constitutions: that the constitutional interpretation offered by the State and the Attorney General is correct and that Brenda King’s interpretation is incorrect. Ironically, the Legislature then cites the separation of powers doctrine in support of its alternative argument, arguing that whether Brenda is entitled to counsel “is a pure question of public policy.” Amicus Brief of Legislature at 4. The Legislature suggests that the Court should give deference to the Legislature’s statutory scheme for the provision of counsel to indigent litigants. *Id.* at 6. But the Legislature fails to explain why the

¹ To the extent the Legislature and Counties repeat arguments made by Respondent Michael King, the State, and the Attorney General, Brenda does not repeat the responses set forth in her other reply briefs.

constitutional issues raised in this matter can be characterized as matters of “policy” alone.

Of course, the Legislature cannot, and thus does not, argue that a statutory scheme can override a constitutional mandate. Interpreting the Constitution is a job that belongs to the courts: “It is emphatically the province and duty of the judicial department to say what the law is. This duty must be exercised even when an interpretation serves as a check on the activities of another branch of government or is contrary to the view of the constitution taken by another branch.” *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 503-04, 585 P.2d 71 (1978) (citing *United States v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)).

The Legislature mentions in passing that the fee-shifting statute for dissolution proceedings, RCW 26.09.140, protects indigent litigants such as Brenda. Amicus Brief of Legislature at 5 n.1. However, neither the Legislature nor any other party directly contends that RCW 26.09.140 was available to Brenda. The statute gives trial courts discretion to award attorneys’ fees only after “considering the financial resources of both parties.” RCW 26.09.140. The record confirms that Michael did not have resources to pay for counsel for Brenda. For instance, the trial court commented that Michael, like Brenda, faced imminent bankruptcy.

CP 114. At the outset of the case, Michael was not even able to pay the fees of the Guardian ad Litem, as the court had ordered him to. CP 363. Moreover, the trial court denied Brenda's motion for a new trial on the basis of the court's belief that there was no mechanism in place for the payment of attorneys' fees for Brenda. CP 39-40. Finally, even with the benefit of this statute, Brenda simply was not able to obtain counsel willing and able to represent her. CP 58.

III. THE COUNTIES' LEGAL ANALYSIS IS FLAWED

The Counties present two principal arguments in their brief. First, the Counties argue that federal case law regarding prisoners' right of access to the courts reveals, by implication, that Brenda is not entitled to counsel at trial. Amicus Brief of Counties at 4-7. Second, the Counties argue that prior Washington case law regarding the Washington Constitution evinces a parsimonious approach toward the poor, with the Court recognizing constitutional protections for indigent litigants only when forced to do so by the United States Supreme Court. Amicus Brief of Counties at 7-17. Both arguments are flawed.²

² The Counties also argue that it is the State, rather than the Counties, that should bear financial responsibility should the Court recognize Brenda's constitutional right to counsel. Amicus Brief of Counties at 18-19. Brenda takes no position on this intergovernmental dispute, the outcome of which has no bearing on her rights.

A. Federal Case Law Regarding Prisoners' Rights of Access to the Courts Is Inapposite

In their presentation of federal case law addressing prisoners' rights of access to the courts, the Counties fail to mention two important features of this body of law.

First, as to indigent criminal defendants' right to counsel beyond the first appeal as of right, the United States Supreme Court has held that an indigent prisoner has no federal constitutional right to counsel because that litigant already has had meaningful access to the courts through representation at the trial and the first appeal. *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974). The Court explained that such claims "had once been presented by a lawyer and passed upon by an appellate court" and the defendant "will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case." 417 U.S. at 614, 615 (internal quotation marks and citation omitted).

The Court on this basis concluded that the defendant was not "denied meaningful access" to the courts because the transcript, appellate briefing, and an appellate decision "supplemented by whatever submission respondent may make pro se, would appear to provide the [court] with an

adequate basis for its decision to grant or deny review.” *Id.* at 615; *see also Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) (“We think that since a defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction, a fortiori, he has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process.”); *Murray v. Giarratano*, 492 U.S. 1, 7, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (stating that *Ross* and *Finley* are based on the distinctions between trial and subsequent proceedings).

The cases dealing with indigent prisoners’ discretionary appeals support Brenda’s arguments. Brenda seeks counsel *at trial*, not for a discretionary review of a proceeding at which she had counsel. Trials are where the factual record is developed. Brenda was unable to introduce evidence effectively or keep out inadmissible prejudicial evidence. Being fact-finding processes, trials are also unique for putting the pro se party in the position of wearing multiple hats simultaneously. Nowhere else, for instance, would Brenda be put in the situation of having to cross-examine the adverse party, particularly difficult here given that the other party was her ex-spouse and that the proceedings were tremendously emotional.

Further, the United States Supreme Court cases recognize that in some proceedings counsel would be necessary to secure that the litigant

has an adequate opportunity to present his or her case and thus have meaningful access. *E.g.*, *Ross*, 417 U.S. at 607 (stating that it “undertook an examination of whether an indigent litigant’s access to the appellate system was adequate”).³ Brenda is not arguing that counsel must be provided in all circumstances, but rather is constitutionally required only where counsel is necessary (as it was in her case) for the party to have an adequate opportunity to present that party’s case and thus have meaningful access to the judicial system.

Second, as to incarcerated individuals’ right of access to the courts, the Counties fail to mention that upon conviction and incarceration, prisoners give up rights. *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). As explained by the Ninth Circuit in a case involving prisoners’ right of access to the courts:

Underlying the conclusions stated above is the fact, not to be overlooked, that inmates of a penitentiary are undergoing punishment for crimes of which they have been convicted. “Lawful incarceration” . . . “brings about the necessary withdrawal or limitation of many privileges and rights, a

³ The Court also observed, in explaining why counsel is required for a criminal defendant’s first appeal, that “[t]he State cannot . . . extend to . . . indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal.” *Id.* at 612 (internal quotation marks and citation omitted).

retraction justified by the considerations underlying our penal system.”

Hatfield v. Bailleaux, 290 F.2d 632, 641 (9th Cir. 1961) (quoting *Price v. Johnston*, 334 U.S. 266, 285, 68 S. Ct. 1049, 92 L. Ed. 1356 (1948)). And even under this line of authority, the amount of assistance that the United States Constitution requires a state to provide to an incarcerated person depends on what is necessary to ensure meaningful access. *John L. v. Adams*, 969 F.2d 228, 234 n.6 (6th Cir. 1992) (“There is ample authority holding that at least for some classes of incarcerated individuals the State must provide more than access to a law library, for example, access to attorneys, in order to assure that access to the courts is meaningful.”).

Brenda is not incarcerated for some criminal conduct. Her right to utilize the courts should not have been abridged. Given what she faced, she needed legal representation to have meaningful access to the court proceedings. The authorities relating to prisoners confirm that the State had an obligation to provide her that counsel.

B. The Counties’ View of Prior Washington Case Law Regarding Indigent Litigants’ Access to the Courts Is Incorrect

The Counties’ view of prior Washington case law regarding the provision of assistance to indigent litigants under the Washington Constitution is similarly in error.

For instance, the Counties rely heavily on *Hous. Auth. of King County v. Saylor*, 87 Wn.2d 732, 557 P.2d 321 (1976), to support their argument that the Washington Constitution offers no more protection of an indigent civil litigant's right to counsel than the United States Constitution. Amicus Brief of Counties at 7-13. But the Counties fail to mention that the Court's approach in *Saylor* to Washington's privileges and immunities clause (Article I, § 12) is no longer sound authority.

In *Saylor*, the Court overruled a prior case that had held that indigent civil litigants were entitled to waiver of appellate filing fees under Article I, §§ 4 (right to petition) and 12 of the Washington Constitution. 87 Wn.2d at 741-42 (overruling *Carter v. Univ. of Wash.*, 85 Wn.2d 391, 536 P.2d 618 (1975) (plurality op.)). The Court ruled that the plurality opinion in *Carter* was incorrect because Article I, § 12 is interpreted identically to the federal Equal Protection Clause. *Id.* at 741.

In more recent cases, however, the Court has rejected outright this view and has interpreted Article I, § 12 independently of the federal Equal Protection Clause. *See Andersen v. King County*, 158 Wn.2d 1, 59, 121, 138 P.3d 963 (2006) (J.M. Johnson, J., concurring in judgment only, joined by Sanders, J.; Chambers, J., concurring in dissent, joined by Owens, J.); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake* ("*Grant County II*"), 150 Wn.2d 791, 811, 83 P.3d 419 (2004). In arguing

that Article I, § 12 is always coextensive with federal equal protection, the Counties do not even mention these more recent authorities.

Further, although the Court in *Saylor* rejected the argument that federal equal protection or the state constitutional right to petition protected the right of access to the courts, the Court observed that “[a]ccess to the courts is amply and expressly protected by other provisions.” 87 Wn.2d at 742. Unfortunately, the Court did not explain what it meant by this statement. However, the appellant in *Saylor* did not argue for a constitutional right to counsel based on either Article I, § 10’s right to access the courts or the state due process clause (Article I, § 3), so the Court had no occasion to address the arguments made here by Brenda.

In other ways as well, the Counties are selective or inaccurate in their review of prior Washington case law. The Counties state that Washington does not provide personal service of dissolution actions at public expense. Amicus Brief of Counties at 9 (citing *Ashley v. Superior Court*, 82 Wn.2d 188, 196-98, 509 P.2d 751 (1973)). The Counties ignore that the Court in *Ashley* proposed that the trial court permit service by registered or certified mail for the indigent litigant, *id.* at 198-99, and further ignore that the Court granted rehearing in *Ashley* and changed its decision regarding the State’s obligation. On rehearing, the Court held that it need not reach the question whether the State was obligated to

provide personal service. *Ashley v. Superior Court*, 83 Wn.2d 630, 632-33, 521 P.2d 711 (1974) (on rehearing) (again formulating a remedy by concluding that the indigent dissolution litigant could effect service by registered or certified mail).

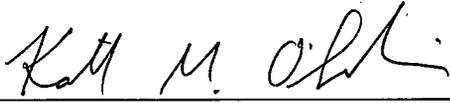
The Counties contend that the Washington Constitution is not “more solicitous of the needs of indigent persons than is the United States Constitution.” Amicus Brief of Counties at 11. This too is incorrect. For instance, as discussed in an earlier brief, the Washington Constitution provides for counsel in terminations and dependencies, whereas the United States Supreme Court has held that the federal constitution does not ensure counsel in all termination trials. *See* Appellant’s Answer to Brief of Attorney General at 4-7.

IV. CONCLUSION

For the reasons set forth in Brenda King’s prior briefs, the Court should reverse and remand for a new trial with instructions for the Superior Court to provide counsel for Brenda King.

DATED: May 18, 2007

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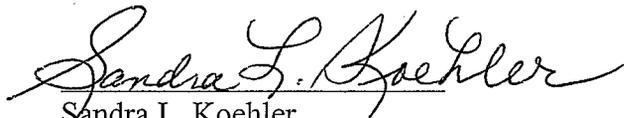
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