

IN THE SUPREME COURT FOR THE STATE OF ALASKA

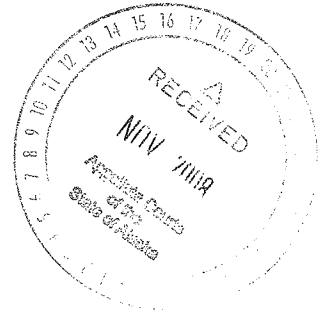
OFFICE OF PUBLIC ADVOCACY,

Appellant,

v.

ALASKA COURT SYSTEM,
RANDALL GUY GORDANIER, JR., and
SIV BETTI JONSSON

Appellees.



Supreme Court No. S-12999

Case No 3AN-06-8887 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE MARK RINDNER, JUDGE

BRIEF OF RETIRED ALASKA JUDGES AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE JONSSON

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I. Introduction

The question of the scope of the right to counsel in private custody disputes under the Alaska Constitution is one of basic fairness and equal access to justice. The Court's answer will derive in part from assessing how proceedings involving pro se litigants actually transpire, considered in light of the applicable constitutional standards. In this brief, Amici Retired Judges provide first-hand observations as well as draw support from research and other commentary that corroborates their experience. These perspectives are relevant to the nature and magnitude of the private and state interests, and the substantial risks of erroneous outcomes, that the Court must consider when determining whether due process or equal protection requires appointment of counsel in this and similar cases. Further, Amici suggest that the Court's analysis of these claims should be resolved in the context of its obligation and authority under the Alaska Constitution, consistent with the separation of powers, to ensure the fair administration of justice.

II. Interests of Amici

The Amici are ten retired Alaska judges with more than 190 collective years of distinguished service on the bench. They are:

Justice Alexander O. Bryner, Alaska Supreme Court, 1997 – 2007 (Chief Justice 2003 – 2006); Chief Judge, Alaska Court of Appeals, 1980 – 1997; District Court, 3rd District at Anchorage, 1975 – 1978.

Judge Victor D. Carlson, Superior Court, 3rd District at Anchorage, 1976 - 1991; District and Superior Court, 1st Judicial District at Sitka and Juneau, 1970 – 1976.

Judge Christopher R. Cooke, Superior Court, Fourth District at Bethel, 1976 – 1986.

Judge Jay Hodges, Superior Court, 4th District at Fairbanks, 1976 – 1997.

Judge John Reese, Superior Court, 3rd District at Anchorage, 1989 – 2004.

Judge Eric T. Sanders, Superior Court, 3rd District at Anchorage, 1996 – 2003.

Judge Richard D. Savell, Superior Court, 4th District at Fairbanks, 1987 – 2005.

Judge Thomas Schulz, Superior Court, 1st District at Ketchikan, 1973 – 1993.

Judge Brian Shortell, Superior Court, 3rd District at Anchorage, 1981 - 2000.

Judge Larry Zervos, Superior Court, 1st District at Sitka, 1990 – 2007; District Court, 4th District at Fairbanks, 1988 – 1990.

Based on their experiences in court, Amici are well situated to illuminate the high costs, both financial and non-monetary, to the parties, the judicial system, and fairness itself when there is a failure to appoint counsel for indigent litigants involved in cases affecting basic human needs, including contested custody matters. Amici Retired Judges urge the Court to determine that principles of due process and equal protection mandate the provision of counsel to an indigent parent contesting custody against a represented party.

III. Preliminary Statements

Amici adopt Appellee Siv Betti Jonsson's jurisdictional statement, pertinent provisions of law, statements of the issues presented and of the case, and discussion of the applicable standard of review.

IV. Argument

A. Due Process and Equal Protection Require Consideration and Weighing of Private and State Interests.

As the parties' briefs make clear and the Court well knows, child custody disputes implicate fundamental rights. The right to direct the upbringing of one's child "is one of

the most basic of all civil liberties.” *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979). The United States Supreme Court has called the right to have children “a basic civil right of man,” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and noted that custody is a right “far more precious ... than property rights.” *May v. Anderson*, 345 U.S. 528, 533 (1953). The opportunity to parent one’s child is a matter of liberty under both the Alaska and U.S. constitutions, and such a fundamental interest may not be abridged without due process of law. Alaska Const. art. I, § 7; U.S. Const. amend. XIV; *Troxel v. Granville*, 530 U.S. 57, 65 (2000). What process is due depends on an evaluation that takes into account the nature of the interests affected, the complexity of the proceeding, and, at base, what is necessary to provide a fair opportunity to be heard. The test is set forth in *Matthews v. Eldridge*, 424 U.S. 319, 321 (1976):

Identification of the specific dictates of due process generally involves consideration of three distinct factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Amici’s experience indicates that forcing unrepresented parents to litigate contested child custody cases against opposing parties who are represented by a lawyer fails to meet due process requirements. In particular, pitting unrepresented parents against represented parents in the context of such fundamental and basic human interests creates an unacceptably high risk of erroneous determinations, coupled with excessive administrative and judicial burdens which cannot be sufficiently mitigated by available aids to pro se litigants.

In the equal protection realm, once a fundamental interest is at stake, the standard is that similarly situated persons cannot be treated differently absent a compelling state interest in doing so. Not only do similarly situated persons deserve equal protection from the imposition of burdens; they also deserve equal access to rights and benefits. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005). In *Flores v. Flores*, this Court decided that when an indigent parent faces a parent represented by publicly funded counsel in a child custody dispute, the indigent parent is entitled to a court-appointed attorney. 598 P.2d at 895. Such representation is now provided pursuant to statute. Alaska Stat. § 44.21.410(a)(4).

The court below decided that there is no meaningful difference in the postures of a parent facing opposition from a party represented by publicly funded counsel and one facing privately retained counsel. Therefore, an indigent parent in a contested custody case against a represented opponent is entitled to a leveled playing field, and thus the assistance of a court-appointed attorney. Amici urge affirmance.

B. Failure to Provide Counsel to Indigent Litigants in Contested Custody Cases Creates Substantial Risks of Erroneous Determinations and Erodes Confidence in and the Effectiveness of the Judicial System

In September 2008, the Alaska Bar Association’s Board of Governors relied on both Alaskan and national experience when it endorsed extension of the civil right to counsel. The Board resolved “That the Alaska Bar Association urges the State of Alaska to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody.” Alaska Bar Association Pro Bono

Committee, Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases (2008), Brief of Appellee Siv Betti Jonsson, Exh. 1 at 2 [hereinafter “Alaska Bar Resolution”]. There is a wealth of anecdotal and social science evidence to bolster their conclusion. Both Alaska judges who were recently surveyed and Amici Retired Judges, from their direct experience on the bench, relate many negative consequences to individual litigants and to the judicial system overall when parties are forced to appear pro se in complex matters. These observations are supported by studies from around the United States. In an adversarial adjudicatory system, with its associated benefits and pitfalls, pursuing a cause without a lawyer dramatically affects the process and its results.

1. Unrepresented Parties Suffer, with Case Outcomes and Fairness Compromised.

When the U.S. Supreme Court established the right to an attorney for indigent criminal defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963), it observed: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He requires the guiding hand of counsel at every step in the proceedings against him.” *Id.* at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

In criminal matters, where the right to counsel is well established, the right is deemed so critical that Alaska requires a searching inquiry before a criminal defendant entitled to the appointment of an attorney is permitted to waive the right to counsel and

proceed pro se. *McCracken v. State*, 518 P.2d 85, 91-92 (Alaska 1974); *Gladden v. State*, 110 P.3d 1006, 1010 - 1011 (Alaska Ct. App. 2005); *McIntire v. State*, 42 P.3d 558, 561 (Alaska Ct. App. 2002). A judge must advise a defendant, in detail, regarding the risks of proceeding without representation. A court form, CR 204, *available at* <http://www.state.ak.us/courts/forms/cr-204.pdf>, outlines the substantial benefits that attorneys confer, including preparing and filing legal papers, making sure no improper evidence is brought in, and making sure that all of the defendant's rights are protected in court.

The 1980 Alaska Magistrate's checklist for misdemeanor arraignment, quoted in *Swensen v. Anchorage*, 616 P.2d 874 (Alaska 1980), sets forth a recommended script for magistrates to assure that the accused knows the advantages conferred by an attorney:

I am going to explain to you what a lawyer is and what a lawyer does.

A lawyer is a person who has studied the laws of Alaska and has passed a test to show that he understands these laws.

If you have a lawyer to represent you, he will talk with you about the facts of this case, in private. Your lawyer is not allowed to tell anyone else about what you tell him about this case unless you want him to do so.

Your lawyer will come to court with you each time you come to court, and he will speak for you in court. He will talk to the lawyer for the state for you.

Your lawyer will examine the charges which have been brought against you to see if they are in proper form. Because your lawyer has been trained in the law, he might see some mistakes in the legal papers which have been filed against you which you might not see. Your lawyer will prepare and file legal papers for you.

Your lawyer will make sure that no improper evidence would be brought against you in court.

