

No. 79978-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRENDA LEONE KING

Appellant

MICHAEL STEPHEN KING

Respondent.

STATE OF WASHINGTON,

Involved Party

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BRIEF OF RESPONDENT MICHAEL KING

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The right which Appellant seeks does not exist in American jurisprudence. Its promulgation by this Court would usurp traditional legislative functions, no matter how appealing the simplistic solution to the problem of meeting the legal needs of lower income people. Furthermore, the solution which Appellant seeks is not timely and can only increase the suffering of the other parties to this case, the children and the father, by ignoring their equally fundamental interests. The ruling of the trial court should be affirmed.

TABLE OF AUTHORITIES

CASES:

<i>Boddie v. Connecticut</i> (1971) 401 U.S. 371, 28 L. Ed. 2d 113, 91 S.Ct. 780	16
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<i>Matter of Sullivan (Alesi)</i> , 297 N.Y. 190, 78 N.E. 2d 467	19
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<i>Tetro v. Tetro</i> , 86 Wn. 2d 252, 544 P. 2d 17 (1975)	20
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<u><i>Wildermuth v. Wildermuth</i></u> , 14 Wash. App. 442, 542 P. 2d 463 (1975)	15

STATUTES:

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Washington Constitution Article I, Section 3	24
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OTHER AUTHORITIES:

<u>Jowitt's Dictionary of the English Law</u> , London, 1977,	37
Maguire, <u>Poverty and Civil Litigation</u> , 36 Harv. L. Rev.	38

361 (1923)

Perluss, Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest, Vol. II, Issue II, at pp. 590-591, note 122 37

Washington Supreme Court, Task Force on Civil Equal Justice Funding, The Washington State Civil Legal Needs Study (Sept. 2003) 30

Washington Supreme Court, Task Force on Civil Equal Justice Funding, Quantifying the Additional Revenue Needed to Address the Unmet Civil Legal Needs of Poor and Vulnerable People in Washington State, a p. 17, Section E (May, 2004) 20, 21, 31, 30

I. INTRODUCTION

The civil dissolution proceeding below presents one issue on appeal: Do either the Washington State or federal constitutions mandate appointment of counsel for an allegedly indigent parent, in a civil action between two private individuals? The clear answer under the federal constitution, the law of this State, and under American jurisprudence in general is no. As the judge correctly stated below, appointment of counsel at public expense in a private marriage dissolution is a matter for the legislature.

In addition, the facts of this case indicate that the court below did precisely what it was supposed to do: It considered all statutory factors in making the allocation of equal fundamental parenting rights between the two parties and establishing a parenting plan that will serve the best interest of the children. Both parents are provided significant residential time. While it awarded Mr. King primary residential placement and major decision making authority, Ms. King retained unrestricted, unsupervised visitation for alternate weekends, alternate holidays, every Mother's Day, her birthday, and one month of vacation time during the summer with their children. CP 250-252. She has unlimited reasonable phone

access to the children. Ms. King also retained the right to seek modification of the Parenting Plan in the future, based upon a change of circumstance, pursuant to statute.

Finally, it is important to note that Brenda King did not request that the court appoint counsel for her until after the case had proceeded to trial and the final orders had been entered; her efforts to obtain *pro bono* counsel were dilatory in numerous respects, including a failure to accept the acceptance of available *pro bono* counsel at a critical juncture in the proceedings. She even failed to provide the court below with credible evidence of indigence, providing instead contradictory evidence to the court.

II. STATEMENT OF THE CASE

A. Nature of the Case

Brenda King and Michael King married in 1994 and lived together for almost ten years to the date of final separation. CP 226. They have three children: Aaron, eleven years old at the time of trial, Jonathon, age seven, and Katie, age six. CP 225-226. Brenda also has two older children, Brandon and Alisia, who also lived with Mike and Brenda. CP 226; 4 RP 93:13.

During the term of the marriage, Mike considered all of the

children to be his and did not make a distinction between the three children of the marriage and Brenda's two older children. 2 RP 50:7. Mike participated in raising them, doing homework, and doing everything a father does with all five of the children. 2 RP 50:11.

It was not until the dissolution proceeding that Brenda's older son, Brandon, was made aware that Mike King is not his father. 2 RP 50:19. Brandon learned this from reading court papers while living with Brenda. Brenda was not to discuss court proceedings with the children. CP 348.

In addition to treating Brandon like all the other children, Mike has expressed love for Brandon as though he were Mike's own son. 2 RP 50:24. Brenda King acknowledged that Mike King is really the only father Brandon has known and that Mr. King assisted in raising Brandon in all ways. 1 RP 30: 15-20.

In September, 2004, Mike petitioned for dissolution of the marriage. CP 225. Then, although Brenda consulted with *pro bono* counsel in December, 2004, Brenda retained private counsel who appeared on her behalf in January, 2005, in connection with a motion for temporary orders CP 42; 5 RP 53: 6-9. Brenda's counsel also began discovery for her client, was responsible for

responding to Mike's discovery requests, and requested appointment of a Guardian ad Litem. Brenda, through her counsel, specifically agreed to appointment of Bridget Llewellyn as Guardian ad Litem for the minor children on January 20, 2005. CP 353 Ms. Llewellyn was specifically charged with the task of representing the best interests of the children during the dissolution process. CP 351.

On April 4, 2006, Brenda's counsel withdrew. CP 181-182. On April 22, 2006, without consulting with pro bono counsel she had consulted five months before, Brenda King filed a notice of her intent to relocate the children to Grayland, Washington. 2 RP 78. Brenda intended to reside in a small home in Grayland with her five children, Mr. Chris Bollen (the gentleman Brenda believed to be Alisia's father) and his two children. 1 RP 9: 5-25; 10: 17-22; 12: 5-12.

Ms. Llewellyn immediately began an investigation of the proposed relocation of the children to Grayland, Washington, reviewing Brenda's information submitted to the Court in regard to the relocation, speaking with the children, including Alisia, and discussing the proposed relocation at length with Mr. Chris Bollen. 2 RP 78:18. The Guardian ad Litem learned from Mr. Bollen that

he did not have the whole picture, and was operating on scanty information at best, and Mr. Bollen came to the conclusion that this was not a viable plan. 2 RP 79:1. Mr. Bollen then withdrew his offer of support for Brenda King and the children. 2 RP 79:3.

Ms. Llewellyn concluded that the information Brenda had previously conveyed to Mr. Bollen was not entirely accurate. 2 RP 80:7.

Ms. Llewellyn then filed an Interim Report with the Court which strongly recommended that Brenda's request for relocation be denied and that the children be placed immediately with their father, Michael King. Exhibit 10; 2 RP 81:20.

Ms. Llewellyn requested that Brenda King undergo a psychological evaluation. 2 RP 85:7. The evaluator, Dr. Gustafson, reported that Brenda King had apparently lived her whole life with untreated attention deficit disorder, that behaviors which are problematic to other people likely seemed quite normal to her, and recommended that she have a trial on medications appropriate to ADD. 2 RP 86:15. Dr. Gustafson further recommended that Brenda see a counselor who specializes in treatment of ADD. 2 RP86: 15-17.

Ms. Llewellyn had requested a psychological evaluation, in

part because she was concerned about Brenda King's need to always be the center of attention, to be adversarial and argumentative, and was particularly concerned because it was obvious that Brenda discusses everything with the children. 2 RP 87:19. Additionally, Ms. Llewellyn had observed Brenda King in action in court on a couple of occasions where she literally tried to take over and run the courtroom and was severely admonished by a court commissioner, behavior which the Guardian ad Litem considered quite alarming. 2 RP 88:5.

The Guardian ad Litem found that during the time the children were living almost exclusively with Brenda King, they had many missed days from school, were often tardy, Mrs. King disrupted the school, and the staff was very, very concerned about the children. 2 RP 98:2-23. During this time, the King children were instrumental in the school starting a breakfast program, because they would come to school hungry. 2 RP 98:6.

Brenda King's older daughter, Alisia, who had just turned eighteen, attended the trial and was privy to everything in the case. 2 RP 105:2.

The Guardian ad Litem was concerned about the lack of boundaries and lack of discipline in Brenda King's home.

2 RP 105:16. The Guardian ad Litem recommended to the trial court that the best interests of the children would be served by providing for them to have their primary residence with their father, Michael King. 2 RP 105:24. Joint decision making under the temporary order was not working, and Brenda and Michael simply could not jointly parent the children without the children becoming “totally messed up”. 2 RP 106:19. The Guardian ad Litem recommended that the children reside primarily with their father and that the father have sole decision making on all major issues. 2 RP 106:23-107:1.

After a five day trial, which due to two continuances took place approximately sixteen months after the Petition had been filed, the Judge issued a comprehensive oral ruling which was incorporated into the Findings of Fact and Conclusions of Law . CP 84-216. In his ruling, the Judge specifically outlined each of the statutory factors required for determining a parenting plan. CP 102-107. The Judge also noted at the outset of the ruling that this was a proceeding determining matters “that I know are terribly important to both mother and father.” CP 84 (emphasis added). The Parenting Plan which the Judge approved provided: (1) unsupervised visitation time for Ms. King, including alternate

weekends and four weeks of vacation time every summer; (2) authority for Ms. King to make any day to day decisions necessary when the children were staying with her; and (3) unrestricted phone contact between Ms. King and the children. CP 250-252; 254-256.

B. Facts Particularly Relevant to Brenda King's Request for Appointed Counsel.

1. Brenda King's Motion for New Trial

After the January, 2005 trial was concluded and final orders had been entered, Brenda King filed a motion asking for a new trial and requesting that counsel be appointed for her at public expense. CP 64-74. The motion was denied. CP 39-40. Directly following the portion of the oral ruling which Ms. King quotes in her brief, the Judge below also stated:

So it is not without sympathy and without appreciating the merits of your position, but absent funding from the legislature or some authorization that would permit the court to appoint lawyers without compensation, I must deny the motion. It raises, at heart, what's been discussed, I think, for years now of a civil Gideon standard in cases of this magnitude. And I think this case amply demonstrates just why that is so critically important to litigants such as Mrs. King.

I'm not going beyond that in terms of commenting on whether the outcome might have been different or likely would be different. I simply don't get there because I don't find a basis under which I can grant the motion. And I realize that you've carefully indicated that your background has not been in family law, and, hence, even if the court

were willing to grant a new trial, it doesn't change her status insofar as you're not available to represent her. And the search to find counsel would be just as tasking on her now as it was while this matter was pending. So, for those reasons, I'll simply be entering an order denying the motion for reconsideration without fees or costs.

RP Feb. 27, 2006.

From his statements, it is also clear that the Judge did not, as part of his ruling, correlate events in the Court's file with the times Brenda King actually consulted pro bono counsel. See Section IV.B.4 of this brief below: "Brenda King's Dubious Efforts to Obtain Legal Aid."

2. Absence of Proof Regarding Alleged Indigent Status.

At the time of trial, Brenda King was employed at Port Gardner Mortgage, d/b/a/ Precept Financial. 1 RP 23:16. She was in training for a new career as a loan officer, and had not yet been compensated by the employer. 2 RP 25:14. She held an additional job working for Paul Zacharias to subsidize her income, and had been living off savings. 2 RP 25:20. She professed not to know the amount of her earnings from employment in 2005. 2 RP 26:4. She anticipated that during her first year as a loan officer she would earn in the range of \$7,000 to \$12,000 per month. 2 RP 29:14-30:1. She also failed to provide any earnings

information to the Snohomish County Prosecuting Attorney in establishing child support. CP 392. She did state at trial that she had savings, at the time of trial, of about \$2,800. 1 RP 26: 14-18.

3. Ms. King's Conduct During Trial.

During the trial, Ms. King was frequently granted leeway by the Court and she made numerous evidentiary objections. 1 RP 50: 25, 2 RP 3: 1-10, 2 RP 4: 23, 2 RP 5: 5-16, 2 RP 20: 2-21-19, 2 RP 31-35, 3 RP 151: 6-20, 5 RP 15: 9-22. She demonstrated at least a very basic understanding of the hearsay rule, successfully objecting on that basis on at least one occasion during testimony by Michael King. 1 RP 50: 25-51: 4.

4. Brenda King's Dilatory Efforts to Obtain Legal Aid

The record does not reflect that Brenda King filed a motion for appointment of counsel at public expense at any time prior to entry of the Decree of Dissolution, Parenting Plan, and Order of Child Support. Instead, the chronology of appointments with possible legal aid counsel indicates a history of starting the process to obtain fee-paid counsel, then abandoning it, either in favor of retained counsel or in favor of proceeding pro se.

Ms. King's first appointment with Snohomish County Legal Services ("Legal Services") was December 21, 2004, and she attended on Dec. 24, 2004, three days late. CP 56: 20, 54:4. During this appointment *pro bono* representation was noted by the attorney. CP 57: 5-6. Ms. King then failed to attend her next appointment on January 4, apparently without explanation to Legal Services. CP 57: 7. However, for her next hearing on January 23, 2005, she appeared with retained counsel, Ms. Aimee Trua. CP 344-353. Ms. Trua also apparently began discovery and promised to complete discovery from Michael King's counsel. CP 42: 19-21.

Ms. Trua withdrew April 4, 2005 and trial was continued for over four months, from April 7 to August 17, 2005. Ms. King then proceeded to file a *pro se* motion to relocate her children on April 22 (CP 339-341), but did not consult Legal Services until May 2. CP 57: 7-9; 42: 14-16. This consultation was: (1) four weeks after Ms. Trua withdrew and trial was continued; (2) only after Brenda had originally scheduled the hearing on her own *pro se* motion to relocate the children. CP 339. Legal Services apparently attempted to obtain an attorney but was unable to do so, in part at least, since the contacted attorneys did not have enough time.

CP 57: 13-17. On May 10 the hearing was two weeks away and trial three months away.

Trial was continued again on August 17, 2005, for five months. Ms. King had requested a continuance in order to complete discovery, but she did not mention her inability to retain counsel as a reason for her request. CP 286-289. Coincidentally, it appears that neither party had followed local court procedure for confirmation of trial, and therefore the case was delayed until January, 2006. 1 RP 1. In spite of prior experience, Ms. King did not visit Legal Services until nearly a month later on September 13 (when she only attended a clinic - she did not make an appointment for consultation). CP 57:17-19. Sometime later Legal Services attempted to find counsel; again the time remaining before trial appeared to be a factor in their inability to find counsel. CP 58: 4-6.

Ms. King declined an offer of Legal Services to assist her with a motion for continuance of trial in December, 2005, one month before the scheduled trial. CP 58: 7-8. The reasons given by Legal Services is that *Ms. King* had by that point given up trying to secure pro bono counsel. Legal Services did not state that this was the opinion of pro bono counsel who was advising her. Indeed, their Declaration suggests otherwise. CP 58: 9-13.

Nonetheless, Ms. King then made her own motion for continuance, which raised some issues she had already raised the preceding summer. CP 266-269; 271-277, 286-293. Again, the motion did not mention the need for counsel or any attempts by her to locate pro bono counsel. CP 264-269 This was never mentioned until the Motion for new trial.

III. ARGUMENT

A. The Judge below correctly deferred the issue of appointment of counsel to the Legislature, as neither the Washington State nor the Federal Constitution provide a right to appointment of counsel for indigent parties in dissolution proceedings.

~~The Washington Supreme Court held in the case of *In Re*~~
Dependency of Grove, 127 Wn.2d 221, 897 P.2d 1252 (1995), that where fundamental constitutional rights are not threatened, the question of who pays for access to courts is properly deferred to the legislature, as follows:

Increasingly the cost of civil litigation weighs against easy access to our courts. The question of who pays for the efficient use of the appellate system is a difficult one. Where fundamental constitutional rights are not threatened, the answer to this question properly belongs with the legislature. It is the legislature that has the power to tax, the power to appropriate funds, and that is answerable to the public for the expenditure of taxes collected. Because public resources are limited and the number of indigent criminal cases is high,

the State is forced to prioritize those cases in which the public will be required to fund civil appeals.

Grove, at p. 228. (*emphasis added*).

The Court in *Grove* went on to note that the matters which are of such a fundamental nature as to require appointment of counsel at the trial level include delinquency and child termination proceedings, i.e., those proceedings “concerning possible permanent deprivation of parental rights”. *Grove*, 127 Wn. 2d at 229, text (*emphasis added*) and footnote 6. See also *In re Luscier*, 84 Wn. 2d 135, 524 P. 2d 906 (1974), and *In re Myricks*, 85 Wn. 2d 252, 533 P. 2d 841 (1975), which both involved child deprivation proceedings brought by the State

In a very recent decision, the Court of Appeals noted, “[n]o Washington case has held that a party to a child custody dispute is entitled to representation at State expense.” *Custody of Halls*, 126 Wash. App. 599, 611, 109 P. 3d 15 (2005), note 4. There is obviously a significant difference between child deprivation proceedings and child custody disputes between private parties. The State of Washington may be a party to a private custody dispute, as it is in the present case, with respect to the issue of child support, but the State does not take a position on the custody

issue and does not serve as an advocate for either party with respect to the issue of custody. Additionally, a private custody dispute does not carry the threat of permanent deprivation, as either party is free to seek modification of a parenting plan based upon a future substantial change of circumstances. RCW 26.09.260.

Washington cases which have discussed a constitutional right of an indigent parent to counsel at public expense have all involved child deprivation hearings. See *In Re Luscier, supra.*, *In Re Myricks, supra.*, and *Dependency of CR.B.*, 62 Wash. App. 608, 814 P.2d 1197 (1991). Where due process is mentioned in marital dissolution, it is procedural due process only, ie. notice and opportunity to be heard. It has never, in the 117 year history of the State of Washington, included a right to appointed counsel. See *Wildermuth v. Wildermuth*, 14 Wash. App. 442, 542 P. 2d 463 (1975) at pp. 445 to 447, and *Custody of Halls, supra.*, 126 Wash. App. at 610-611.

The vast majority of states which have considered the issue have almost without exception taken the same approach as Washington. See Annotation, 85 ALR 3d 983, "Appointment of counsel for indigent husband or wife in action for divorce or

separation" (1978). There the author noted:

Litigation concerning the right to appointed counsel for an indigent in an action for divorce or separation has been based primarily upon the decision of *Boddie v. Connecticut* (1971) 401 US 371, 28 L. Ed 2d 113, 91 S Ct 780, conformed to (DC Conn) 329 F Supp 844, in which the Supreme Court held that the due process clause of the Fourteenth Amendment requires that an indigent divorce litigant have access to the courts regardless of the inability to pay fees and costs. However, distinguishing the *Boddie* case on the basis that lack of counsel does not deny a litigant access to the courts, the courts confronting the issue have uniformly held that an indigent has no constitutional right to appointed counsel in an action for divorce or separation.

Annotation, supra., 85 ALR 3d at 985, and cases cited therein.

More recently, The Nebraska Supreme Court reached the same conclusion when it conducted a comprehensive review of state law on the subject. In *Poll v. Poll*, 256 Neb. 46, 588 N.W. 2d 583 (1999) the Court considered a post-dissolution petition by the mother to limit the father to supervised, rather than unsupervised, visitation with the children. The trial court ruled in favor of the mother and the father appealed, alleging in part that he was indigent and had been denied the constitutional due process right to appointed counsel. The case bears quotation at some length:

We have reviewed the literature regarding appointment of counsel in dissolution cases, including cases cited by the parties on appeal. It is the majority rule that a party is not

entitled to appointment of counsel in a dissolution action. See, e.g., *Harmon v. Harmon*, 943 P.2d 599 (Okla. 1997) (holding that husband did not have constitutionally protected right to counsel, although case involved property issues and issues concerning custody and visitation with minor child); *Gibbs v. Gibbs*, 941 P.2d 1014 (Okla. Civ. App. 1997) (holding no right to counsel in marital dissolution because civil in nature); *In re Marriage of Smith*, 537 N.W.2d 678 (Iowa 1995) (holding that absence of counsel satisfied due process where pro se litigant did not contest petition for dissolution of marriage); *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977) (holding no right under 6th or 14th Amendment to counsel in divorce action, evidently because civil in nature); *South v. South*, No. 02A01-9703-CV-00054, 1997 WL 426975 (Tenn. App. July 30, 1997) (holding that there is no right to appointment of counsel in dissolution action, because it is civil case); *Yeh v. Kisaka*, No. 3111-96-4, 1997 WL 310061 (Va. App. June 10, 1997) (holding that right to counsel does not extend to civil domestic cases of divorce and child custody, relying on *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996)); *Calhoun v. Calhoun*, No. CA95-11-024, 1996 WL 307128 (Ohio App. June 10, 1996) (holding no right to counsel in civil case between individual litigants); *Roth v. Roth*, 65 Ohio App. 3d 768, 585 N.E.2d 482 (1989) (holding no right of counsel in dissolution cases involving custody, because civil case between individual litigants); *Haller v Haller*, 168 Mich. App. 198, 423 N.W.2d 617 (1988) (holding no due process right to counsel in dissolution involving custody, because custody decree is subject to modification). Compare *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (holding that where father was represented by Alaska legal services corporation, mother had due process right to court-appointed counsel). For the sake of completeness, we note that we are aware that the appointment of counsel in a dissolution action may be discretionary with the court where custody is at issue and the statutes provide for such appointment. See N.Y. Judiciary-Court Acts-Family Court § 262(a)(v) (McKinney 1999). Nebraska has no such statutory provision.

* * *

In the instant case, the father claims that he is entitled to appointed counsel because a fundamental liberty interest is affected by the mother's application to modify visitation. The father misperceives the scope and impact of the mother's application.

The instant proceeding is one brought on by an individual involving a dispute between parents. The "weapons" of the state have not been marshaled against the father. The subject matter of the proceeding is the adjustment of visitation, not the initiation or termination of parental rights. Indeed, the issues of custody and visitation remain subject to modification following dissolution by statute, see Neb. Rev. Stat. § 42-351 (Cum. Supp. 1996), and upon a proper showing, visitation more favorable to the father could be ordered. The father has not, as a result of the modification of the postdissolution visitation, suffered the severe deprivation that triggers the appointment of counsel in civil and criminal cases. The father's legal interest in his child is unaffected. The father received reasonable notice and an opportunity to be heard commensurate with the rights affected by the proceedings. We conclude that the father did not have a due process right to appointment of counsel in these proceedings involving the mother's application to modify visitation. The trial court did not err in not appointing counsel for the father.

Poll, supra, 588 N.W. 2d at 587-588 (*emphasis added*). Compare Poll's "weapons of the state" language with *Myricks, supra*, 85 Wn. 2d at 254, which found the opinions of six other jurisdictions persuasive in adopting Washington's position on child deprivation hearings.

In addition to the cases cited above, the Court of Appeals in

New York, in the seminal case *In re Smiley*, 36 N.Y. 2d 433, 330 N.E. 2d 53 (1975) considered whether indigent defendant and plaintiff wives in divorce proceedings had a constitutional right to counsel. The trial court granted the wives' request for counsel, and the Appellate Division reversed. The Court of Appeals stated:

. . . In reversing, the Appellate Division correctly held that, absent a statute therefor, there is no power in the courts to direct the provision of counsel or to require the compensation of retained counsel for the indigent wives out of public funds (*citations omitted*) . . .

The mandatory direction to provide counsel to defendants in criminal cases derives from the Federal and State cases applying Federal and State constitutional provisions. These cases recognize that the right to counsel in criminal cases means more than the right to appear by counsel, but that in the event of inability by a defendant to provide his own counsel, particularly because of indigency, the State must provide counsel (*Gideon v. Wainwright*, 372 U.S. 335, 334, 83 S. Ct. 792, 9 L. Ed. 2d 799; *People v. Witek*, 15 N.Y. 2d 392, 397, 259 N.Y.S. 2d 413, 416, 207 N.E. 2d 358, 360). The underlying principle is that when the State or Government proceeds against the individual with risk of loss of liberty or grievous forfeiture, the right to counsel and due process of law carries with it the provision of counsel if the individual charged is unable to provide it for himself (*citations omitted*) . . .

There are no similar statutory provisions to cover public provision or compensation of counsel in private litigation. Nor under the State Constitution may the courts of this State arrogate the power to appropriate and provide funds (see, e.g., *Matter of Sullivan (Alesi)*, 297 N.Y. 190, 195-196, 78 N.E. 2d 467, 469-470; *Jacox v. Jacox*, 43 A.D. 2d 716, 717, 350 N.Y.S. 2d 435, 436).

In Re Smiley, supra., 330 N.E. 2d at 437-438.

Like the numerous cases cited above, the present case is a private marital dissolution involving child custody issues between the biological parents of children. By its very nature it does not present a constitutional issue for appointment of counsel for the parents. It does not involve permanent deprivation of parental rights, or of threatened loss of physical liberty for a party. *Compare Tetro v. Tetro*, 86 Wn. 2d 252, at 254-55, 544 P. 2d 17 (1975). It is instead a necessary apportionment of equal fundamental liberty interests between the two parents which must be resolved in the best interests of the child. RCW 26.09.002. Thus the judge below was correct in his ruling that appointment of taxpayer paid counsel for the wife was a *statutory* matter for the legislature, not the court as a matter of *constitutional right*.¹ This is in keeping with the current efforts of our Supreme Court task force to address the needs of indigent civil litigants in the state. See Washington Supreme Court, Task Force on Civil Equal Justice Funding ("Supreme Court Task Force"), Quantification Working Group Report, *Quantifying the Additional Revenue Needed to Address the*

¹ Similar to other states, the power to tax and appropriate funds is reserved to the legislature.

Unmet Civil Legal Needs of Poor and Vulnerable People in Washington State, at p. 17, Section E (May, 2004) (*emphasis added*):

. . . [A] substantial gap exists between the need for services and the resources to provide those services. The Task Force believes that it is a fundamental responsibility of the state legislature to provide the funding to address this gap.

This recommendation is incorporated into the Supreme Court Task Force *Final Report and Recommendations*, §§ 3 and 4 on p. 2 (May 26, 2004),² i.e. “the state general fund should be the primary source of additional revenues needed to meet the need for state-eligible equal justice services”.

B. Ms. King refused assistance of pro bono counsel to move for a continuance of trial to further seek appointed or pro bono counsel, and then refused to seek such relief herself; to seek similar relief now, after additional dilatory conduct, ignores her children’s interest in a timely and stable determination of their residence and the father’s interest in the care and custody of their children.

It is beyond dispute that both natural parents share the fundamental liberty interest in the care and custody of their children. The right is “parental” and not limited to father or mother. *See Dependency of Grove, supra.*, 127 Wn.2d 229. In addition, it

² It is expected that Appellant may seize upon certain general language on p. 2 of the *Final Report and Recommendations*, stating that access to the justice system is a fundamental right, and citing *Tennessee v. Lane*, 541 U.S. 509, No. 02-1667 (Slip Op. May 17, 2004). However, that case involved ADA access to buildings and justice facilities, and explicitly recognized the existing federal

is well settled that both the State and children have a strong interest in establishing a stable and permanent home for the children as soon as possible, so that extended uncertainty does not impinge on the children's' interest in establishing stable, if newer, relationships. *Dependency of C.R.B*, 62 Wn. App. 608, at 615, 814 P.2d 1197 (1991). The law recognizes that the children have an interest in finality of parenting plan litigation, and that extended litigation may be harmful to children. *Marriage of Jannot*, 149 Wn. 2d 123 (2003).

In this case, Brenda King was dilatory at least twice in seeking pro bono counsel, and chose to proceed pro se when assistance of pro bono counsel was available. In the spring of 2005, she waited over a month to consult Legal Services after trial had been continued; she then proceeded to make an important motion on her own before even consulting pro bono counsel. CP 57: 8-9, 181-182, 339-341 In August and September of 2005, again she waited nearly a month after the second continuance of trial before informing Legal Services, and then only by coming to a clinic. CP 282-283, 57: 15-16. Finally, in December, 2005 Brenda King chose to represent herself one month before trial, even though

limitations on right to fee-paid counsel

pro bono counsel stood ready to assist her in bringing a motion for continuance in order that she might look further for pro bono or appointed counsel. CP 57: 7-9. She did not avail herself of this assistance, and instead brought her own motion that did not mention her need or search for counsel. She also argued the motion, capably moving to strike opposing papers, but never mentioned the need to seek pro bono counsel, even though she had discussed it with Legal Services one month before this hearing. Transcript of Hearing of January 3, 2006, CP 264-269. Only after trial, which had already been continued nearly ten months, did she raise a request for appointed counsel.

What Brenda King asks now will involve new proceedings that will once again disrupt the children's' chance to establish a stable home with their father. Yet the question she raises now could easily have been raised with the assistance of counsel before trial, thus settling the matter and subjecting all parties concerned to only one trial. As the Court stated in *Kiddie v. Kiddie*, 563 P.2d 139 (Okla. 1977):

Furthermore, in a civil matter such as a divorce proceedings, two or more persons rights must be protected. Here, husband chose to represent himself. He may not now attempt to prejudice the other litigant, his wife, and deprive her of her rights because of his appearance pro se. His rights are no greater than hers.

Neither are Ms. King's rights greater than the rights of her former husband or, more importantly, her children. Indeed, it is the interests of the children in establishing a stable home pursuant to the judgment of the Court that are paramount. Thus, by her conduct Ms. King relinquished any right to appointment of counsel in this case, if such a right had existed.

C. Neither the Due Process Clause of the Fourteenth Amendment of the United States Constitution, nor Article I, Sec. 3 of the Washington Constitution require appointment of counsel in private marital dissolution actions.

As noted above, no Washington court has found that there is any right to counsel in private dissolution proceedings. *Custody of Halls, supra*. Washington and the vast majority of States have determined that a parent has a constitutional right to counsel only in child deprivation proceedings where the parent may permanently lose all of his or her parental rights. *In re Dependency of Grove, supra*, cases noted in Annotation, *supra*, 83 ALR 3rd at 983, and in *Poll v. Poll, supra*. Nonetheless, Ms. King now argues that without

a right to counsel paid by the taxpayers for indigent parents in private dissolution proceedings, at least where the residential placement of children is an issue³, the dissolution statute violates an interest protected by the due process clause of the fourteenth amendment of the United States Constitution. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Thus she argues that in order to determine if adequate due process is maintained in all judicial proceedings involving a parent's care, custody, and control of children, the court must (1) either consider the following factors established in *Eldridge, supra*, as applied by *Lassiter v. Dep't of Social Servs. of Durham County*, 452 U.S. 18, at 23-24, 27,33, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), or (2) abandon *Lassiter* as no longer vital.

In *Lassiter*, the Court applied the following factors from *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

³ Ms. King does not state that the posited right to counsel would extend to all matters in the dissolution, including property division, restraining orders between the parents, award of child support where custody is not an issue, etc.. Her posited right is based upon a fundamental liberty interest in the parent-child relationship. Even if a hypothetical court appointed counsel on the basis of that interest, that counsel would not be able to argue property and other issues since that would be an unauthorized expense of taxpayer dollars. On examination, such an arrangement could easily threaten the

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. *Lassiter, supra.*, 452 U . S. at 23-24, 27,33.

As suggested above, *Lassiter* (and Washington cases such as *Luscier, supra.*, *Myricks, supra.*, *In re Harris*, 98 Wn.2d 276, 285, 654 P.2d 109 (1982) and *In re Dependency of C.R.B.*, 62 Wn.App. 608, 614-15, 814 P.2d 1197 (1991)) focused on state-prosecuted parental rights termination proceedings, not private dissolutions with child custody issues. Under the *Lassiter* test, the right to counsel is absolute only in criminal proceedings where an individual may be deprived of his or her physical liberty. Therefore, after balancing the *Eldridge* factors, the court in *Lassiter* 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 under the federal due process clause. *Lassiter, supra.*, 452 U.S. at 23-27 and 33. Thus *Lassiter* anticipates balancing the *Eldridge* factors only in a situation where

statutory prohibition against bifurcation of dissolution proceedings and be unworkable.

a parent-child relationship may be permanently severed. As stated above, termination proceedings necessarily involve a significantly greater intrusion on parental rights than private custody petitions because private actions involve the allocation of both residential time and decision-making authority between the parents, RCW 26.09184, and the parenting plan entered by the court is subject to future modification, pursuant to RCW 26.09.260. Since the two actions involve such a fundamentally different degree of infringement upon a parent's rights, under *Lassiter* it is not appropriate to apply the *Eldridge* factors to determine if a constitutional right to counsel exists in a marital dissolution action.

Even so, Appellant argues that consideration of the *Eldridge* factors suggests somehow that a right to counsel in dissolution proceedings is appropriate. A thorough analysis of the *Eldridge* factors reveals that they do not require appointment of counsel for indigent parents in dissolution proceedings in Washington. First, since custody issues in dissolutions under chapter 26.09 RCW are not a permanent deprivation of parental rights, as they are in termination proceedings, the private interest at stake is lower. In termination proceedings;

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 proceedings concerning the child{.} RCW 26.10.160; RCW 26.10.190.

RCW 13.34.180 and 200. Under the court ordered Parenting Plan, Brenda King visits her children alternate weekends and for four weeks of vacation; she has telephone contact with the children; she has day to day decision making authority when the children stay with her; and she may bring a petition for modification of the Plan if she feels that the circumstances the Court considered have changed. Her private interest in custodial allocation in the dissolution is thus far less than it would have been in a termination proceeding.

Second, Chapter 26.09 RCW provides various procedural safeguards which minimize the risk that the procedure will lead to erroneous decisions in the absence of counsel for the indigent parent. In this regard it is important to note that it is not the interests of a parent that may have been erroneously considered that is paramount. It is whether the process that led to the decision, without appointment of counsel for indigent parents as a matter of course, is likely to lead to erroneous determinations of the best interests of

the *children* In this regard the statute allows the court to award attorney fees and to appoint a Guardian ad Litem for the child.

It is very clear that even though Brenda King represented herself at trial, the court fashioned a parenting plan which is correct and serves the best interests of the minor children. The judge below suggested as much, even in his oral ruling on the motion for appointment of counsel and new trial, even though he appears to have confused the standards governing permanent deprivation with those of a parenting plan in a dissolution proceeding. As he stated there, he would not comment on whether the result might have been different. Transcript, February 27, 2006, p. 4 lines 6-8. Indeed, his oral ruling on the merits suggests otherwise. There he expressly found that Mr. King's counsel acted largely for the benefit of the *children* (CP115: 18-116: 19), and that consequently attorneys fees should be awarded against Brenda King. Furthermore, the Judge found that the Guardian ad Litem, which *Lassiter* does not require but who was appointed at the mother's request for benefit of the children, was experienced, well respected, and independent. CP100: 18-24. He also noted several instances where it was Ms. King's own actions or testimony which provided a basis for the outcome. CP 86:13, 87:8, 89:12-18,

91:13-22, 93: 6-12.

Considering the third *Eldridge* factor, the State interest in having private parties maintain private dissolution actions at their own cost is high. First, the State has no function in a private dissolution custody matter other than (1) allocation of competing, equal fundamental interests between the parents, and (2) determination of the best interests of the child. The State is not appointed custodian of the child as in a dependency action. Second, dissolution proceedings are numerous and likely involve significant other issues besides custody which practically cannot be separated. For example, division of a community home and the award of child support will depend in part on custody determinations. Yet any appointed counsel for custody issues would not be able to spend further tax dollars using time to advise an indigent parent on other issues, for which the indigent parent likely could not afford to pay another attorney. The fiscal and administrative burdens requiring additional or substitute procedural requirements could be this extreme⁴.

⁴ Not only are family law proceedings the second most numerous legal problems for lower income litigants (Supreme Court Task Force "Civil Legal Deeds Study" at p. 33), but it would be hard to distinguish a constitutional right to counsel for child custody issues in dissolution proceedings from other civil interests that, at times at least, have been deemed "fundamental" under Washington law.

Appellant's contention that *Lassiter* may no longer be viable is presumptuous and ignores the experience of almost all the States since *Lassiter*. A chief result of *Lassiter* was to clarify that for non-criminal proceedings where parental interests were only temporarily at stake, the due process consideration of appointment of counsel was left to the states. *Lassiter, supra.*, 452 U.S. at 34. The States have continued to address the issue, relying on their freedom to do so under *Lassiter*. For example, of the thirteen State appellate cases cited in the quoted portion of *Poll v. Poll, supra.*, ten were decided after *Lassiter*. At least one State legislative body has addressed the issue of appointed counsel in family law matters. In New York, after the *Smiley* decision quoted above, the legislature established limited rights to appointed counsel in certain Family Court proceedings. *McGee v. McGee*, 180 Misc. 2d 575, 694 N.Y.S. 2d 269, at 274, discussing Family Court Act Sect. 262. Our own state has commissioned the Supreme Court Task Force as discussed above, which has outlined arguments and a time line for the legislature to address the problem.

As noted by Appellant, *State v. Gunwall*, 106 Wn. 2d 54, 720 P. 2d 808 (1986), identifies six factors which guide the court in determining whether or not the Washington State Constitution

should be considered as extending broader rights to its citizens than the United States Constitution. Appellant concedes that there is no argument under the first *Gunwall* factor, as the language of the federal and state due process clauses are identical. Contrary to Appellant's assertion, common law, as discussed in more detail at Section E of this brief, *infra*, does not provide a right to counsel in dissolution cases, and therefore the third and fourth *Gunwall* factors support the conclusion that the Washington State Constitution does not mandate appointment of counsel for an indigent litigant in a civil dissolution proceeding. Finally, as indicated in *Poll v. Poll, supra.*, the issue of appointed counsel has been litigated in a significant number of jurisdictions throughout the United States, and is clearly not a matter of "particular state or local concern" (the sixth *Gunwall* factor).

D. The Equal Protection Clauses of the State and Federal Constitutions Do Not Apply to Marital Dissolution Proceedings.

Brenda King also claims that somehow chapter 26.09 RCW, without provision for appointed counsel for indigent parents, is unconstitutional 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). The first task in determining whether chapter 26.10 RCW is constitutional is defining the class affected by the statute, i.e., 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).

Brenda does not identify the minority class in her argument. Appellants Opening Brief at pp. 43-45. If, by implication, she is arguing that that the class of indigent parents in dissolution proceedings is not granted the same right to counsel as those similarly situated in child deprivation proceedings, then her argument is incorrect. Yet this appears to be the only argument that she could be making under an equal protection analysis,

Participants in a dissolution proceeding with custody issues are not ‘similarly situated’ to respondents in dependency or termination proceedings. As discussed above, parents in dissolution proceedings are not defending against a state-supported attempt to permanently sever all of their parental rights.

Even if the state is tangentially involved, the determination in dissolution proceedings is to apportion parental rights between the two parents pursuant to society's interest in regulating family relations (Brenda King went to trial against her husband and the father of her children, Michael King; she did not go to trial against the State of Washington with its enormous resources). 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 orders can be modified. Again, compare *In re Luscier, supra*, 84 Wn.2d at 137 with the cogent statement of the different interests in *Poll v. Poll, supra*, 588 N.W. 2d at 588:

The instant proceeding is one brought on by an individual involving a dispute between parents. The "weapons" of the state have not been marshaled against the father. The subject matter of the proceeding is the adjustment of visitation, not the initiation or termination of parental rights. Indeed, the issues of custody and visitation remain subject to modification following dissolution by statute, see Neb. Rev. Stat. § 42-351 (Cum. Supp. 1996), and upon a proper showing, visitation more favorable to the father could be ordered. The father has not, as a result of the modification of the postdissolution visitation, suffered the severe deprivation that triggers the appointment of counsel in civil and criminal cases.

Thus, the respondents in each type of action are not similarly situated. Because they are not similarly situated, they are not

accorded like treatment, nor are they required to be given like treatment. 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).

E. Appellant's argument based on incorporation of ancient common law into Article I Section 10 of the Washington State Constitution, is inapposite and disingenuous.

Appellant posits that Article I, Section 10 of the Constitution of Washington incorporates certain ancient law, namely, the English statute from King Henry VII's reign, II Henry VII c. 12 (1494), which allows the sovereign to appoint counsel for certain civil indigent parties. In addressing a similar argument, the Maryland Supreme Court noted:

To resolve the issue hinged on the English statute, we would have to determine, among other things, (1) whether that statute, which to the best of our knowledge, has never been applied in the 379 year history of Maryland as a colony and

State, is nonetheless currently a vital part of the Maryland common law, (2) if so, whether it is limited to plaintiffs as it says or should be extended by judicial fiat to defendants like Ms. Frase as well, (3) at what point the right attaches and how long it continues, and (4) if the right exists and the court is, indeed, required to appoint counsel, what would happen if the lawyer appointed for one reason or another refuses to take the case. See *Mallard v. United States District Court*, 490 U.S. 296, 109 S. Ct. 1814, 104 L. Ed. 2d 318 (1989).

Frase v. Barnhart, 379 Md. 100, 840 A.2d 114, at 130 (note 10) (2003).

Appellant has advanced very similar arguments here based upon the same statute of Henry VII; and also alleged inchoate rights to counsel based on general references to fundamental principles in our State constitution.

Turning first to the ancient statute, according to Appellant, Washington adopted such "common law", including English statutes in force at the date of the Declaration of Independence, when it adopted its Constitution. See *Cooper v. Reynolds*, 48 Wn. 2d 108, 112, 291 P. 2d 657 (1955). Yet initial research indicates that the right to which appellant refers did not apply to marital proceedings either in the original statute or at the time the Constitution of the United States was adopted. At the time of Henry VII, in the late 1400s, actions at common law clearly did not include marital proceedings. The statute was meant to help the indigent in an

action at common law, and these actions were severely limited at the time, at least in comparison with our concepts of unitary action and the number of possibilities of suits. See, for example, Maguire, Poverty and Civil Litigation, 36 Harv. L. Rev. 361, at 373 (1923), and Jowitt's Dictionary of the English Law, London, 1977, at the definition of "action" at Vol. 1, p. 40. Indeed, it was Henry VII's successor, Henry VIII, who, failing to secure a divorce from the ecclesiastical court in the 1500s, severed relations with Rome. Initial research indicates that suits in equity (which still may not have included the *sui generis* dissolution proceedings) were not subject to the statute until the mid-1800's. *Oldfield v. Cobbett*, 41 Eng. Rep. 765 (1845).

An additional reason that the Statute of Henry is inapposite is that it forbids any compensation for appointed attorneys. Any attorney appointed to represent an indigent under the statute "shall do their duties without any rewards for their Counsels, help and business in the same." Unless Appellant is arguing that we should no longer compensate Legal Aid or court appointed attorneys, this provision suggests that the statute is indeed no longer vital.

This argument is not meant as merely an exercise in arcane scholarship. It is meant to underscore Appellant's use of glittering generalities from other areas of law, or from inapposite and general provisions of the State Constitution, without noting the facts of the cases from which they are drawn or the systems upon which they are based. Such arguments are not germane to such an important consideration, i.e., the imposition of a duty on all tax payers to fund civil counsel for all indigents. Indeed, the direction of appellant's arguments suggests that there may be little way to limit the right to appointed counsel as appellant argues it. See Appellant's Brief at p. 25. For example, Washington Courts have found constitutional protection for the individual right to contract, albeit again in a very old case, *Dennis v. Moses*, 18 Wash. 537, 52 P. 333 (1898); privacy rights, *State v. Gunwall*, 106 Wn. 2d 54, 720 P. 2d 808 (1986); education, *Seattle School District No. 1 v. State*, 90 Wn. 2d 476, 585 P. 2d 71 (1978); and religion, *Witters v. State Commission for the Blind*, 112 Wn. 2d 363, 771 P. 2d 1119 (1989); as well as to possession of the home, at least against invasions of privacy and levy from debts, under Washington Constitution Article I, Sections 7 and 19. See discussion in Perluss, Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest, Vol. II, Issue II, at pp.

590-591, note 122, suggesting that a right to counsel should attach in such cases as well. This approach ignores long-standing doctrine in both state and federal courts, that the right to appointed counsel for indigents is a matter of due process arising from criminal or similar proceedings, and not in private civil disputes.

F. There is no basis for new trial pursuant to Civil Rule 59.

Appellant asks this Court to grant her a new trial on the theory that her constitutional rights were violated when the lower court failed to appoint counsel to represent her in the dissolution proceeding. Since her motion seeking appointment of counsel was only made after the trial had been concluded, she seems to be arguing that she not only had a constitutional right to appointed counsel, but that the court had a duty to advise her of this right, presumably some period of time prior to trial. There is, of course, no legal authority for the proposition that the court, of its own accord, was to offer Ms. King the services of appointed counsel.

A motion for new trial is governed by Civil Rule 59, which specifies nine possible causes for granting a litigant a new trial. Appellant has cited no provision in the rule which supports

Appellant's request for new trial, and Appellant's brief is devoid of any argument as to application of CR 59 to Appellant's request.

Appellant alleges certain errors in both the admission and exclusion of evidence, but provides no citations to the record as to her objections, or offers of proof, during the trial as required by ER 103. Since the necessary objections and offers of proof were not made at trial, Appellant is precluded from raising such issues on appeal. RAP 2.5(a).

IV CONCLUSION

The right which Appellant seeks does not exist in American jurisprudence. Its promulgation by this Court would usurp traditional legislative functions, no matter how appealing the simplistic solution to the problem of meeting the legal needs of lower income people. Furthermore, the solution which Appellant seeks is not timely and can only increase the suffering of the other parties to this case, the children and the father, by ignoring their equally fundamental interests. The ruling of the trial court should be affirmed.

RESPECTFULLY SUBMITTED April 23, 2007

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