

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 APR 23 P 2:30

BY RONALD R. CARPENTER
NO. 79978-4

CLERK *Rh*

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Marriage of:

MICHAEL STEVEN KING,

Respondent,

v.

BRENDA LEONE KING,

Appellant,

STATE OF WASHINGTON,

Interested Party.

STATE'S RESPONSE TO AMICI

ROBERT M. MCKENNA
Attorney General

Jeffrey T. Even
Deputy Solicitor General
WSBA # 20367
PO Box 40100
Olympia, WA 98504-0100
(360) 586-0728

TABLE OF CONTENTS

I. ARGUMENT1

 A. The Prerogative Of Establishing Public Policy As To The
 Best Use Of Public Funds Is Vested In The Legislature1

 B. Public Policy Arguments Fail To Support The Claim That
 The Constitution Mandates Counsel At Taxpayer
 Expense In Dissolution Actions.....6

 1. Due Process Does Not Guarantee Counsel At
 Taxpayer Expense In Private Dissolution Actions.....7

 2. The Right Of Access To The Courts Does Not
 Entitle Private Litigants To Taxpayer-Paid Counsel.....13

 C. Foreign Cases Construing Different Law Do Not Alter
 The Established Construction Of Our Federal And State
 Constitutions15

II. CONCLUSION20

TABLE OF AUTHORITIES

Cases

Beazley v. Johnson,
242 F.3d 248 (5th Cir. 2001) 18

Cary v. Allstate Ins. Co.,
130 Wn.2d 335, 922 P.2d 1335 (1996)..... 3, 15

Citizens for Responsible Wildlife Mgmt. v. State,
149 Wn.2d 622, 71 P.3d 644 (2003)..... 17

City of Ellensburg v. State,
118 Wn.2d 709, 826 P.2d 1081 (1992)..... 5

Clark v. Superior Court,
62 Cal. App. 4th 576, 73 Cal. Rptr. 2d 53 (1998)..... 1

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992)..... 19

Das v. Das,
133 Md. Ct. Spec. App. 1, 754 A.2d 441 (2000)..... 1

Doe v. Puget Sound Blood Ctr.,
117 Wn.2d 772, 819 P.2d 370 (1991)..... 13, 14

Eggleston v. Pierce Cy.,
148 Wn.2d 760, 64 P.3d 618 (2003)..... 6

Flores v. Flores,
598 P.2d 893 (Alaska 1979) 11

Harmon v. Harmon,
943 P.2d 599 (Okla. 1997)..... 2

Hawkins v. Comparet-Cassini,
33 F. Supp.2d 1244 (C.D. Cal. 1999) 18

| | |
|---|--------|
| <i>Heinrich v. Sweet</i> , 49 F. Supp.2d 27 (D. Mass. 1999)..... | 18 |
| <i>Hillis v. State</i> , 131 Wn.2d 373, 932 P.2d 139 (1997)..... | 5 |
| <i>Igartua De La Rosa v. United States</i> , 32 F.3d 8 (1st Cir. 1994)..... | 18 |
| <i>In re Custody of Halls</i> , 126 Wn. App. 599, 109 P.3d 15 (2005)..... | 2 |
| <i>In re Grove</i> , 127 Wn.2d 221, 897 P.2d 1252 (1995)..... | passim |
| <i>In re Haynes</i> , 100 Wn. App. 366, 996 P.2d 637 (2000)..... | 19 |
| <i>In re Personal Restraint of Gentry</i> , 137 Wn.2d 378, 972 P.2d 1250 (1999)..... | 12 |
| <i>In re Smiley</i> , 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975)..... | 2, 12 |
| <i>Jama v. INS</i> , 22 F. Supp.2d 353 (D.N.J. 1998)..... | 18 |
| <i>Joni B. v. State of Wisconsin</i> , 202 Wis.2d 1, 549 N.W.2d 411 (1996)..... | 13 |
| <i>Kyler v. Montezuma County</i> , 203 F.3d 835, 2000 WL 93996 (10th Cir. 2000)..... | 18 |
| <i>Langworthy v. Dean</i> , 37 F. Supp.2d 417 (D.Md. 1999)..... | 18 |
| <i>Lassiter v. Dep't of Social Servs.</i> , 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)..... | passim |
| <i>Lyon v. Lyon</i> , 765 S.W.2d 759 (Tenn. Ct. App. 1988)..... | 2 |

| | |
|--|--------|
| <i>Miranda v. Sims</i> , 98 Wn. App. 898, 991 P.2d 681 (2000)..... | 14 |
| <i>Pannell v. Thompson</i> , 91 Wn.2d 591, 589 P.2d 1235 (1979)..... | 4 |
| <i>Piper v. Popp</i> , 167 Wis.2d 633, 482 N.W.2d 353 (1992)..... | 8, 12 |
| <i>Poll v. Poll</i> , 256 Neb. 46, 588 N.W.2d 583 (1999) | 1 |
| <i>Ralk v. Lincoln County</i> , 81 F. Supp.2d 1372 (S.D. Ga. 2000)..... | 18 |
| <i>Roper v. Simmons</i> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)..... | 15, 16 |
| <i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)..... | 17 |
| <i>State ex. rel. Ondracek v. Blohm</i> , 363 N.W.2d 113 (Minn. Ct. App. 1985)..... | 2 |
| <i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004)..... | 3 |
| <i>Travelers Indem. Co. v. Mayfield</i> , 923 S.W.2d 590 (Tex. 1996)..... | 12 |
| <i>United States v. Duarte-Acero</i> , 132 F.Supp.2d 1036 (S.D. Fla 2001) | 18 |
| <i>Walmart, Inc. v. Progressive Campaigns, Inc.</i> , 139 Wn.2d 623, 989 P.2d 524 (1999)..... | 3 |
| <i>Weaver v. Torres</i> , No. Civ.A WMN-00-1126, 2000 WL 1721344 (D.Md. 2000)..... | 18 |
| <i>White v. Paulsen</i> , 997 F. Supp. 1380 (E.D. Wash. 1998)..... | 18, 19 |

| | |
|--|----|
| <i>Zuver v. Airtouch Commc'ns, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004)..... | 17 |
|--|----|

Statutes

| | |
|---------------------|-------|
| RCW 26.09.002 | 8, 13 |
| RCW 26.09.110 | 9 |
| RCW 26.09.140 | 10 |
| RCW 26.09.210 | 9 |
| RCW 26.09.220 | 9 |

Other Authorities

| | |
|---|----|
| ABA Report to the House of Delegates No. 112A (2006) http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf | 5 |
| International Covenant on Civil and Political Rights, art. 14(3)(d) http://www.unhchr.ch/html/menu3/b/a_ccpr.htm | 19 |
| 2SSB 5470 Legislature's online bill information http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5470&year=2007 | 9 |
| Roger P. Alford, <i>Four Mistakes in the Debate on "Outsourcing Authority"</i> , 69 ALB. L. REV. 653 (2006)..... | 17 |
| Washington State Supreme Court, <i>Task Force on Civil Equal Justice Funding 2-3</i> (2004) http://www.courts.wa.gov/newsinfo/content/taskforce/task_force_report_final_draft.doc)..... | 5 |

Rules

RPC 6.1 10

Constitutional Provisions

Wash. Const. art. I, § 10..... 13

The State responds as follows to the *Amicus Curiae* briefs of the International Law Scholars (“Int’l Scholars”), the National Coalition for a Civil Right to Counsel (“NCCRC”), the Northwest Women’s Law Center (“NWLC”), the Retired Washington Judges (“Retired Judges”), and the Washington State Bar Association (“WSBA”).

I. ARGUMENT

A. **The Prerogative Of Establishing Public Policy As To The Best Use Of Public Funds Is Vested In The Legislature**

The question before the Court is whether the state or federal constitutions obligate the State to provide counsel at taxpayer expense for indigent private parties to dissolution actions when the adoption of a parenting plan is at issue. This is a constitutional question, albeit one that courts throughout the country have consistently answered by concluding that taxpayers are not obligated to provide counsel for parties to dissolution proceedings. *Das v. Das*, 133 Md. Ct. Spec. App. 1, 29, 754 A.2d 441 (2000) (“The right to counsel does not apply to a simple action for divorce”); *Poll v. Poll*, 256 Neb. 46, 52-54, 588 N.W.2d 583, 587-88 (1999) (surveying cases from numerous states and concluding that private parties are not entitled to counsel at taxpayer expense in dissolution actions); *Clark v. Superior Court*, 62 Cal. App. 4th 576, 586-87, 73 Cal. Rptr. 2d 53 (1998) (rejecting claim of constitutional right to taxpayer-paid

counsel in dissolution action); *Harmon v. Harmon*, 943 P.2d 599, 605 n.5 (Okla. 1997) (“We do not believe husband has a constitutionally protected right to counsel in this divorce case merely because it involves property issues and issues concerning custody/visitation with a minor child”); *Lyon v. Lyon*, 765 S.W.2d 759, 763 (Tenn. Ct. App. 1988) (terming argument that a party to a divorce action is entitled to counsel “without merit”); *State ex. rel. Ondracek v. Blohm*, 363 N.W.2d 113, 115 (Minn. Ct. App. 1985) (“we find no statutory or constitutional right to counsel in dissolution proceedings”); *In re Smiley*, 36 N.Y.2d 433, 437, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975) (parties to a divorce action lacked a right to taxpayer-paid counsel because that right attaches only “when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture”).¹

All five *Amici* devote substantial attention to public policy preferences, rather than to the applicable constitutional question. *Amici* argue that providing counsel to private parties in private dissolution actions would be a good idea,² or would be valuable to the parties

¹ See also *In re Custody of Halls*, 126 Wn. App. 599, 611 n.4, 109 P.3d 15 (2005) (“No Washington case has held that a party to a child custody dispute is entitled to representation at State expense”).

² WSBA Br., *passim*; Retired Judges’ Br., *passim*; Int’l Scholars’ Br. at 12-13; NCCRC Br., *passim*; NWLC Br. at 3-12.

involved³ or to the court.⁴ Policy preferences and good ideas do not, however, equate with constitutional rights.

Under our constitutional system of government, voters elect the Legislature to determine public policy questions. “Public policy is generally determined by the Legislature and established through statutory provisions.” *Cary v. Allstate Ins. Co.*, 130 Wn.2d 335, 340, 922 P.2d 1335 (1996). In the specific context of an asserted right to counsel in a private dispute at taxpayer expense, this Court explained, “It is the Legislature’s prerogative, as the taxing and appropriating branch of government, to determine what actions other than those which are constitutionally mandated will be publicly funded.” *In re Grove*, 127 Wn.2d 221, 236, 897 P.2d 1252 (1995). The proper standard, again, is not the virtues of a particular public policy preference, but the requirements of the constitution. *State v. Costich*, 152 Wn.2d 463, 476, 98 P.3d 795 (2004) (courts consider constitutional standards, not the wisdom of legislative policy choices); *Walmart, Inc. v. Progressive Campaigns, Inc.*, 139 Wn.2d 623, 638, 989 P.2d 524 (1999) (policy argument should more properly have been addressed to the Legislature).

³ See, e.g., WSBA Br. at 5-9; Retired Judges’ Br. at 5-10; Int’l Scholars’ Br. at 11-12; NCCRC Br. at 8-11; NWLC Br. at 3-6.

⁴ WSBA Br. at 7-9; Retired Judges’ Br. at 12-18.

The demarcation between constitutional analysis and legislative policy choice is particularly compelling in this case. Courts construe constitutional claims, but they neither weigh broader competing claims to public resources nor determine the appropriate level at which private resources should be taxed for public use. While the provision of counsel for civil litigants may be desirable, decisions concerning how funds will be prioritized among this and other laudable public purposes are decisions for the Legislature.

The Court and the Legislature face critically different tasks when faced with claims for the allocation of public resources. The Court engages in a constitutional analysis to resolve particular claims at issue. *See Grove*, 127 Wn.2d at 237 (presumption that civil litigants enjoy no right to counsel at public expense). In contrast, only the Legislature is positioned to take a broader view, both apportioning public resources among numerous competing claims on budgetary priorities, and deciding upon the appropriate overall level of taxes to fund those priorities. *See Pannell v. Thompson*, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) (noting the “legislative fact of life” that “[t]he decision to create a program as well as whether to and to what extent to fund it is strictly a legislative prerogative”). Arguments that a court should base a decision on the need for a particular public policy choice must accordingly be evaluated in light

of the prerogative of the Legislature to set policy and to apportion resources. “The power of appropriation is vested in the Legislature. It is the rare case where the judiciary interferes with that power.” *City of Ellensburg v. State*, 118 Wn.2d 709, 718, 826 P.2d 1081 (1992) (declining to order the Legislature to increase appropriations for fire services). Absent a constitutional right, this Court resists the temptation to order the Legislature to reallocate public resources based on its own policy preferences, because “such action would violate the separation of powers doctrine.” *Hillis v. State*, 131 Wn.2d 373, 389-90, 932 P.2d 139 (1997). As this Court has explained, “we would find it . . . intolerable for the judicial branch of government to invade the power of the legislative branch. Just because we do not think the legislators have acted wisely or responsibly does not give us the right to assume their duties or to substitute our judgment for theirs.” *Id.*, 131 Wn.2d at 390. None of the *Amici* acknowledge the well-settled legislative prerogatives to set policy and to establish budgetary priorities.⁵

⁵ Notably, the report of this Court’s Task Force on Equal Justice Funding, upon which *Amicus* WSBA places emphasis, recommends legislative, rather than judicial, action to address the problems it identifies. Washington State Supreme Court, *Task Force on Civil Equal Justice Funding 2-3* (2004) (available online at: http://www.courts.wa.gov/newsinfo/content/taskforce/task_force_report_final_draft.doc). Similarly, the American Bar Association report, which forms much of the basis of the brief of *Amicus* NCCRC, discusses both litigation and legislative action to address the problems it identifies, but its fundamental thrust is clearly advocacy for a particular policy view. ABA Report to the House of Delegates No. 112A (2006) (available online at: <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>). Both sources

The policy arguments offered by *Amici*, as well as by the Appellant whom they support, must be evaluated in this light. The question before the Court is not whether a particular allocation of public resources would be good or bad, wise or unwise; the question is whether the constitution *mandates* that allocation. Even where a court may “feel the pull of the justness of the cause . . . [t]he proper apportionment of the burdens and benefits of public life are best addressed to the legislature, absent a violation of a right held by an individual seeking redress under the appropriate vehicle.” *Eggleston v. Pierce Cy.*, 148 Wn.2d 760, 774, 64 P.3d 618 (2003) (declining to find damages resulting from a police search to constitute a “taking” of property).⁶

B. Public Policy Arguments Fail To Support The Claim That The Constitution Mandates Counsel At Taxpayer Expense In Dissolution Actions

The briefs submitted by the various *Amici* rely heavily upon arguments regarding the importance of counsel and the burdens placed

may be valuable to policy makers, but they do not change the fundamental nature of the issue as one of public policy more properly directed to the Legislature. Similarly, the arguments offered by *Amici* Retired Judges concerning costs to the judicial system and to society related to *pro se* advocates relate directly to the Legislature’s prerogative to weigh societal needs, costs and benefits, rather than to judicial construction of the constitutional provisions at issue. Retired Judges Br. at 12-19.

⁶ *Amicus* NWLC relies extensively upon policy arguments concerning victims of domestic violence. While the problem of domestic violence should not be underestimated, it, like the other policy positions advocated by various *Amici*, fall squarely within the legislative prerogative to address. This case is not about providing counsel for victims of domestic violence, or any other crime. When factually supported in a particular case, it might be indicative of a power imbalance between private litigants, an imbalance of power by private litigants in civil litigation has never been found to be the genesis for a constitutional right to taxpayer-paid counsel.

upon litigants and the court in the absence of the counsel. They provide little in the way of analysis of the constitutional standards governing the claim at issue, and do not rebut the State's argument. This Court's decision, however, must be based on the standards governing the various constitutional provisions at issue.

1. Due Process Does Not Guarantee Counsel At Taxpayer Expense In Private Dissolution Actions

The United States Supreme Court established the standard governing claims of a due process right to counsel at taxpayer expense over a quarter century ago. *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 25, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). Courts begin with a presumption that parties to a civil action enjoy no constitutional right to counsel. *Id.* at 31. That presumption is then balanced against three elements, consisting of "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions." *Id.* at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

The public policy arguments advanced by *Amici* have no application to this constitutional standard. Since *Amici* barely even acknowledge existence of the standard for evaluating a claim of a right to

counsel under *Lassiter*, this is hardly surprising.⁷ At most, it might be argued that their policy arguments have an indirect relevance to the third due process element: the risk that the procedures used will lead to erroneous results. The absence of counsel, by itself, does not automatically tilt this factor in favor of a claimed right to counsel. *Piper v. Popp*, 167 Wis.2d 633, 650, 482 N.W.2d 353, 360 (1992) (“A lawyer might have done more, but the lack of counsel did not create a risk of an erroneous decision”). *Amici* argue that *pro se* parties find it difficult to proceed in court, but overlook the fact that the legal standard to be applied in entering a parenting plan is *not* the best interests of the parents, but the “best interests of the child.” RCW 26.09.002. Since this is the governing principle at issue, it is entirely appropriate to address the risk of incorrect outcomes by addressing the interests of the child rather than the parent. The Legislature has done precisely that, through several means. First,

⁷ Three out of the five *amicus* briefs supporting Appellant make no mention whatsoever of *Lassiter*. *Amicus* NCCRC cites *Lassiter* for the purpose of urging that its analysis be rejected. NCCRC Br. at 4-5, 13-14. *Lassiter*, however, establishes the United States Supreme Court’s analysis of a due process claim of a right to counsel. *Lassiter*, 452 U.S. at 27. This Court has followed the same approach to a claim of a constitutional right to counsel. *In re Grove*, 127 Wn.2d at 237. *Amicus* WSBA cites *Lassiter* only to urge a case-by-case approach to claims of a right to counsel (WSBA Br. at 18-19), an approach to which *Amicus* NCCRC specifically objects. NCCRC Br. at 13-14. With regard to WSBA’s argument, it is important to recall that the *Lassiter* Court rendered its opinion in a case concerning termination of parental rights, rather than a private dissolution action. *Lassiter*, 452 U.S. at 31. As previously argued at length, dissolution actions are decidedly different than termination actions. Br. of *Amicus Curiae* Robert M. McKenna at 4-6. Since the right to counsel simply does not apply to dissolution actions (see cases cited at pages 1-2 above), there is no reason to remand for a case-specific consideration of the point.

where the court deems appropriate it may appoint an attorney to represent the interests of the child, and this is done at public expense when the parties are indigent. RCW 26.09.110. The court may also seek the advice of professionals concerning the parenting plan. RCW 26.09.210. The court may also appoint a guardian *ad litem* (GAL) to investigate and report to the court concerning parenting arrangements. RCW 26.09.220.

Two *Amici* attempt to portray the appointment of a GAL as adding to the need for taxpayer-paid counsel for a parent.⁸ The task in weighing this due process element is to consider the risk of an erroneous decision. *Lassister*, 452 U.S. at 27. Since a parenting plan is to reflect the best interests of the *child*, the risk to be guarded against is to an erroneous decision as to the *child's* best interests. The GAL process is designed to address that risk. Other problems in the GAL process alleged by *Amici* are better addressed through reforms to that process itself, rather than through taxpayer-paid counsel for parents.⁹

⁸ WSBA Br. at 14; NWLC Br. at 12-15.

⁹ For example, *Amicus* NWLC complains that GALs are not required to undergo domestic violence training, noting that a bill to require that training was pending in the Legislature at the time their brief was written. NWLC Br. at 13. That bill, 2SSB 5470, has now passed the Legislature and as of the date of this brief awaits the Governor's signature. (2SSB 5470 Legislature's online bill information at: <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5470&year=2007> (accessed April 19, 2007)). In fact, that bill addresses the needs of parties to dissolution actions generally, and domestic violence victims in particular, in more ways than *Amicus* acknowledges. Far from supporting their argument in favor of a right to counsel, this legislation illustrates that the Legislature is fully equipped to take the appropriate actions to address public policy concerns such as theirs.

Like the Appellant, *Amici* rely upon an alleged imbalance between the parties when one party is represented and the other is not. There may be any number of reasons why one party might have a lawyer while the other does not, but none of them lead to the conclusion that the constitution mandates taxpayer-paid counsel. Where an inequality in resources between the two spouses in a dissolution is the cause, Washington law already provides a remedy. The court is statutorily authorized to order a party to a dissolution action to pay reasonable defense costs, including attorney fees, for the other party. RCW 26.09.140. Accordingly, where an imbalance in resources between the two parties causes one party to be unable to afford a lawyer while the other pays for his or her own representation, the law already provides a remedy.

Under other circumstances, the rule that Appellant and her *Amici* seek would produce a perverse disincentive against *pro bono* counsel. It is easy to imagine circumstances in which an attorney agrees to represent a party to a dissolution action *pro bono*. Such representation might be motivated by a desire toward community service (*See* RPC 6.1), a prior relationship with the party, or a conviction that the party's position is just

and should be represented.¹⁰ The conclusion that an attorney's agreement to undertake the case *pro bono* would create an issue of constitutional dimension, giving rise to a right to taxpayer-paid counsel for the other party, would create a disincentive against *pro bono* representation. This might be particularly true in cases in which the prospective *pro bono* counsel feels potentially mismatched by taxpayer-paid counsel, as might often be the case if the prospective *pro bono* attorney does not ordinarily practice family law.

The argument about an alleged imbalance between the parties is misdirected in any event. It would be one thing to allege that an imbalance between the resources of two parties supports a right to counsel when *the State* creates the imbalance by providing a free lawyer to one party but not to the other. See, e.g., *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979) (finding a due process right to counsel when the other spouse was provided an attorney *with public funds*). It is quite another matter to assert that an alleged imbalance between private parties in a private dispute gives rise to a constitutional mandate that the public foot the bill. Moreover, even when the State's resources *are* arrayed against a private party, it does not automatically follow that the private party has a constitutional right to counsel at public expense. See *In re Personal*

¹⁰ There is also the obvious situation in which an attorney undertakes representation expecting to be paid, but is not.

Restraint of Gentry, 137 Wn.2d 378, 390, 972 P.2d 1250 (1999) (“There is no constitutional right to counsel in postconviction proceedings . . . even when the death penalty has been imposed.”) *Amici* cite to no case finding publicly-paid counsel is constitutionally required solely due to an imbalance of power or resources among the parties, and such arguments simply have no application to cases in which State resources are not arrayed against a private party. *See In re Smiley*, 36 N.Y.2d at 437 (no right to counsel in a divorce action because the right attaches only “when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture”).

Amicus NCCRC takes the argument a step farther, describing two state court decisions as if they recognized a right to counsel at taxpayer expense in “exceptional cases.” NCCRC Br. at 7-8. The cited cases stand for no such proposition. The Texas case upon which they rely concerned a statute that permitted courts to appoint counsel “without fee or reward.” *Travelers Indem. Co. v. Mayfield*, 923 S.W.2d 590, 593-94 (Tex. 1996) (quoting Tex. Gov’t Code § 24.016). The Texas court, in fact, stated that, “we have never held that a civil litigant must be represented by counsel in order for a court to carry on its essential, constitutional function.” *Id.* at 594. Similarly, the Wisconsin court found (following *Lassiter* and *Piper*) “that there is no absolute right to the appointment of counsel in civil cases

carrying no threat of loss of physical freedom.” *Joni B. v. State of Wisconsin*, 202 Wis.2d 1, 18, 549 N.W.2d 411, 417 (1996) (concerning right to counsel in a case involving termination of parental rights, not a dissolution action). *Amicus*’ reliance upon these cases is inapt.¹¹

2. The Right Of Access To The Courts Does Not Entitle Private Litigants To Taxpayer-Paid Counsel

Amici fare no better when framing their public policy arguments in terms of a right of access to the courts. The right of access to the courts promises that the courts’ processes and procedures will be available to all litigants, but not that the State will level the resources available to all litigants. Wash. Const. art. I, § 10. The right to access “does not carry with it any guaranty of success, but . . . access must be exercised within the broader framework of the law as expressed in statutes, cases, and court rules.” *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991) (finding a right to the availability of discovery methods).

¹¹ *Amicus* NCCRC also addresses the first element of a due process analysis, the nature of the right at stake. NCCRC Br. at 8-10. In doing so, *Amicus* fails to recognize the distinction between actions in which the State seeks to *terminate* all parental rights, in which a parent/child relationship may be completely severed, and private actions for dissolution, in which the court must adopt a parenting plan that reflects the fact that the parents will no longer be married. The State would not minimize the importance of parenting arrangements after dissolution of marriage, but the interests of a parent in a dissolution action can in no way be equated with those of a parent facing an action by the state to terminate all parental rights. *See* Br. of Amicus Curiae Robert M. McKenna at 4-6. In establishing the “best interest of the child” standard for parenting plans, the Legislature has explained that, “the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.” RCW 26.09.002.

Although it supports a waiver of filing fees for indigents,¹² it does not extend to claims of a right to counsel. *Miranda v. Sims*, 98 Wn. App. 898, 902, 991 P.2d 681 (2000).

Amici WSBA and NCCRC err in asserting that the State's provision of a forum for resolving dissolution disputes, coupled with the complexity of judicial proceedings, add up to the conclusion that *pro se* parties are denied access to the courts.¹³ WSBA Br. at 17; NCCRC Br. at 10. Not only are *Amici* unable to cite any case for that proposition, but the mere fact that marriages are dissolved judicially can hardly be held to compel the taxpayers to shoulder the expenses of the private choices individuals make to end their marriages. The State provides a forum in which private parties can resolve their disputes, but the State does not decide whose marriages should be dissolved. The State does not interject itself into individual cases and takes no position as to disputes between parties to a dissolution action. Arguments that the process may be difficult may, again, lend support to *Amici's* public policy position, but

¹² *Id.* at 781 (citing *O'Connor v. Matzdorff*, 76 Wn.2d 589, 458 P.2d 154 (1969)).

¹³ WSBA, like Appellant, goes so far as to equate the right of *physical* access to the courthouse *building*, guaranteed by the Americans with Disabilities Act, with the right of access to the judicial *process* addressed by the state constitution. WSBA Br. at 17 (citing *Tennessee v. Lane*, 541 U.S. 509, 532-33, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004)). The comparison is specious, merely relying upon the linguistic happenstance that the word "access" can be used in more than one sense.

such arguments are more properly addressed to the Legislature. *In re Grove*, 127 Wn.2d at 236.

Amici Retired Judges, in a similar vein, contend that the courts “have no choice” but to appoint counsel where the Legislature fails to statutorily authorize the practice. Retired Judges Br. at 10-11. This argument begs the question of whether the state or federal constitutions guarantee a right to counsel, a conclusion that courts uniformly reject. *See* cases cited at pages 1-2 above. More fundamentally, this argument overlooks the Legislature’s role in our constitutional system as the branch of government elected to establish public policy. *Cary*, 130 Wn.2d at 340.

C. Foreign Cases Construing Different Law Do Not Alter The Established Construction Of Our Federal And State Constitutions

The International Law Scholars’ plea that this Court should base its decision, at least in part, upon various decisions of European courts is unpersuasive. Whatever usefulness foreign decisions may have as persuasive authority, they do not control the construction that our courts give to our constitutions. The principal case upon which *Amici* rely states just this point. *Roper v. Simmons*, 543 U.S. 551, 575, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (foreign cases are not controlling when interpreting the U.S. Constitution, for this remains the task of our courts). This country has its own extensive precedent on the subject of the right to

counsel, as illustrated by the volume of briefing this Court has received. Not only is the analytic approach to such claims well established by such cases as *Lassister* and *In re Grove*, but numerous courts around the country have already considered, and rejected, claims of a right to counsel in the context of dissolution actions. See cases cited at pages 1-2 above.

Nothing about the analytic approach our courts have developed suggests any particular value in a comparison with the decisions other countries may have made. Additionally, nothing about the foreign decisions cited by *Amci* suggest a principled basis for restricting the policy prerogatives of the Legislature. In this respect, this case differs markedly from *Roper*, a death penalty case in which an inquiry into evolving standards regarding cruel and unusual punishment lies at the heart of the inquiry. *Roper*, 543 U.S. at 560-61. “Obviously, American law is distinctive in many respects, not least where the specific provisions of our Constitution and the history of its exposition so dictate.” *Id.* at 605 (O’Connor, J., dissenting).¹⁴ Whatever the value of European decisions may be in other contexts, the established body of authority in this country obviates the need to search more broadly for authority. In fact, the Supreme Court has cautioned against using foreign law “to seek out and

¹⁴ Additionally, the Washington case that *Amicus* cites as evidence of persuasive value of foreign law merely mentions a United Nations declaration in passing, during a discussion of the development of the common law and constitutional history. *Eggert v. City of Seattle*, 81 Wn.2d 840, 841, 505 P.2d 801 (1973).

define new and debatable violations of the law of nations”. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004).¹⁵

Amici additionally rely upon a treaty, the International Covenant on Civil and Political Rights (ICCPR). The Court need not, and should not, reach this argument because it is well settled that this Court will not consider issues raised only by *Amici*. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 304 n.4, 103 P.3d 753 (2004); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003).

Amici fail to note that the ICCPR affords no privately enforceable rights. They note simply that treaties are among the federal laws entitled to supremacy under the federal constitution. Int'l Scholars Br. at 17 (quoting U.S. Const. art. VI, cl. 2). When the Senate ratified the ICCPR, it specifically declared that its substantive provisions were not self-executing. *Sosa*, 542 U.S. at 728. “‘Non-self-executing’ means that

¹⁵ One scholar has cautioned that:

At bottom, international law and constitutional law use different methods, ask different questions, and find answers in different source material. In short, they explain different spheres of legal epistemology. The two disciplines may inform one another on the margins, but the goal should not be integration (unifying international and constitutional law into a single discourse), consonance (reconciling the two disciplines in overlapping regions), or assimilation (attempting the maximum possible conceptual merging of international and constitutional law).

Roger P. Alford, *Four Mistakes in the Debate on “Outsourcing Authority”*, 69 ALB. L. REV. 653, 655 (2006).

absent any further actions by the Congress to incorporate them into domestic law, the courts may *not* enforce them.” *Beazley v. Johnson*, 242 F.3d 248, 267 (5th Cir. 2001) (concluding that the ICCPR may not be judicially enforced). “Courts have uniformly held that there is no private cause of action under ICCPR.” *United States v. Duarte-Acero*, 132 F.Supp.2d 1036, 1040 n.8 (S.D. Fla 2001) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 818, 819 n.26 (D.C. Cir. 1984) (Bork, J., concurring); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994), *Kyler v. Montezuma County*, 203 F.3d 835 (tbl), available in 2000 WL 93996, at *1 (10th Cir. 2000); *Hawkins v. Comparet-Cassini*, 33 F. Supp.2d 1244, 1257 (C.D. Cal. 1999); *Ralk v. Lincoln County*, 81 F. Supp.2d 1372, 1380 (S.D. Ga. 2000); *Heinrich v. Sweet*, 49 F. Supp.2d 27, 43 (D. Mass. 1999); *Weaver v. Torres*, No. Civ.A WMN-00-1126, available in 2000 WL 1721344, at *3 (D.Md. 2000); *Langworthy v. Dean*, 37 F. Supp.2d 417, 423 (D.Md. 1999); *Jama v. INS*, 22 F. Supp.2d 353, 364 (D.N.J. 1998); and *White v. Paulsen*, 997 F. Supp. 1380, 1385-87 (E.D. Wash. 1998)).

Among the most thorough explanations of the conclusion that the ICCPR is not judicially enforceable is a federal district court decision from the Eastern District of Washington. Relying on the text of the treaty, the Senate’s statement on ratification, and prior case law, the court

concluded that it is not self-executing and creates no private rights. *White*, 997 F. Supp. at 1385-87; *see also In re Haynes*, 100 Wn. App. 366, 996 P.2d 637 (2000) (finding no violation of the ICCPR, but noting alternatively that “There is authority holding that the ICCPR is not self-executing and therefore does not apply to the states”) (citations omitted).

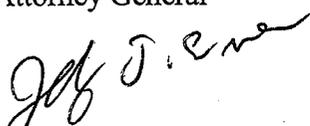
Even if the ICCPR somehow did apply to the question before this Court, *Amici* offer no analysis demonstrating that it would be violated by a failure to appoint taxpayer-paid counsel in a dissolution action. Tellingly, they never even quote the treaty language that would allegedly support their position. The most *Amici* offer is the observation that it has been “suggested” that ICCPR might require the appointment of counsel in an unspecified context. Int’l Scholars’ Br. at 18. The ICCPR only expressly mentions a right to counsel for criminal cases, leaving the document silent on a civil right to counsel. ICCPR, art. 14(3)(d) (online at: http://www.unhchr.ch/html/menu3/b/a_ccpr.htm, accessed April 20, 2007). Appellate courts do not consider arguments unsupported by citation or authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In the absence of principled argument supported by authority, *Amici* present no argument meriting consideration by this Court.

II. CONCLUSION

For these reasons, as well as reasons elaborated upon in other briefs, this Court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 23rd day of April, 2007.

ROBERT M. MCKENNA
Attorney General



JEFFREY T. EVEN, WSBA #20367
Deputy Solicitor General
PO Box 40100
Olympia, WA 98504-0100
360-586-0728

Counsel for the State of Washington