

No. 79978-4

IN THE SUPREME COURT
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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(CORRECTED) ERRATA SHEET OF INVOLVED PARTY STATE OF
WASHINGTON BY SNOHOMISH COUNTY

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I. ARGUMENT

The State of Washington by Snohomish County, Respondent, filed a brief in this matter on November 20, 2006. That brief contains certain inaccurate statements which the County wishes to correct. The County is filing and serving herewith a corrected brief which makes the three corrections. For the convenience of the Court, those corrections appear in the sections listed below. Page numbers are from pagination in the original brief:

- 1) Section III (B) at pages 2-4 in the original brief;
- 2) Section V (C) at pages 29-32 and 35 of the original brief.

II. CONCLUSION

This Court should accept this errata sheet and allow the corrected brief to be filed.

Respectfully submitted this 18th day of April, 2007.

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I. ASSIGNMENT OF ERROR

The trial court properly entered judgment against Ms. King, and properly allowed her to try her case pro se.

II. ISSUES ASSOCIATED WITH ASSIGNMENT OF ERROR

1. Was the trial court obligated to provide Ms. King with counsel when she did not make a request for same?

2. Was the trial court obligated to, sua sponte, create an entitlement to free legal assistance in custody cases absent any support in case law?

III. STATEMENT OF THE CASE

A. Introduction.

This case is in the “wrong place at the wrong time”.¹ Appellant Brenda King had many opportunities to obtain assistance of competent counsel. She failed to follow through on them, instead going to trial pro se and hoping that it would work out for the best. Then, dissatisfied with the result, she has filed this appeal. Thus, it is at the wrong time. Pro bono counsel, Perkins Coie, now seeks an appointed lawyer for her. It is not clear who they envision paying for this lawyer. This request is better directed

¹ This is a paraphrase of a song by Dr. John which was popular in the 70's.

to the State Legislature. Thus, it is the wrong place as well.

B. Procedural Setting.

The Snohomish County Prosecuting Attorney's Office, acting as counsel for the State of Washington's Department of Social and Health Services, filed a Notice of Appearance in the trial court below. The State was present to enforce the parties' obligation to provide support for their children. A deputy prosecuting attorney attended the trial, which commenced on January 4, 2006, and was active in the case until the final judgment on March 16, 2006. This is set forth in the ER 904 Notice and attachments. SCP 314-336². At the trial court level, the State had an interest in the child support order provision of the final judgment entered by the trial court, as a judgment debtor of the child support order at issue. One or more of the parties to the dissolution, child custody and child support actions previously received public assistance for medical insurance for the minor children who are the subjects of this child custody action.

Snohomish County's appearance on behalf of the State of Washington sought to insure that any child support order, whether

² Supplemental Clerk's Papers are abbreviated as SCP ___, and Clerk's Papers as CP___.

retroactive, current or future, be applied to that existing state debt. The State's interest was represented at trial by and through deputy prosecuting attorney David Mace. He is on record before the trial court seeking to insure the final judgment in this matter reflected the debt owed to the State for the prior public assistance. Mr. Mace also successfully moved to amend the order of child support after trial. CP 4-6. The State of Washington was the actual participant in trial, although it appeared through the Snohomish County Prosecuting Attorney's Office. The County's actions were limited to those described above.

After three attorneys from Perkins Coie took interest in this matter and filed a 71-page appellate brief, trial counsel for Mr. King³ brought this to the attention of the County and the State of Washington. Due to the procedural complexity of this matter and the confusion initially present, the County was not in a position to respond until it filed its motion to be treated as a party, which was granted by this Court on October 16, 2006. The County's appellate brief will focus on the legal flaws in the Perkins Coie analysis and the problems that granting the relief sought would cause the County. The Office of Public Defense in Snohomish County is

created by Snohomish County Code § 2.09. The County funds that office, its contract with the local Public Defender Association, as well as private defense counsel. Thus, funding legal services is a major issue for this County.

At this point in time, the State of Washington, by and through the Attorney General's Office, has filed a Notice of Withdrawal and Substitution assuming the lead role in this matter.

IV. FACTS

This simple matter took five (5) days to try for one reason. Ms. King steadfastly ignored Judge Bowden's rulings, advice, suggestions, and instructions. She insisted on arguing with witnesses instead of proceeding using the time-honored question and answer format. At one point, Judge Bowden stated:

Ms. King, I'm a fairly patient person, and you're taxing my patience greatly with questions that are so ridiculous that it just does you a great disservice when there are more important issues that perhaps we should get to, such as the welfare of your children. But I feel I'm in the middle of a marital argument between you and your husband that is initiated solely by you. And he's patiently trying to respond to largely pointless questions, and it's taxing and counterproductive.

³ We refer to Mr. King, and Ms. King, by their surnames.

3 RP 108:15-23⁴. Reading the transcript, one is amazed by her refusal to follow basic instructions from the Court, and by his patience in not sanctioning her.

A. Ms. King's Attempts to Obtain Counsel Were Ambivalent, at Best.

The record below is filled with examples of Ms. King going to various legal aid providers, beginning discussions with them, and failing to follow through. She went to one legal aid provider in December, 2005, and was given forms and an appointment the next month. She failed to appear for the appointment in early January of 2005, and did not re-appear until May 10, 2005. CP 57. At that point, no one was available to assist her. She then disappeared until September 13, 2005. CP 57. She met with an attorney who thought she needed assistance, and a staff member found an attorney willing to assist. She re-appeared on November 29, 2005, and met with that attorney who had agreed to assist her. CP 58. He then filed his case report, stating she "has essentially given up and had not followed through with his office in seeking the

⁴ The report of proceedings (RP) is cited by volume number. Transcripts of other hearings below are cited by date.

continuance.” CP 58. She verified this. CP 58. She cannot now complain of the natural result of her failure to follow through. After the trial, she again sought help. CP 58.

The problem with her argument is similar to those raised by a criminal defendant who refuses the assistance of a public defender, takes his or her chances at trial, and then blames ineffective assistance of counsel when he or she loses. State v. McDonald, 143 Wn.2d 506, 512, 2 P.3d 791 (2001) (generally defendants who are afforded the right to self-representation cannot claim ineffective assistance of counsel); State v. Barker, 35 Wn. App. 388, 396, 667 P.2d 108 (1983) (pro se defendant cannot contend on appeal that the quality of his own defense amounted to a denial of effective assistance of counsel) (citations omitted); State v. Silva, 108 Wn. App. 536, 539, 31 P.3d 729 (2001) (recognizing that United States Constitution allows a criminal defendant to have and to reject assistance of counsel) (citation omitted).

To grant this relief would give Ms. King, and all individuals who follow the trail she is attempting to blaze, two bites at the apple. If Ms. King really and truly believed she needed an attorney to assist her, she should have followed through on her attempts to

get one before trial, or at least told Judge Bowden at the beginning of trial about her concerns. She did neither. The record reflects someone who was ambivalent, at best, in her attempts to obtain counsel. CP 56-59.

B. Ms. King Cannot Willingly Try a Case Pro Se and then Complain After She Does Not Like the Results.

Ms. King cannot knowingly and willingly fail to follow through on an attempt to obtain counsel, try the case pro se, and then complain about the result.

This matter was the subject of several motions to continue. During the motion Ms. King filed on August 5, 2005, she said nothing about her desire to have an attorney. SCP 286-289. Instead, she focused on discovery she claimed was outstanding. Id. The Court granted her motion re-setting the trial for January 4, 2006. SCP 282-283.

On the eve of trial, she again moved for a continuance, this time to allow the Court to review an anger management assessment which had apparently just been received. SCP 264-281. Again, there was no mention of a desire to have legal help. Id.

Ms. King ably argued the motion to continue before Presiding Judge Thomas Wynne. She did not mention the desire to have an attorney at any point. RP 1/3/06. Then, when the trial began, and the Court inquired about her desire to make an opening statement, she gave one. There is no mention of the desire to have an attorney. 1 RP 3:7-12. Once the trial began, she did well except for one problem. Her problem was not lack of ability; it was a deliberate failure to follow the Court's instructions. A microcosm of her behavior is her cross-examination of Steven King, the grandfather of the children. She cut him off repeatedly, argued with him, and finally Judge Bowden admonished her, repeatedly, to ask questions. 1 RP 80:20 – 91:3. Her difficulties continued when she cross-examined Mr. King's fiancée. 1 RP 131:5 – 132:17; 1 RP 138:12 – 140:8; 147:15 – 148:9.

The other problem with Ms. King's approach is that she attempts to portray a situation in which she alone was fighting against her adversary who was represented by counsel.

Ms. King is not an incapable advocate. She is smart enough that she expects to be earning \$110,000 per year soon after finishing loan officer training. 1 RP 29:13-25; 30:1-2. The trial transcript shows her main problem was being argumentative and

ignoring Judge Bowden's attempts to assist her. 2 RP 3:1-10; 2 RP 5:7 – 6:4; 2 RP 10:11 – 12:21; 2 RP 19:16 – 21:20; 2 RP 25:1 – 26:2.

The Guardian ad Litem testified that she had seen Ms. King on a couple of occasions attempt to take over and run a courtroom, which caused Commissioner Brudvik to admonish her severely. 2 RP 88:1-10. Judge Bowden thus had the opportunity to observe her conduct for five days, and to learn that his courtroom was not the only forum for her misbehavior. The Guardian ad Litem also testified, unequivocally, that the interests of the children would be best served by having their primary residence with their father. 2 RP 105:24 – 106:1.

As the trial progressed, her performance as a pro se litigant did not improve, again, because she would not follow instructions. 2 RP 109:19 – 111:20; 2 RP 135:15-22. Finally, faced with yet another claim that Ms. King “understands”, Judge Bowden says, “Well, I don't believe you have. Because I've reminded you several times and nothing changes.” 2 RP 139:5-7; 2 RP 146:24 – 148:6. Her behavior continued. 2 RP 150:24 – 161:2.

This was not a “me against the world” situation, because there were several other people present concentrating on the real

issue – the best interests of the children. First of all, Judge Bowden did an excellent job of providing her with information necessary to prosecute her case.⁵ For example, he patiently instructed her how to present exhibits. 2 RP 30:3 – 35:10. His Findings of Fact and Conclusions of Law are lengthy and show he considered all the evidence, and made his decision with the children’s best interests in mind. CP 77-136.

Second, the record shows that Mr. King’s attorney was not a “bully”, and in fact, was quite gentle in his cross-examination of Ms. King. 1 RP 37:16-18 (offered her chance to compose herself).

Third, the children had their own advocate in this matter, Guardian Ad Litem Bridget Llewellyn. The trial court praised her as being well respected and experienced. RP 2/1/06 18:18-20. Ms. Llewellyn’s written and oral presentation clearly evidenced the fact that she was putting the children’s best interests in front of all other concerns. RP 2/1/06 18:11-17.

Ms. King’s cross-examination of her ex-husband was also problematic, not due to incompetence, but due to her failure to

⁵ His remarks regarding her pro se status are dicta, and unfortunate. His performance at trial was exemplary, however.

listen to the Court's simple, often repeated, instructions. 3 RP 69:4-22; 3 RP 77:16 – 79:5. She became sarcastic and badgered the witness to the point where Judge Bowden asked Mr. King's attorney to object more. 3 RP 92:1 – 92:12. She finished the cross-examination in the same vein. 3 RP 128:13 – 129:10.

Her case in chief got off to a choppy start, as her friend cannot testify to hearsay and ends up supporting Mr. King. 3 RP 136-158. Even examining her own daughter, she cannot resist the urge to comment on the evidence, and the Court admonishes her repeatedly. 3 RP 165:1-12; 3 RP 175:7-13; 3 RP 178:12-14; 4 RP 25:2-6. It also became clear that she and her oldest daughter had carefully rehearsed her testimony. 4 RP 54:11-3.

Ms. King's attempt to present her own direct testimony was disjointed and convoluted. 4 RP 87:9 – 145:15; 5 RP 35:24 – 66:23. The transcript, read in its entirety, makes it relatively easy to understand why Judge Bowden concluded she was not the best parent to have primary custody. He found her hostile and arrogant. RP 2/1/06, 13:6-7.

C. **Ms. King had Access to the Courts and Access to Justice.**

One of the fundamental principles of American jurisprudence is that a person gets to pick his or her own lawyer. The choosing of a lawyer is one of the most personal decisions a litigant makes. This includes the choosing of a lawyer, or to represent oneself. In the American system of justice, people defend themselves in criminal cases every day, prosecute and defend small claims matters, and handle civil matters pro se as well. For example, in Snohomish County Superior Court, Jerry Jones defended himself in his third murder trial. (See CBS News story "Defending Your Life" dated 7/22/06 (story originally aired 10/15/05), available at http://www.cbsnews.com/stories/2005/10/12/48hours/main938233_page4.shtml). There is simply nothing wrong with this, and in fact it is a well organized part of our legal system. Ms. King's brief confuses access to the courts with access to the courts accompanied by a lawyer paid for by someone else. This is a huge distinction.

V. STANDARD OF REVIEW

Statutes are presumed constitutional, and a party challenging the constitutionality of a statute has the heavy burden

of proving its unconstitutionality beyond a reasonable doubt. State v. Blank, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997) (citations omitted).

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). Only a “manifest error affecting a constitutional right” can be raised for the first time on appeal. State v. Lynn, 67 Wn. App. 339, 345-46, 835 P.2d 251 (1992); RAP 2.5(a)(3). A manifest error is one that is unmistakable or evident and that has an impact or makes a difference, and has “practical and identifiable consequences.” Lynn, 67 Wn. App. At 345. An error whose impact is abstract and theoretical will not be considered for the first time on appeal. Id.

VI. ARGUMENT

A. The Failure to Appoint Counsel Does Not Violate Constitutional Due Process.

The due process clause is not violated in this case. Washington courts have determined that a parent has a constitutional right to counsel in a dependency proceeding where he or she may permanently lose all of his or her parental rights. In re Welfare of Luscier, 84 Wn.2d 135, 524 P.2d 906 (1974). Where a parent in a dependency proceeding is indigent, he or she is

entitled to appointment of counsel at public expense. RCW 13.34.090. Further, a guardian ad litem is automatically appointed to represent children in dependency proceedings. RCW 13.34.100. These statutory rights have not been granted parents or children in private third-party custody proceedings under chapter 26.10 RCW. Thus, Ms. King argues that the third-party custody statute violates the fundamental liberty interests of parents in the care, custody and control of their children, an interest protected by the due process clause of the fourteenth amendment the United States Constitution.

Ms. King claims that all judicial proceedings involving the care, custody, and control of children must include consideration of the following factors established in Mathews v. Eldridge to determine if counsel should be appointed to indigent parents: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used plus the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed. 18

(1976). However, Lassiter v. Dep't of Social Servs. of Durham County, the case upon which she relies, and its Washington progeny, focused on the state-prosecuted parental rights termination proceedings, not private custody petitions. Lassiter v. Dep't of Social Servs. of Durham County, 452 U.S. 18, 33, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); In re Harris, 98 Wn.2d 276, 285, 654 P.2d 109 (1982); In re Dependency of C.R.B., 62 Wn. App. 608, 614-15, 814 P.2d 1197 (1991).

Further, Lassiter held that the right to counsel is absolute only in criminal proceedings where an individual may be deprived of his or her physical liberty. Lassiter, 452 U.S. at 23-24, 27, 33 (citing Mathews, 424 U.S. at 335). Therefore, although Lassiter balanced the Mathews factors, the court ultimately held that even where a parent may permanently lose all parental rights to his or her child in a state-prosecuted dependency proceeding, the right to counsel is not absolute. Lassiter, 452 U.S. at 25-27, 33.

Lassiter anticipates a Mathews balancing test only in a situation where a parent-child relationship may be permanently severed. Termination proceedings necessarily involve a significantly greater intrusion on parental rights than private custody petitions because custody may be modified and parents in private

custody petitions may still exercise visitation rights. RCW 26.10.160; RCW 26.10.190. Here, Ms. King gets her children every other weekend, for four weeks in the summer, and has the ability to speak with them on the telephone as often as she wishes. She may also seek to modify this arrangement at any point. This is not close to a total deprivation. CP 250-252.

Nevertheless, consideration of the Mathews factors illustrates that they do not require appointment of counsel for indigent parents in private third party custody actions in Washington. First, because third party custody determinations filed pursuant to chapter 26.10 RCW are not a permanent deprivation of parental rights, such as that anticipated in chapter 13.34 RCW, the private interest at stake is lower.⁶ Additionally, although custody determinations are not necessarily permanent, chapter 26.10 RCW provides for various procedural safeguards which minimize the risk that the procedure will lead to erroneous decisions in the absence of counsel for the indigent parent. The statute allows the court to

⁶ RCW 13.34.200 ("Upon the termination of parental rights pursuant to RCW 13.34.180, all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent shall be severed and terminated and the parent shall have no standing to appear at any further legal proceeding concerning the child{.}"); RCW 26.10.160; RCW 26.10.190.

award attorney fees and to appoint a guardian ad litem for the child. RCW 26.10.070; RCW 26.10.080.

Finally, the State interest in having private parties maintain these private actions at their own costs is high. The State has no function in a private custody action other than adjudication because third party custody actions involve private parties and the State is not appointed custodian of the child as in a dependency action. RCW 26.10.030; RCW 13.34.210. Thus, the fiscal and administrative burdens requiring additional or substitute procedural requirements would be extreme. Analysis of the Mathews factors illustrates that Washington's third-party custody statute provides due process to all parents despite the fact that it does not require appointment of counsel for indigent parents.

Washington also chose to require by state appointment of a guardian ad litem to represent the best interests of the child in a dependency proceeding, although Lassiter does not anticipate or require this. RCW 13.34.100. However, as discussed above, a dependency proceeding involves a more permanent intrusion on the care, custody, and control of a child than a private third-party custody action. Ms. King advances no convincing argument that chapter 26.10 RCW violates her due process for failing to require

appointment of a guardian ad litem where other procedural protections were sufficient in the absence of a court-appointed attorney.

In summary, Ms. King argues that the trial court applied RCW Ch. 26.10 to her in violation of her due process right to counsel under the 14th Amendment to the United States Constitution. In support of this contention, she relies on Lassiter, in which the Supreme Court held the trial court did not deny due process to an indigent parent when it denied appointed counsel in a state-prosecuted parental rights termination proceeding. Lassiter does not guarantee a parent appointed counsel in every state-prosecuted parental rights termination proceeding, let alone in every custody action between private parties. If it did, the County and State would bear an enormous cost in providing counsel in every divorce action in which parents contest the legal and physical custody of a child. These are the majority of divorce cases.

Due process jurisprudence includes a “presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.” Lassiter, 452 U.S. at 26-27. In Lassiter, the Supreme Court held that a litigant may be entitled to appointed counsel in a proceeding to terminate

her parental rights, but only if compelled by application of the three factors in Mathews. Of special concern to the Supreme Court in Lassiter was that a permanent deprivation of parental rights is significantly more intrusive than a custody order: “Here the State has sought not simply to infringe upon that interest, but to end it.” Lassiter, 452 U.S. at 27.

Even with Lassiter’s full parental rights at stake, the Supreme Court did not hold she was entitled to appointed counsel. After applying the Mathews factors – the private interest at stake, the government’s interest, and the risk that the procedure will lead to erroneous decisions – the Court held that the trial court did not deny due process when the trial court denied appointed counsel in the proceeding that ultimately led to the termination of Ms. Lassiter’s parental rights. Lassiter, 452 U.S. at 33.

Ms. King does not attempt to weigh the Mathews factors and makes no sustainable argument for reversal. Contrary to her argument that RCW Ch. 26.10 must provide a statutory mechanism for weighing the relevant factors, nothing in Lassiter requires anything of the sort. Ms. King fails to demonstrate that application of the Mathews factors in her case would compel appointment of counsel at state expense, particularly since the proceeding involved

neither state action nor the termination of the parent-child relationship. Further, she cites no case from any jurisdiction holding that an indigent parent in either a private or state-prosecuted custody proceeding is constitutionally entitled to appointed counsel. Even assuming a private custody proceeding is not categorically exempt from mandatory appointment of counsel at public expense, Ms. King fails to demonstrate that she deserved appointed counsel under Lassiter and Mathews. This court should reject this “naked casting into the constitutional sea”. Request of Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970), cert. denied, 401 U.S. 917 (1971)).

B. The Custody Decree is Not Void on Equal Protection Grounds.

- 1. The Equal Protection Clause Does Not Mandate that Protections Afforded to Parents of Dependent Children Under RCW Ch. 13.34 be Offered on Equal Terms to Ms. King Under RCW Ch. 26.10.**

Ms. King claims that chapter 26.10 RCW is unconstitutional in its entirety because it violates equal protection. The equal protection clause of the Fourteenth Amendment requires that “persons similarly situated with respect to the legitimate purpose of

the law receive like treatment.” State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (quoting State v. Phelan, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983) (quoting Harmon v. McNutt, 91 Wn.2d 126, 130, 587 P.2d 537 (1978))). The first task in determining whether chapter 26.10 RCW is constitutional is defining the class affected by the statute, the persons who are similarly situated. State ex rel. Sigler v. Sigler, 85 Wn. App. 329, 334, 932 P.2d 710 (1977). Because a statute is presumed constitutional, the party challenging it bears the burden of establishing the constitutional violation. Campos v. Dep’t of Labor & Indus., 75 Wn. App. 379, 384, 880 P.2d 543 (1994).

Ms. King apparently argues that the class is indigent parents accused of abuse or neglect under either chapter 26.10 RCW or chapter 13.34 RCW, and asserts that the protections afforded under chapter 13.34 RCW are not provided under chapter 26.10 RCW. RCW 13.34.060(2); RCW 13.34.090(2); RCW 13.34.100. However, respondents to a custody proceeding pursuant to chapter 26.10 RCW are not ‘similarly situated’ to respondents in a dependency or termination proceedings under chapter 13.34 RCW. Thus, they do not comprise a class for purposes of equal protection analysis.

As discussed above, respondents to a third party custody action under chapter 26.10 RCW do not have to defend against a state-supported attempt to permanently sever all of their parental rights. Additionally, parents in custody actions may retain visitation rights even if a third party receives custody of their child and, unlike the permanent termination of parental rights, custody petitions can be modified. Thus, the respondents in each type of action are not similarly situated. See also, In re Infant Child Skinner, 97 Wn. App. 108, 10, 982 P.2d 670 (1999) (parent in adoption proceeding not similarly situated to parent in dependency proceeding, even where parent's rights were terminated under RCW 26.33 after the child's mother placed the child for adoption); State ex rel. A.N.C. v. Grenley, 91 Wn. App. 919, 932, 959 P.2d 1130 (1998) (unmarried parents who live in Washington but whose children live in other states not similarly situated to married parents who live in Washington and whose children live in Washington). Because they are not similarly situated, they are not accorded like treatment, nor are they required to be given like treatment.

The essence of Ms. King's equal protection claim is that indigent parents receive different treatment under RCW Ch. 26.10 than under RCW Ch. 13.34. "Equal protection does not require

that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made.” Personal Restraint of Young, 122 Wn.2d 1, 45, 857 P.2d 989 (1993) (quoting Baxstrom v. Herold, 383 U.S. 107, 111, 15 L. Ed. 2d 620, 86 S. Ct. 760 (1966)). The statutes are presumed constitutional, and Ms. King bears a heavy burden of proving the RCW Ch. 26.10 is unconstitutional. State v. Blank, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997). Ms. King fails to prove the unconstitutionality, and hence the alleged error, for any of several reasons.

First, Ms. King wrongfully assumes that indigency is the classification upon which the Legislature has discriminated. This assumption is unfounded, for the indigent parties are treated the same as non-indigent parties under both statutes. The actual classification is between indigent respondents to a dependency proceeding and indigent respondents to a custody proceeding. The classification at issue for equal protection purposes is therefore between the two statutes, not between indigents and non-indigents.

This point is emphasized in State v. Mills, 85 Wn. App. 286, 291, 932 P.2d 192 (1997). In that case, a criminal defendant

challenged a law that provided appointment of counsel in cases where an indigent defendant is responding to a motion for discretionary review but not in cases the indigent defendant is initiating such a motion. The court ruled that indigent defendants seeking review, as distinct from indigent defendants defending review, are not a suspect class or even a semi-suspect class, because the complained of classification is not based on financial status, but on whether one is petitioner or respondent. Mills, 85 Wn. App. At 291. The court therefore reviewed the classification for a rational basis. Mills, 85 Wn. App. At 291. Like the defendant in the Mills case, Ms. King complains not of an indigency-based classification, but of a classification based on which type of proceeding one is defending, a custody petition or a dependency petition.

There is no reason to apply strict scrutiny or intermediate scrutiny. Though statutes implicating a fundamental right may be held to strict scrutiny, the threshold question is not whether a statute vaguely implicates a fundamental right, but whether the allegedly discriminatory classification affects a suspect class or threatens a fundamental right. State v. Shawn P., 122 Wn.2d 553, 560, 859 P.2d 1220 (1993). The classification here does not

discriminate against a suspect class. Nor does the classification truly affect a fundamental right, since the protections afforded in dependency actions are mandated only by statute, not the U.S. Constitution, at least insofar as either statute denies custody without severing the parent-child relationship.

Further, it is arguable that Ms. King has by her own conduct abdicated any fundamental right to the care, custody and control of her children. Judge Bowden, in his Findings of Fact and Conclusions of Law, blamed the unkempt home and poor school performance and attendance on her as the primary caregiver. CP 80-84. It is true that the State will not interfere nor countenance interference with a parent who “adequately cares” for his or her children:

[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.

Troxel v. Granville, 530 U.S. 57, 68, 120 S. Ct. 2054, 2061, 147 L. Ed. 2d 49 (2000) (emphasis added). But with parental rights comes responsibilities. Where, as here, a parent basically abdicates her responsibilities and rights, the State can provide

various mechanisms for protecting the best interests of their children, and third parties may commence a custody action under RCW Ch. 26.10 subject only to the general constraints of civil actions.

The challenged differences between RCW Ch. 26.10 and RCW Ch. 13.34 are in any event strongly related to the State's interest in insuring that children are protected from harm. The dependency statutes extend extra efforts to reunite the family because the State has a strong interest in avoiding having children dependent on the State. But under RCW Ch. 26.10, where a petitioning private party is able to take custody of the child on a showing of harm, the State avoids the costs associated with dependency. Further, the respondent in a dependency action has far more at stake than a respondent to a custody action. A dependency action may result in an order terminating the parent-child relationship entirely, RCW 13.34.180, whereas a termination of parental rights is beyond the subject matter jurisdiction of a court hearing a custody action. The different treatment is strongly related to the different interests of the two classes and to the goal of conserving fiscal resources.

Ms. King has not met her heavy burden of proving the statute unconstitutional on equal protection grounds. Blank, 131 Wn.2d at 235. But even if RCW Ch. 26.10 were unconstitutional on equal protection grounds, any error in applying that statute to Ms. King does not render the custody decree void.

2. If RCW Ch. 26.10 was Applied to Ms. King in a Manner that Violated Her Rights to Equal Protection, Such a Constitutional Error Does Not Make the Custody Decree Void.

Ms. King's equal protection argument is in any event not grounds to vacate a decree as void. Though a decree may be void ab initio for lack of personal jurisdiction, lack of subject matter jurisdiction in some instances, or lack of procedural due process, other constitutional errors do not render a decree void. Rather they are merely legal error and fall under the general rule that legal issues are reviewable only on direct appeal, and not in a motion to vacate. See Marriage of Moody, 137 Wn.2d 979, 991, 976 P.2d 1240 (1999) (affirming denial of motion to vacate; holding fairness of spousal separation agreement was legal issue reviewable only on direct appeal); Burlingame v. Consolidated Mines and Smelting Co., 106 Wn.2d 328, 336, 722 P.2d 67 (1986) (reversing trial court and reinstating contempt judgment; holding insufficiency of

evidence was legal error not justifying relief from judgment); Marriage of Tang, 57 Wn. App. 648, 653-54, 789 P.2d 188 (1990) (reversing order that granted motion to vacate decree based on error of law in the marital property distribution, to wit, not having a list of all marital property); see also 4 Wash. Prac., Rules Practice CR 60 at 719 (1992); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 375, 84 L. Ed. 329, 60 S. Ct. 317 (1940) (holding judgment not void on basis of unconstitutional statute where statute not found unconstitutional in final judgment). Thus even if RCW Ch. 26.10 were held wholly unconstitutional (see Custody of R.R.B., ___ Wn. App. ___, ___, 31 P.3d 1212, 1222 (2001) (Morgan, J., dissenting)), such a decision would not render the order void.

C. **This is a Nation-Wide Campaign to Expand the Constitutions of the United States and the State of Washington, which should be Rejected.**

The pro bono brief from Perkins Coie is part of a nation-wide attempt to create a new entitlement which does not exist in either the United States or Washington State Constitutions. The Constitution of the United States and of the individual states is not a piece of Silly Putty to be stretched in any direction desired. In fact, the courts should refrain from making decisions they do not

need to make on social issues. “It is part of the new philosophy of the Constitution. And when you push the court into that, and when they leap into it, they make themselves politically controversial. And that’s what places their independence at risk.” Justice Scilia quoted in the “Arizona Daily Star”, Sunday, October 22, 2006.

This Court should reject this clear attempt to stretch and modify the Washington State Constitution to meet a political agenda which is little more than a “naked casting into the constitutional sea”. Request of Rosier, 105 Wn.2d 606, 616 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970), cert. denied, 401 U.S. 917 (1971)). Whatever the merits of the position advocated by Perkins Coie, the solution is simple. They can go to Olympia and make their feelings known. The answer to this problem is a legislative one; not a piecemeal one to be imposed by the courts.

In addition to the legal problems cited herein, there are practical problems as well. What if neither party has an attorney? Can both then receive free lawyers? What if one of the individuals has a lawyer; then does the other one automatically get one? Where do these lawyers come from?

There is simply no adequate mechanism currently set up in the State of Washington to take care of this need. Most public defense funding is supplied by counties; some comes from the state. Additionally, we have a patchwork quilt of pro bono and legal service attorneys already stretched to the breaking point. The demand for free civil legal assistance far outstrips the supply in Snohomish County and all of Washington State. CP 61.

Thus, the Legislature could create a mechanism through which a free family law attorney would be available whenever a divorce involving custody was filed. On information and belief, that is the vast majority of divorces. Where this panel, or funding for it, would come from is unclear. The Court can take judicial notice that counties do not have the resources to fund such an entitlement.

The bottom line is most lawyers, including most private practitioners in big Seattle law firms like Perkins Coie, simply do not want to do divorce work. For example, after Ms. King lost, a lawyer from the biggest firm in Snohomish County (www.andersonhunterlaw.com, "About Us" page) appeared pro bono for her. However, his appearance was specifically limited to the motion for a new trial. CP 41-76. Then he departed. This is further evidenced by the appellant's brief. At page 15, Perkins

strongly asserts that their representation is for the purpose of this appeal only (“ . . . [s]he is represented by pro bono counsel, limited to the issues in this appeal”). The problem with this is obvious. If Anderson Hunter and Perkins Coie don't want to represent Ms. King, who does?

The Washington State Supreme Court recently rejected an attempt to enlarge the scope of the right to counsel to convicted sexually violent predators at their psychiatric evaluations. In re Peterson, 130 Wn.2d 70, 94, 980 P.2d 1204 (1999), cf., Hague v. Committee for Industrial Organizations, 307 U.S. 496, 520, 59 S.Ct. 954, 966 (1939) (explaining need to narrowly construe the privileges and immunities clause); see also Matter of Maxfield, 133 Wn.2d 332, 349 at note 5, 945 P.2d 196 (1997) (there is no state constitutionally protected right to privacy of one's electrical consumption records). The Courts in Olympia and Washington, D.C., rule the same way over and over again. The Constitutions are fixed documents, not documents to be expanded at someone's whim.

This case is very similar to a recent Maryland case. In it, a very irresponsible individual with four children from four different fathers sought to get custody of them from a couple who had cared

for them when she was in prison for drug dealing. After her attempt failed, she appealed, using pro bono counsel, and also sought counsel for the matter below. The facts were strikingly similar. After making very ambivalent attempts to get an attorney, she lost part of her case as a pro se litigant, and then asked the court to unring the bell. Frase v. Barnhart, 840 A.2d 114 (2004). The court declined to do so, noting that it would not speculate that the five lawyers and three law firms representing her on the appeal would not continue to represent her. It also noted amicus briefs from the ACLU, the State Bar, and several other legal services groups. Id. at FN 9.

When a pro se litigant goes to trial in the State of Washington, there are no "do-overs". This was ignored by Ms. King. Ms. King had her day in court, and she lost. The result should be affirmation of the Court's order below.

Finally, the State Constitution makes no provision for funding civil attorney's fees although it expressly considered and adopted means of meeting expenses for criminal defendants, unlike the federal constitution. The State Constitution expressly considered the matter of costs for a criminal defendant in the last sentence of Sec. 22, adopted in 1889. The matter of attorney's

fees does not appear to be part of this section of the State Constitution. See the territorial statutes that may have provided for appointment of counsel for indigent criminal defendants well before the adoption of the State Constitution (RCW 10.40.030, adopted 1854 and 1855). Thus, even though the matter of court appointed counsel was already part of Washington territorial law before adoption of the Constitution, and even though the State constitution expressly defers other costs to a criminal defendant, the matter of fees and costs for a civil defendant was never made a part of the Washington Constitution. See also discussion of Art. I Sec. 22 in Utter and Spitzer, The Washington State Constitution, A Reference Guide, at p. 36, citing also Stowe v. State, 2 Wash. 124 and State v. Fenimore, 2 Wash. 370.

VII. CONCLUSION

Ms. King's argument that she is entitled to a free lawyer is being made at the wrong place and at the wrong time. If she really wanted assistance at trial, she should have followed through on her efforts to get a lawyer before she went to trial. Thus, this is the wrong time. If she and her pro bono attorneys really believe that a miscarriage of justice has been done, they should go to Olympia and encourage the legislature to come up

with a solution to this problem. An alternative would be to work with the State Bar to encourage more lawyers to do pro bono work. Thus, they are in the wrong place.

RESPECTFULLY SUBMITTED: April 18, 2007.

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DECLARATION OF SERVICE

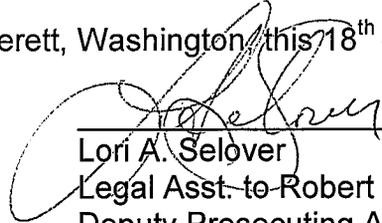
I, Lori A. Selover, hereby certify that on April 18, 2007, I caused the original of the foregoing Errata Sheet of Involved Party State of Washington by Snohomish County (together with corrected brief) to be transmitted via mail to the Supreme Court of the State of Washington (Temple of Justice, P.O. Box 40929, Olympia, Washington 98504-0929); and that I caused to be served a true and correct copy of the foregoing Errata Sheet of Involved Party State of Washington by Snohomish County (together with corrected brief) upon the following counsel via First Class U.S. Mail:

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

SIGNED at Everett, Washington, this 18th day of April, 2007.



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