

No. 79978-4

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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RESPONDENT'S ANSWER TO BRIEF OF
AMICUS CURIAE NORTHWEST WOMEN'S LAW CENTER
ET AL.

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INTRODUCTION

In the numerous briefs previously filed in the Court of Appeals and Supreme Court of the State of Washington in this case, the issue has variously been presented as:

1. Was the State obligated to provide Brenda King an attorney? (Brief of Appellant, p. 2);
2. Whether Brenda King has a constitutional right to counsel in a civil case of this nature (Brief of Appellant, p. 15, identifying this as the “threshold question”);
3. Was the trial court obligated to provide Brenda King with counsel when she did not make a request for same? (Brief of Involved Party State of Washington by Snohomish County, p. 1);
4. Do either the State or Federal constitution obligate the State to provide counsel at taxpayer expense for indigent private parties to dissolution actions when the parenting or custody of a child is at issue? (Brief of Amicus Curiae Robert M. McKenna, Attorney General, p. 1);
5. Whether the Washington Constitution requires courts to appoint counsel for litigants unable to afford or obtain pro bono counsel in cases where basic human needs are at stake (Brief of Amicus Retired Washington State Judges, p. 2).

As evidenced by the Amicus briefs recently filed in this case, there are a number of organizations advocating for a new social policy of appointing counsel at taxpayer expense to represent indigent persons in civil cases. While that concept may have support among individuals who embrace a particular political or social agenda, the fact is that the Courts in at least nine

states which have addressed the issue have uniformly held there is no right to appointed counsel at taxpayer expense in domestic relations disputes between private parties (Cases cited in Brief of Respondent, pp. 17 and 19, Brief of Involved Party State of Washington by Snohomish County, p. 32, and Brief of Robert M. McKenna, Attorney General, p. 11). The proponents of taxpayer supported attorneys in civil cases apparently hope to make Washington the first state in the union to find a constitutional right to appointed counsel in civil cases.

In their zeal to urge the court to adopt this new social policy, the distinguished judges, scholars, and attorneys who have presented to this Court their arguments in favor of court appointed counsel in civil cases have overlooked the procedural posture of this case, and have therefore failed to properly frame the issue before this Court. The record does not contain any citation to a pretrial motion by Brenda King seeking appointment of counsel at taxpayer expense. The issue was not raised by Ms. King until after the trial had been concluded and final orders had been entered by the trial court. Brenda King then filed a motion for a new trial, alleging that the Court should have appointed counsel for her. CP 64. This appeal is taken from the Order denying Ms. King's motion for a new trial. The real issue before this Court is, therefore: Whether the trial judge abused his discretion in denying Brenda King's CR 59 Motion for New Trial.

The remainder of this brief will focus primarily on a response to the Amicus Brief filed by the Northwest Women's Law Center ("NWLC"). Respondent Michael King respectfully concurs in arguments presented by the State of Washington Attorney General in reply to the various other amicus filings and will not repeat those arguments.

ARGUMENTS

1. The NWLC's arguments concerning the difficulties faced by victims of domestic violence have no bearing on the issue of whether Brenda King was entitled to a new trial.

With all due respect for the excellent work the NWLC has done in many areas of law pertaining to women's rights, including family law, and work in drafting and lobbying the legislature for passage of the Domestic Violence Prevention Act and the Parenting Act (Brief of NWLC, p. 1), the NWLC's extensive discussion of difficulties faced by victims of domestic violence fails to provide any legal analysis relevant to Brenda King's CR 59 Motion for New Trial. The NWLC makes no effort to explain how the facts of this case fall within any of the nine possible grounds for granting a litigant a new trial set forth in CR 59, nor is any explanation given as to how or in what manner the trial judge abused his discretion in denying Brenda King's Motion for New Trial.

The arguments advanced by the Northwest Women's Law Center appear to be predicated on an assumption that Appellant Brenda King was a victim of severe and pervasive domestic violence, and therefore Brenda King

faced an uphill battle in custody litigation, and Michael King was more likely to prevail. The assumptions underlying this argument are inaccurate, contrary to the trial court's Findings of Fact, and are not supported by substantial evidence.

The NWLC Brief contains minimal citations to the record in this case, with the primary exception being that in a footnote on p.2, reference is made to six excerpts from the trial testimony which purport to show Brenda King's attempts to put evidence of domestic violence on the record. Examination of that testimony clearly reveals that there is no support for the effort to portray Brenda King as a battered spouse:

- 2 RP 68:14-70. Mike King told a construction worker who threw garbage in one of Mike's landscaping trenches that if he did it again, Mike would kick his behind. Brenda does not appear to have been present.
- 2 RP 71:9-73:7. Mike King was arrested during a confrontation with a person who objected to where Mike's vehicle was parked. Brenda was arrested for jumping on one of the police officers.
- 3 RP 85:5-18. Mike has a court hearing scheduled pertaining to a domestic violence protection order. There is no evidence as to the outcome of the hearing.
- 4 RP 95-96. Mike spanked Brenda's oldest daughter.
- 4 RP 97:23-24. Brenda claims that Mike is easily angered.
- 4 RP 105:1-107:10. An incident which occurred after the parties separated, Mike tried to prevent Brenda from driving off in the car with the children, grabbed the car keys and tossed them. There are no reports of injury resulting from this incident.

Brenda King was allowed to testify in narrative form during at least

two extended periods of time during the trial, once in the form of cross examination after she had been called to the stand by Michael King's attorney, 1 RP 39-42, and again when she called herself to the stand during the presentation of her case in chief. 4 RP 86-145 and 5 RP 35-66. While she testified that Mr. King had a volatile temper and that he had spanked the children, on none of these occasions when she was permitted to testify at length during trial did Ms. King claim that Michael King was physically abusive of her during their marriage.

The court appointed guardian ad litem filed her initial report in May, 2005 (approximately eight months before trial) Ex. 10. The initial report was necessary because Brenda King had expressed an intent to relocate the five children (the three children of this marriage and Brenda's two children from prior relationships) to Grayland, Washington, where she intended to reside with an old boyfriend and his two children. Ex. 10. The report acknowledges that the guardian ad litem was aware of the fact Brenda King had made allegations of domestic violence. Nevertheless, after thoroughly investigating the circumstances of the proposed relocation, the guardian ad litem recommended that the children be placed immediately with their father, Respondent Michael King. It was noted that Brenda King appeared to be "highly manipulative" and that she becomes extremely pushy and has no boundaries when things do not go her way. The guardian ad litem witnessed this first hand, as she caught Brenda King behind her assistant Judy's desk

reading the mail that Judy had just opened. The report and recommendation no doubt avoided what would have been a disastrous move to Grayland, as the guardian ad litem found that Brenda King had not related critical information to her former boyfriend, who after learning the true facts from the guardian ad litem withdrew his offer that Brenda and her five children move in with him. Ex. 10; 2 RP 78:14-80:7.

The guardian ad litem testified on the second day of trial in January, 2006, 2 RP 75-165, and again gave her recommendation that the best interests of the children would be served by placing their primary care with their father, Michael King. 2 RP 103:17-106:1. Despite extensive cross examination by Brenda King, the guardian ad litem did not characterize Ms. King as an abused spouse. 2 RP 107-161.

The Parenting Plan adopted by the trial court does not include any findings at Sections 2.1 or 2.2 regarding a basis to impose any restrictions on the father, Michael King. CP 250. The court did make the following specific findings regarding Brenda King's involvement or conduct which may have an adverse effect on the children's best interests:

A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in RCW 26.09.004.

The abusive use of conflict by the parent which creates the danger of serious damage to the children's psychological development. CP 250.

The court also found, as set forth in the oral decision which was incorporated into the Findings, CP 77-136, that there was no credible evidence the father

had physically hurt anyone deliberately or in anger, with the exception of one incident of excessive corporal discipline of Brenda's oldest daughter years ago. The court also stated that the wife's effort to paint Michael King as an abusive husband, was "a bit of the pot calling the kettle black" CP 97.

2. The Northwest Women's Law Center's effort to introduce expert testimony at this time should be rejected.

The Northwest Women's Law Center brief purports to offer numerous expert opinions on domestic violence, suggesting among other things that an abusive father is more likely to seek sole custody than a non-abusive father, and that an abuser who contests custody is likely to prevail, Brief of Northwest Women's Law Center, pp. 4, 5. It is even suggested at p. 8 that judges deciding custody issues may consider abuse to be irrelevant unless the children have been injured or have witnessed the abuse. While none of these opinions are germane to the issue before the Court, i.e., whether or not Brenda King is entitled to a new trial because she was pro se, it should also be noted that none of these purported experts testified at trial. Their opinions are not part of the record before the Court on this appeal, and should not be considered.

3. The Guardian ad Litem thoroughly investigated the facts and more than adequately protected the best interests of the children.

The trial court found that the guardian ad litem in this case was a well respected and experienced guardian, CP 100. The guardian ad litem testified extensively at trial and two written reports were admitted into evidence, 2 RP

76-164; Ex. 8 and 10.

The guardian ad litem was concerned that Brenda's oldest daughter, who was under eighteen at the time, was the one in fact parenting the children. 2 RP 89:19. The GAL was also concerned that Brenda had cut off her oldest son's contact with Mike, who was not his father but was the only person he had ever known as his dad. 2 RP 90. It was also noted that the children had significant problems in school while they were in Brenda's primary care. 2 RP 98.

The guardian ad litem spent an inordinate amount of time listening to Brenda King, 2 RP 130. When Brenda tried to discredit her for not contacting some of the collateral sources who had been identified, the trial judge commented that the guardian ad litem had already explained she did not contact other individuals because there was so much information, there were declarations from many of those people in the court file, and there was enough information that she did not find it cost effective to spend additional time contacting more people. 2 RP 132:12-25.

4. Brenda King was not denied meaningful access to the courts.

The NWLC suggests at p. 15 that a victim of domestic violence may be indirectly denied access to the courts, apparently reflecting the arguments previously made by appellant Brenda King under Article 1, § 10 and Article 4, §§ 1 and 30 of the Washington Constitution. As stated in the Brief of

Respondent at p. 16, quoting annotation at 85 ALR 3d 985, courts that have addressed the issue of appointed counsel for an indigent in an action for divorce or separation have distinguished *Boddie v. Connecticut* (1971) 401 U.S. 371, on the basis that lack of counsel does not deny a litigant access to the courts. The Attorney General provided a more comprehensive response to the “meaningful access” argument at Brief of Robert M. McKenna, Attorney General, pp. 16 - 20.

While suggesting that Brenda King was somehow denied access to the courts due to the fact she was pro se, the NWLC offers no explanation for why Ms. King did not take full advantage of the offers of help which were extended to her as detailed in a declaration filed in support of her Motion for New Trial. CP 56-59. As previously discussed in the Respondent’s brief, p. 22-23, pro bono counsel was ready to assist Brenda King in bringing a motion for continuance in order that she might make additional efforts to find counsel, but she did not avail herself of this assistance. CP 57: 7-9.¹

Brenda King was certainly not denied access to the courts in any sense of the word. She participated fully in the proceedings, as evidenced by her extensive testimony, cross-examination, as well as evidentiary objections

¹ Regrettably, the heading for this section of Respondent’s brief contains a misstatement as to the nature of assistance offered by pro bono counsel. The statement that pro bono counsel was available to file a motion for appointment of counsel is incorrect, and Respondent apologizes for this error; the argument is correctly stated in the body of the brief, i.e., that pro bono counsel would have assisted with a motion for continuance of trial so Ms. King could attempt to find an attorney to represent her, as set forth in the Declaration cited above.

which appear throughout the Report of Proceedings. The record also reflects that she was represented by counsel for several months during the pretrial proceedings, CP 42, 181-184; 5 RP 53:6-9, and presumably could have brought any motions she desired, including a motion for court appointed counsel.

5. The foreign law described by the International Law Scholars is not properly pleaded, and should not be considered.

In addition to suggesting that international law may be instructive in this case, the Amicus Brief of International Law Scholars and Professors argues that the International Covenant on Civil and Political Rights (ICCPR) has been interpreted to include the right to counsel in civil matters and the claim is then made that the State of Washington is “primarily responsible” for implementing provisions of the ICCPR relating to marriage, divorce, and care of children. There is no record in this case of pleadings pertaining to foreign law, as required by Civil Rule 9(k), and all issues before the Court should therefore be governed by the laws of the State of Washington. CR (9)(k)(4).

6. Public policy considerations raised by all five Amici would more properly be addressed to the Legislature, and have no direct bearing on Brenda King’s request for a new trial.

As noted by the Attorney General’s Response to Amici, all five of the briefs devote substantial attention to public policy considerations, rather than to the applicable constitutional question. None of the briefs provide

argument on the issue of whether or not the trial judge abused his discretion when he denied Brenda King's Motion for a New Trial.

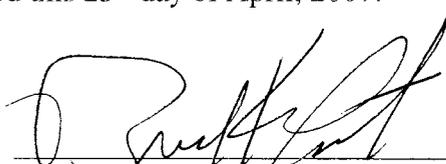
While Respondent concurs with all arguments made by the State of Washington Attorney General and respectfully urges the Court to reject Appellant's attempt to create a new constitutional right respecting appointment of counsel for indigent persons in civil matters, Respondent also respectfully submits that it is not necessary for the Court to reach that constitutional issue in this case. The record clearly establishes that Brenda King had ample opportunity to consult with legal counsel prior to trial and was represented for several months by an attorney who appeared in this case on behalf of Ms. King in January, 2005. Nevertheless, she did not make a request for appointment of counsel at taxpayer expense until after the Decree of Dissolution had been entered. The Amici briefs all focus on the issue of whether there is a right to appointed counsel in cases of this nature, but no authority has been cited for the proposition that Brenda King is entitled to a new trial because she was pro se. There is no argument that the mere fact Brenda King was pro se at trial constitutes an "irregularity in the proceedings" under CR 59(a)(i) and, considering the guardian ad litem's strong recommendations that the children have their primary residence with the father, there is no argument that the trial court ruling falls below the "substantial justice" standard of CR 59(a)(9). The trial court findings

regarding Brenda King's emotional impairment and abusive use of conflict are supported by substantial evidence, and the decision to place the children in the primary care of their father certainly works substantial justice.

CONCLUSION

The trial judge properly denied Brenda King's Motion for a New Trial under CR 59 and the denial of the motion cannot be said to be an abuse of discretion. There is no constitutional right to appointment of counsel at taxpayer expense in cases of this nature, either under due process, equal protection, privileges and immunities, or any other state or federal constitutional provisions, but even if such a right existed. Michael King and the children are entitled to rely upon the finality of the trial court ruling, and they should not be subjected to a second trial. This appeal should be dismissed.

Respectfully submitted this 23rd day of April, 2007.



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CERTIFICATE OF SERVICE

I certify that on April 20, 2007, I caused a true and correct copy of the foregoing Respondent's Answer to Brief of Amicus Curiae Northwest Women's Law Center, et al., to be served on the following counsel via First Class Mail:

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Executed at Seattle, Washington this 23 day of April, 2007.

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