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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,
and
STATE OF WASHINGTON,
Involved Party.**

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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Michael King and the State of Washington (by Snohomish County)¹ fail to respond to many of the arguments raised in Brenda King's opening brief. To the extent that they do respond, they do so largely with non-Washington case law and an imaginative view of the record. Though the State and Michael insist that the appointment of counsel is a legislative issue, neither disputes that the courts have the power to appoint counsel if constitutionally required. Yet, neither Michael nor the State respond to Brenda's arguments based on Article I, § 10 of the Washington Constitution, which requires meaningful access to the courts; or Article I, § 12 of the Washington Constitution to the extent it differs from federal equal protection; or the requirement of a fair and impartial judiciary.

Instead of addressing these substantive issues, the response briefs spend pages on collateral points (e.g., whether Brenda was indigent and whether she diligently attempted to obtain counsel), but these arguments are based on distortions of the record and outright misstatements. In addition, the State attacks Brenda at length. These attacks not only

¹ The State appeared below through the Snohomish County Prosecuting Attorney solely to protect the State's financial interests with respect to child support obligations and health insurance for the children, and its counsel was excused at the outset of the trial. *See* 1 RP 2:14-3:3. The State indicates that the Attorney General's Office may file an amicus curiae brief. State's Br. at 4. It would seem that a single entity cannot be both a party and an amicus curiae.

inaccurately portray the record, they wrongly presuppose that the record would have been the same if Brenda had been represented. Brenda did not “abdicate” her interests in parenting her children, as the State asserts. To the contrary, she did everything she knew how to do, during a complex and emotional trial, to maintain her family. That she had to do this alone is a travesty of justice.

II. BRENDA’S REQUEST FOR APPOINTMENT OF COUNSEL IS PROPERLY BEFORE THE COURT

A. Brenda Did Not Waive, Forfeit, or “Relinquish” Her Right to the Appointment of Counsel

Michael and the State spend considerable portions of their briefs arguing that Brenda was not sufficiently diligent in the pursuit of counsel. To try to make this point, Michael’s brief flatly misrepresents the record in some instances and stretches it almost beyond recognition in others. The State’s brief relies on many of Michael’s misstatements.

Michael’s most blatant misstatement is that “[Brenda] refused assistance of pro bono counsel for a pre-trial motion for appointed counsel, and then refused to seek such relief herself.” Respondent’s Br. at 21; *see also* Respondent’s Br. at 10, 23. The statement is pure fiction. For evidence, Michael cites to CP 57:7-9. Respondent’s Br. at 23. But the cited declaration (actually at CP 58:7-9) says, “On December 6, 2005, Mr. Swanson agreed to take her case for the limited purpose of filing and

arguing a motion for continuance to allow Ms. King additional time to find an[] attorney for trial.”

Such a motion for continuance, even if granted, would have changed nothing.² The lack of available pro bono attorneys, especially for difficult trials like this one, is uncontested. *See* CP 57-58, 60-63. The trial court correctly observed:

[Y]our materials point out quite clearly what a desperate search it is in this county as well as throughout the state to find lawyers willing to spend the time to take on the more difficult cases such as this one.

RP Feb. 27, 2006 at 3:9-13. Likewise, the court specifically noted, “[T]he search to find counsel would be just as tasking on her now as it was while this matter was pending.” RP Feb. 27, 2006 at 4:6-8.

Michael’s argument that “[Brenda] relinquished any right to appointment of counsel,” Respondent’s Br. at 24, is made without citation to case law and is not supported by the facts. “Waiver must be a knowing and voluntary relinquishment and is typically indicated by an affirmative, verbal request.” *In re Dependency of V.R.R.*, 134 Wn. App. 573, 582, 141

² The interest in finality, emphasized by Michael, does not overcome the need for a correct process because, if so, no appeals would be allowed in parenting cases. Further, Brenda likewise had an interest in an expeditious process. The first trial continuance occurred because Michael failed to pay the fees of the Guardian ad Litem. CP 362-66. The second continuance occurred when Michael’s counsel failed to follow the correct procedure for confirming the trial date. RP Jan. 3, 2006 at 6:6-9.

P.3d 85 (2006) (internal quotation marks omitted). There is no evidence that Brenda was ever informed or otherwise learned that she had a right to have counsel appointed for her. Because the “right to counsel can only be waived knowingly and intelligently, by a person aware that it exists,” *Tetro v. Tetro*, 86 Wn.2d 252, 255, 544 P.2d 17 (1975), Brenda simply could not have waived that right.

In order to result in forfeiture, a party must have “engage[d] in extremely severe and dilatory conduct.” *In re V.R.R.*, 134 Wn. App. at 582. Brenda’s conduct was nowhere near this standard. For instance, in *City of Tacoma v. Bishop*, 82 Wn. App. 850, 859, 920 P.2d 214 (1996), the defendant was granted repeated continuances to try to locate counsel, but despite “almost complete inaction” in trying to locate counsel, the court concluded that his conduct was not so egregious as to constitute forfeiture.

Brenda took repeated steps to obtain counsel for trial, all of which were futile. Michael’s argument to the contrary omits certain facts and misrepresents the record on other matters. For instance, Michael does not mention that Brenda made numerous telephone calls to the Northwest Justice Project’s help line, CP 42:4, 14-16, and he misrepresents the nature of the services provided to Brenda by Snohomish County Legal Services.³

³ Snohomish County Legal Services did not provide “pro bono representation” or act as “pro bono counsel” for Brenda. See Respondent’s Br. at

Michael also suggests that Brenda should be penalized because she halted her search for pro bono counsel during the first few months of 2005, when she used her rent money to briefly retain a private attorney, Aimee Trua, but he fails to acknowledge that Ms. Trua withdrew when Brenda could no longer pay her. *Compare* Respondent's Br. at 11 *with* CP 43:1-2.

In addition to informing the court repeatedly that she believed she needed counsel, *e.g.*, CP 49, 51, 149-50, 155, 221-22, Brenda formally requested court-appointed counsel on a motion for a new trial, CP 64-74.⁴

B. Brenda Did Not Exercise a Right to Represent Herself

The State proudly announces that “[o]ne of the fundamental principles of American jurisprudence is that a person gets to pick his or her own lawyer.” State’s Br. at 12. The State continues by observing that the right to pick one’s attorney includes the right to represent oneself, and that many people represent themselves in criminal and civil matters. From

3, 4, 9, 11, 12, 21, 22, 23. The clinic offered Brenda limited pro se advice and attempted unsuccessfully to find pro bono counsel for her. CP 57:10-58:13.

⁴ Brenda’s lack of counsel was an “[i]rregularity in the proceedings” under CR 59(a)(1) and resulted in substantial justice not being done under CR 59(a)(9). The State incorrectly argues that certain arguments were raised for the first time on appeal, State’s Br. at 13, but even if so, the failure to appoint counsel for Brenda was a “manifest error affecting a constitutional right” under RAP 2.5(a)(3). *State v. Silva*, 108 Wn. App. 536, 542, 31 P.3d 729 (2001) (“It is fundamental that deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error.”) (internal quotation marks omitted).

here, the State leaps to the unsupported conclusion that Brenda elected to represent herself. *See* State's Br. at 6-7.

The utopian world of choice described by the State does not exist for indigent parties. Even those represented by appointed counsel cannot ask for alternative counsel at State expense. *See State v. Roberts*, 142 Wn.2d 471, 516, 14 P.3d 713 (2000). Further, and for an indigent litigant such as Brenda for whom counsel is not appointed, one does not "choose" to represent oneself when one is unaware of any other option and all known options have proven futile. Brenda represented herself because she understood that was her only choice. CP 41. By analogy, before a court permits a criminal defendant to represent herself at trial, the court verifies that the decision is knowing and voluntary. *See, e.g., State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001) (reversing conviction for lack of record of knowing waiver; "the trial court . . . should indulge every presumption against a valid waiver").⁵

⁵ "[E]xperience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'" *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (quoting John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 Seton Hall Const. L.J. 483, 598 (1996)). Regarding Jerry Jones' self-representation in a double homicide trial, *see* State's Br. at 12, the very story cited by the State describes how Jones was outmaneuvered by the prosecutor and quickly convicted.

C. Brenda Was Indigent at the Time of Trial

By focusing on Brenda's ambitions for *future* income as a loan officer, Michael suggests that Brenda was not indigent. Respondent's Br. at 9. Brenda's hopes that she could turn from a stay-at-home mother to a successful wage earner are irrelevant to her indigency status at the time of trial. Brenda's declaration, filed in support of her motion for new trial, outlined her inability to pay for an attorney. CP 41-43.⁶ Michael did not submit any contradictory evidence, nor did he even argue lack of indigency, in opposition to Brenda's motion. CP 356-61.⁷

D. Brenda Was Not Able to Represent Herself Effectively

The State admits that dissolution cases involving children are "in many ways, more complex" than the cases currently handled by Snohomish County's public defenders, "[w]ith all due respect to the criminal defense bar." State's Br. at 30. If this case was more

⁶ In addition, the declaration from the executive director of Snohomish County Legal Services indicates that Brenda had gone through the intake process and had qualified for referral to pro bono counsel. CP 56-59. Brenda had earlier informed the court, "I am pro SE because I am broke." CP 51; *see also* CP 49.

⁷ The factual findings of the trial court, also unchallenged by Michael, reflect the dire economic situation in which Brenda found herself at the time of trial. The court candidly observed that Brenda was on the verge of bankruptcy. CP 114. Likewise, in denying Brenda's motion for new trial, the court found that Brenda "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.*" CP 39 (emphases added).

complicated than those regularly handled by seasoned lawyers, of course it was not a “simple matter,” *id.* at 4, for a nonlawyer such as Brenda.

The State also asserts that Brenda “is not an incapable advocate,” *id.* at 8, but spends four pages outlining all the ways in which Brenda did not further her own cause at trial, *id.* at 8-11. The State fails to recognize that many of the failings to which it points are directly attributable to Brenda not having counsel and Michael having counsel. For instance, the State writes that Brenda’s “attempt to present her own direct testimony was disjointed and convoluted.” *Id.* at 11. The State’s characterization of Brenda’s performance ignores the difficulty presented by simultaneously serving as witness, defendant, and advocate. Similarly, the State criticizes Brenda for not following the court’s instructions about court decorum and procedure. The State asserts, without any support, that this conduct was “deliberate.” *Id.* at 8. The State’s position ignores the tremendous stress under which Brenda was operating and ignores the ability of attorneys to advise their clients how to follow court direction.

The State goes so far as to suggest that Brenda was lucky the trial court did not impose sanctions against her. *Id.* at 5. But, in essence, it did. As the State points out elsewhere, *id.* at 11, Brenda’s trial conduct influenced the judge adversely to her interests, and the ultimate sanction was imposed—loss of control of her children’s lives.

III. NO AUTHORITY FORECLOSES BRENDA'S REQUEST FOR THE APPOINTMENT OF COUNSEL

A. Washington Case Law Does Not Foreclose Brenda's Request

Michael's brief observes that "no Washington court has found that there is any right to counsel in private dissolution proceedings."

Respondent's Br. at 24. That is true. However, it is equally true that no Washington court has found that there is *not* a right to counsel for an indigent litigant in a case like this.

Contrary to Michael's suggestion, *In re Dependency of Grove*, 127 Wn.2d 221, 897 P.2d 1252 (1995), did not resolve the issues raised in this appeal.⁸ *In re Grove* was a consolidated appeal of three separate cases, the first two of which involved statutory rights to counsel not relevant here. The third case (*Smith v. National Semiconductor Corp.*) was an appeal of a jury verdict that resulted in the termination of workers' compensation benefits. The court stated: "The issue in this third case is whether a civil litigant, who has an alleged property interest which is threatened by a private party, has a right to appeal at public expense solely because he or she is indigent." *Id.* at 227-28. The court considered several possible bases for waiver of appellate fees, one of which was the existence of a

⁸ Nor did *In re Custody of Halls*, 126 Wn. App. 599, 109 P.3d 15 (2005). In *Halls*, the court vacated the parenting plan modifications "for procedural flaws," 126 Wn. App. at 610, and did not reach the constitutional issue of a right to counsel, concluding simply that "the issue is not before us yet," *id.* at 611.

statutory or constitutional right to counsel. *Id.* at 237. It stated that the workers' compensation litigant had no such right and that "there is no constitutional right to appeal at public expense in civil cases *in which only property or financial interests are threatened.*" *Id.* at 240 (emphasis added). Brenda's interests are not property or financial interests.

Although it was not necessary for the court in *In re Grove* to address in which civil cases—other than workers' compensation-related appeals—an indigent civil litigant might or might not have a constitutional right to counsel, the court did observe, in dicta, that "[i]ncreasingly, the cost of civil litigation weighs against easy access to our courts. The question of who pays for the efficient use of the appellate system is a difficult one. Where fundamental constitutional rights are not threatened, the answer to this question properly belongs with the Legislature." *Id.* at 228. Michael seizes on this language. But two fundamental constitutional rights *are* threatened in this case: Brenda's right of access to the courts and her right to the care, custody, and control of her children. Indeed, Michael concedes that this case involves the fundamental liberty interests of both parents in the care and custody of their children.⁹

⁹ Michael suggests that the right of access to the courts is not fundamental. Respondent's Br. at 21 n.2. But the Supreme Court flatly stated as much in *Tennessee v. Lane*, 541 U.S. 509, 533-34, 124 S. Ct. 1978, 158 L. Ed. 2d

Respondent's Br. at 21 (citing *In re Grove*, 127 Wn.2d at 229, as teaching that the "fundamental liberty interest in the care and custody of . . . children" is "parental" and "not limited to father or mother"). Brenda agrees with Michael that "it would be hard to distinguish a constitutional right to counsel for child custody issues in dissolution proceedings from other civil interests that, at times at least, have been deemed 'fundamental' under Washington law." Respondent's Br. at 30-32 n.4.¹⁰

It is thus the province of the courts, not the Legislature, to rule on Brenda's right to counsel claim. *See, e.g., Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) ("The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary.")

Given the lack of Washington case law supporting his position, Michael turns to case law from other jurisdictions. The cases he cites are

820 (2004), though it did not, contrary to Michael's suggestion, address when and to what extent that right of access requires the appointment of counsel.

¹⁰ Despite his concession, elsewhere in his brief Michael uses language from *In re Grove* to suggest that the only civil matters which are of such a "fundamental" nature are delinquency and child termination proceedings. Respondent's Br. at 14. However, the court in *In re Grove*, 127 Wn.2d at 239-40, quoting from *In re Welfare of Lewis*, 88 Wn.2d 556, 558, 564 P.2d 328 (1977), preceded these examples with the words "such as," which indicate that these examples are not exclusive. *See Rabon v. City of Seattle*, 135 Wn.2d 278, 295 n.6, 957 P.2d 621 (1998). Moreover, the court in *In re Grove* was not asked to decide whether a constitutional right to counsel exists in civil cases other than those in which workers' compensation benefits are threatened, and *In re Grove* contains no analysis of any of the State or federal constitutional provisions that Brenda contends provide her with the right to counsel.

of marginal relevance, and certainly not binding. Even on their merits, these non-Washington cases are in large part distinguishable. Michael relies heavily on a Nebraska decision, *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999). To the extent *Poll* and the cases cited therein address on the merits claims for the appointment of counsel, they primarily rely on federal law or the incorporation of federal law into state law analysis. 588 N.W.2d at 586-88. Michael also quotes from a Maryland case, *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114, 130 n.10 (2003), but omits that the majority concluded that it was “unnecessary” for the court “to address the right-to-appointed-counsel issue.” 840 A.2d at 115. The only judges in the *Frase* case who addressed the right to counsel concluded that “counsel should be provided for those parents who lack independent means to retain private counsel.” *Id.* at 138 (Cathell, J., concurring).

One non-Washington case that rejects a claimed right to counsel in other circumstances (e.g., in all “matrimonial matters”) is instructive in that it acknowledges that counsel “in *complicated* matrimonial litigation would be *essential*.” *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 56, 57, 369 N.Y.S.2d 87 (1975) (emphases added). As the New York court noted, “in the absence of disputes over money or the custody of children, matrimonial litigation is likely to be quite simple.” 330 N.E.2d at 57. This action was not simple; nobody contends otherwise.

B. Article I, § 22 Does Not Foreclose Brenda's Request

In a sort of *expressio unius* argument, the State suggests that because the Washington Constitution states that criminal defendants do not have to advance costs to secure their right to appear by counsel, Article I, § 22, but contains no parallel provision for civil litigants, there can be no constitutional civil right to counsel. State's Br. at 34.¹¹ It cannot be that the existence of Article I, § 22 (and the absence of a parallel provision for civil cases) limits any constitutional right to counsel to criminal cases, or even to cases in which physical liberty is at stake. It is established law that the Washington Constitution affords a right to counsel in termination of parental rights proceedings and dependencies, both of which are civil and do not involve physical liberty. See *In re Grove*, 127 Wn.2d at 237; *In re Welfare of Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975) (dependencies); *In re Welfare of Luscier*, 84 Wn.2d 135, 138-39, 524 P.2d 906 (1974) (terminations); see also *Tetro*, 86 Wn.2d at 255 (civil contempt).

¹¹ For historical background with respect to state constitutional provisions such as Article I, § 22, see *Powell v. Alabama*, 287 U.S. 45, 59-66, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

IV. ARTICLE I, § 10 REQUIRES THAT BRENDA HAVE MEANINGFUL ACCESS TO THE COURTS

The State fails to address Brenda's argument based on Article I, § 10 of the Washington Constitution: "Justice in all cases shall be administered openly, and without unnecessary delay." See Appellant's Br. at 18-27 (citing, e.g., *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

Michael never responds to the core of that argument, and instead twists it into something it is not by contending, incorrectly, that Brenda's argument is "based on incorporation of ancient common law." Respondent's Br. at 35. The Article I, § 10 argument does not rise or fall on whether the right to counsel in civil cases recognized over 500 years ago was incorporated into Washington law when Washington became a state. Instead, Brenda's argument is that the accepted right to meaningful access protected by Article I, § 10 requires counsel for litigants where circumstances prevent them from representing themselves adequately.

The common law right, which the opening brief referred to in one paragraph in a lengthy section regarding the requirement of meaningful access under Article I, § 10, is relevant as background for the Court in attempting to give meaning to Article I, § 32's reference to "fundamental principles." Thus, common law was cited not as an argument that Brenda

is entitled to a lawyer under the common law itself, but to show that the principle that a lawyer is needed for a fair adjudication, including the provision of lawyers for those too poor to pay for them, has been accepted in some fashion since the beginnings of our system of justice.¹²

V. BRENDA IS ENTITLED TO THE APPOINTMENT OF COUNSEL AS A MATTER OF DUE PROCESS

A. Federal Due Process Applies Outside Termination Proceedings

Michael and the State assert that the federal due process factors set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), need not even be weighed because this case is not a State-initiated proceeding to terminate parental rights. Respondent's Br. at 26-27; State's Br. at 15. This analysis is flawed. While the severity of the potential deprivation may affect the precise point where the scales lie when the court weighs the *Eldridge* factors, *Lassiter v. Department of Social*

¹² Michael states that "[i]nitial research" suggests that suits in equity were not subject to Henry VII's statute "until the mid-1800's." Respondent's Br. at 37 (citing *Oldfield v. Cobbett*, 41 Eng. Rep. 765 (Ch. 1845)). But *Oldfield* does not hold or state that. Rather, it notes that by 1845 it was established law that equity courts appointed counsel for pauper plaintiffs and defendants. Judicial rulings and practice extended the right to appointed counsel codified in 11 Hen. 7, c. 12 to indigent plaintiffs and defendants in equity courts well before 1776. See *The Practical Register in Chancery* 265-66 (1714). A study of the courts of Chancery during the time of Elizabeth I (1558-1603) describes the process working in those courts: "By discretion of the Lord Chancellor, they [poor suitors] might have original writs and writs of *subpoena* without payment, and counsel and attorneys were to be assigned free of charge." W.J. Jones, *The Elizabethan Court of Chancery* 323-24 (1967). Also, there are early cases in which the right was applied to defendants at law. See *Wiat v. Farthing*, 2 Keble 379, 84 Eng. Rep. 237 (K.B. 1668).

Services, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), does *not* require that the severity be at the worst possible extreme before due process is even considered. Due process applies whenever there is a potential infringement or curtailment of a fundamental liberty interest, not only when the liberty interest will be extinguished. *See Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (due process applies to parole revocation hearings even though revocation deprives the parolee “not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions”).¹³

Further, Brenda’s due process claim is premised on two fundamental liberty interests, *each* of which requires due process prior to deprivation. In addition to parental interests, Brenda has a fundamental right of access to the courts, of which she was deprived when she was forced to go through the proceeding below without counsel. Appellant’s

¹³ In a related argument, the State argues that because the Supreme Court in *Lassiter* held that the facts of that case were insufficient to outweigh the presumption against counsel when physical liberty is not at stake, the presumption cannot be outweighed in this case because Brenda faces a deprivation of her parental rights that is something less than a complete severance. State’s Br. at 18-20. But the outcome of *Lassiter* did not depend on any one factor of the test. The Supreme Court weighed all three *Eldridge* factors, and refrained from setting out bright-line rules, instead leaving the decision to be made on the facts of each case. 452 U.S. at 31-32.

Br. at 32, 35, 38-39. Neither Michael nor the State performs a due process analysis for the deprivation of Brenda's right of access to the courts.

B. The *Eldridge* Factors Require That Counsel Be Appointed for Brenda

In contrast to the arguments of Michael and the State, *see* Respondent's Br. at 27-30; State's Br. at 13-20, a proper weighing of the *Eldridge* factors indicates that counsel is required for Brenda.

1. The Potential Loss Brenda Faced Was Severe and Significant, and Thus Her Interests Are High

Notwithstanding his recognition that parenting rights are fundamental liberty interests, Respondent's Br. at 30-32 n.4, Michael argues—as does the State—that the differences between terminations and “private” parenting disputes obviate any need for counsel, Respondent's Br. at 26-28; State's Br. at 16. A litigant in a parenting dispute does not usually face the same level of potential loss as a parent facing legal termination of all parental rights. But the potential loss faced by a parent in Brenda's position is nonetheless a severe and significant one. For example, instead of seeing her children most days, Brenda now sees them for just two weekends a month and four weeks of vacation in the summer.

In addition, Michael has sole decision-making authority for all matters of import. Brenda's day-to-day decision-making authority is limited to decisions about how the children will spend the day when with

her and any emergencies that arise on those days. RCW 26.09.184(4)(a), (b). Determining what type of lunch to feed the children on a Saturday is a far cry from being able to participate in significant decisions about medical care, education, and religious upbringing.

Michael and the State also note that a parenting plan is subject to modification. But, in addition to not having counsel to pursue modification, Brenda cannot obtain modification unless Michael's or the children's circumstances change. *See In re Custody of Halls*, 126 Wn. App. 599, 606-07, 109 P.3d 15 (2005) (parenting plan can be modified only if “a *substantial change* has occurred in the circumstances of the *child* or the *nonmoving* party and . . . the modification is in the best interest of the child and is *necessary* to serve the best interests of the child”) (quoting RCW 26.09.260(1)) (emphases added; omission in original). For these reasons, modification is not a substitute for due process in the original proceeding.

2. The State's Interests Do Not Outweigh Brenda's

The State's interests do not outweigh Brenda's. The State in fact *shares* with Brenda an interest in an outcome that protects the best interests of the child. *See Lassiter*, 452 U.S. at 27 (the State “shares the parent's interest in an accurate and just decision”). The State and Michael note that the State “has no function in a private custody action other than

adjudication.” State’s Br. at 17; *see also* Respondent’s Br. at 30. But the very purpose of the adjudication is to determine the child’s best interests, which the State must protect.

As to financial concerns, the State notes that there is a cost associated with counsel appointed at public expense and that it would prefer not to bear that cost.¹⁴ *E.g.*, State’s Br. at 17, 18. With counsel, however, this case might have settled, or at a minimum had a shorter trial, had Brenda been represented, and thus the State might have saved money. Further, the State’s financial interests are not a trump card outweighing any other concern. In *Lassiter*, the Supreme Court identified the State’s interest in saving money, 452 U.S. at 28, but called it a “relatively weak” interest, *id.* at 31, and proceeded to weigh it with the other factors, *id.*

3. The Procedure Followed Below Was Insufficient to Protect Against an Erroneous Deprivation

On the third *Eldridge* factor, the risk that an erroneous decision will be reached in the absence of counsel for Brenda is high. Michael and the State rely on two supposed procedural safeguards. Respondent’s Br. at 28-29; State’s Br. at 16. Neither protected Brenda. First, Washington’s

¹⁴ The State’s brief asserts that the Court can take judicial notice of the counties’ inability to fund counsel for civil litigants. State’s Br. at 31. Brenda submits that the Court can only take judicial notice of the counties’ unwillingness, not their inability, to do so. To the extent there may be a dispute between Snohomish County and the State as to which would pay for Brenda’s appointed counsel, that disagreement is of no consequence here.

fee-shifting statute provides no protection to a litigant—like Brenda—who cannot afford to retain counsel and for whom no attorney will take the case without payment in advance. Second, when, as here, the Guardian ad Litem (“GAL”) bases his or her opinion on an incomplete investigation (e.g., the GAL decided not to interview witnesses suggested by Brenda, *see* CP 288; 2 RP 128:11-135:18) and is the conduit through which substantial amounts of inadmissible evidence come in, Appellant’s Br. at 10-12, the GAL does little to safeguard the fact-finding process. At least one court has held that GALs are insufficient to ensure the fairness of the system and the accuracy of the results when considered from the perspective of the child and has accordingly found a constitutional right to counsel for *children* in dependency proceedings. *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005); *see also In re Parentage of L.B.*, 155 Wn.2d 679, 712 n.29, 122 P.3d 161 (2005) (citing *Kenny A.*, 356 F. Supp. 2d at 1359-61), *cert. denied*, 126 S. Ct. 2021 (2006).

C. *Gunwall* Supports a More Expansive Interpretation of Washington’s Due Process Clause Than the Federal Clause

Michael, but not the State, addresses Brenda’s argument that she is independently entitled to the appointment of counsel under Washington Constitution Article I, § 3. *See State v. Gunwall*, 106 Wn.2d 54, 720 P.2d

808 (1986).¹⁵ Respondent's Br. at 32. First, Michael disputes the import of common law, to which Brenda responds above. *See supra* pages 14-15 & note 12. Second, Michael asserts that the question of the right to counsel in family law matters is not a matter of state or local concern. Respondent's Br. at 32. Family law matters are quintessential areas of state or local concern. *See United States v. Morrison*, 529 U.S. 598, 615, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (family law is an "area[] of traditional state regulation").

**VI. BRENDA IS ENTITLED TO THE APPOINTMENT OF
COUNSEL UNDER ARTICLE I, § 12 AND FEDERAL EQUAL
PROTECTION**

Michael and the State equate Article I, § 12 of the Washington Constitution with federal equal protection. But recent rulings of the Washington Supreme Court suggest three possible approaches to the relationship between Article I, § 12 and the federal equal protection clause. Under the first of these approaches, federal law is not relevant, and under the third, it is not determinative. *See* Appellant's Br. at 40-45.

The Washington cases cited by Michael, which merely import federal equal protection analysis, are no longer valid precedents because they predate the recent decisions regarding the scope and nature of

¹⁵ In *In re Grove*, the court did not perform a *Gunwall* analysis of Article I, § 3. However, it noted that Washington due process is broader than federal due process in some respects. 127 Wn.2d at 229 n.6.

Article I, § 12. *See Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake* (“*Grant County II*”), 150 Wn.2d 791, 83 P.3d 419 (2004).

However, even if Brenda’s claim under Article I, § 12 is governed solely by federal equal protection analysis, the Court still should recognize Brenda’s right to counsel. Michael and the State argue that indigent parents in dissolution proceedings are not similarly situated with indigent parents in child deprivation proceedings. Respondent’s Br. at 33; State’s Br. at 21-25. But that is not the relevant comparison. The comparison is between two parents *in a “private” parenting proceeding*, one with counsel and one without. Both face potential loss or curtailment of parenting rights through a court-ordered parenting plan. As to either parent, the loss will be adjudicated and enforced through the power of the State and its courts, including the contempt power. As to a parent represented by counsel, the State inflicts the loss after a true opportunity to access the courts, introduce relevant evidence, develop a complete and fair record, and litigate the matter. As to a parent such as Brenda without counsel, the State inflicts the loss without such opportunity. In this way, similarly situated litigants are treated differently.

Actions that burden a fundamental right are subject to strict scrutiny under federal equal protection analysis. *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). Here, the court's acts burdened both Brenda's fundamental parenting rights¹⁶ and her fundamental right of access to the courts. *See* Appellant's Br. at 43. The State attempts to evade strict scrutiny by incorrectly suggesting that this case involves a comparison between the statutes for third-party custody actions and dependencies/terminations of parental rights. State's Br. at 23-24. In fact, the State spends much of its brief addressing an argument that Brenda never made: a supposed challenge to the constitutionality of Chapter 26.10 RCW, the statute governing third-party custody actions. State's Br. at 12-13, 17-28. This case is not an appeal from a third-party child custody proceeding. Brenda raised no challenge to the statute that governs such proceedings.

State v. Mills, 85 Wn. App. 286, 932 P.2d 192 (1997), cited by Michael, which concerned statutory provision of counsel for indigent criminal litigants responding to, but not prosecuting, motions for discretionary review, is inapposite because no fundamental right was at issue in that case. *Id.* at 291 ("[A]ccess to discretionary review of an

¹⁶ The State appears to suggest that parenting rights are not fundamental. State's Br. at 25. It is beyond dispute that federal and Washington courts have recognized parental rights as fundamental. *See* Appellant's Br. at 32-33. Counsel is mandated in cases involving fundamental parenting rights under the Washington Constitution, not merely by statute. *See In re Myricks*, 85 Wn.2d at 254.

appeal as a matter of right is not a fundamental constitutional right.”).

Further, here, unlike in *Mills*, Brenda was not represented by counsel at trial.

VII. BRENDA IS NOT ARGUING THAT COUNSEL MUST BE APPOINTED IN EVERY CIVIL CASE OR EVEN IN EVERY CONTESTED DISSOLUTION INVOLVING PARENTING RIGHTS

The State suggests that this case would open the floodgates.

State’s Br. at 18. While Brenda is not naive to the fact that the Court’s decision may set a precedent that could be used in other cases, the Court must decide the case before it, rather than every hypothetical situation.

See id. at 29. Brenda has never suggested that counsel should be provided as a matter of constitutional right “in every divorce action in which parents contest the legal and physical custody of a child.” *Id.* at 18.

Instead, the opening brief laid out four factors that indicate that counsel must be provided in this case: (1) the proceeding is adversarial; (2) critical interests are at stake; (3) Brenda was indigent and made reasonable, but unsuccessful, efforts to obtain counsel; and (4) Brenda was unable to adequately or effectively advocate for her interests for numerous reasons, including (a) Michael’s capable representation by counsel; (b) domestic abuse allegations; and (c) the complexities of litigating against an adverse GAL opinion and addressing psychological issues such as Michael’s anger and the preliminary diagnosis, never subjected to

further medical or legal testing, that Brenda suffered from attention deficit disorder. *See* Appellant's Br. at 25.

These factors would not be met in every contested dissolution action, and certainly not in every civil action. For example, the fourth factor—that the unrepresented litigant is unable to adequately or effectively advocate for his or her interests—would not be met in a parenting case if the contested issues were narrow or simple, the unrepresented litigant was able to follow courtroom procedures and use evidentiary tools to present his or her best case, and the other side was also unrepresented such that there was no imbalance between the parties.

VIII. CONCLUSION

The Court should reverse the trial court's ruling on the motion for new trial, vacate the judgment below, and remand for a new trial with instructions for the Superior Court to provide counsel for Brenda King.

DATED: January 19, 2007

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CERTIFICATE OF SERVICE

I certify that on January 19, 2007 I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF to be served on the following counsel in the manner indicated:

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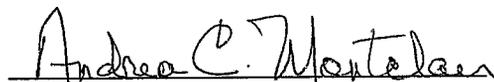
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Seattle, Washington this 19th day of January, 2007.


Andrea C. Montclair

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