No. 30761-8 II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Custody of:
Trina M. Halls,
Jeffrey C. Halls, Jr.,
and Selma Halls,
Minor Children,

v.

Jeffrey C. Halls, Sr.,
Respondent,

and

June Arden,
Appellant

BRIEF OF AMICUS CURIAE NORTHWEST WOMEN'S LAW CENTER

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I. SUMMARY OF ARGUMENT

Parents have a fundamental liberty interest in raising their children. Both the Washington Supreme Court and the Washington Legislature recognize that due process requires that counsel be appointed for indigent parents when this liberty interest is at risk. Otherwise, "the lack of counsel, in itself, may lead improperly and unnecessarily to deprivation of one's children." *In re Welfare of Luscier*, 84 Wn.2d 135, 138, 524 P.2d 906 (1974).

June Arden has been deprived of most of the rights associated with being the parent of her three children in a legal proceeding in which the odds were stacked unfairly against her. She had insufficient resources to pay for a lawyer and thus had to try to navigate the legal system on her own. In contrast, Jeffrey Halls, her former husband, was represented by counsel armed with knowledge of the law and procedures of the court and pushed by the ethical obligation to zealously represent his client. When Mr. Halls deemed the court's initial decision unsatisfactory, his attorney had the ability and resources to pursue additional proceedings seeking more custodial and decisional rights for Mr. Halls. In the end, Ms. Arden was denied a meaningful opportunity to be heard and has lost the right to participate meaningfully in the upbringing of her children.

The Washington courts have yet to define the outer bounds of the circumstances where due process requires that counsel be appointed for civil litigants. This case does not require that that be done either, as this case squarely falls within those bounds. There is no question that Ms. Arden is indigent and that she was denied an opportunity to be heard

through counsel. The party seeking to deny her access to her children had the benefit of the skills, education, experience, and resources of an attorney. And the risk to Ms. Arden was the denial of one of the most basic fundamental rights—the liberty interest associated with raising her children, which the Washington Supreme Court has correctly indicated is "more precious to many people than the right of life itself." 84 Wn.2d at 137 (internal quotation marks and citation omitted).

II. IDENTITY AND INTEREST OF AMICUS

The Northwest Women's Law Center (the "NWLC") is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, and the provision of legal information and referral services. Since its founding in 1978, the NWLC has participated as counsel and as *amicus curiae* in cases throughout not just the Northwest, but all around the country, and is currently involved in numerous legislative and litigation efforts.

The NWLC has developed expertise in many areas of law pertaining to women's rights, including family law, and was an instrumental stakeholder in drafting and lobbying efforts surrounding the Parenting Act's relocation provisions. Of additional significance to this case, the NWLC serves as a regional expert on the impact of gender inequity and domestic violence in the family law context. As such, the NWLC has developed expertise on the constitutional importance of meaningful access to the legal system, an issue directly raised in this matter.

The NWLC appears as *amicus curiae* in this case on the issue of Ms. Arden's right to counsel.

III. STATEMENT OF THE CASE

Appellant Ms. Arden is the mother of three minor children, Trina, Jeffrey, and Selma Halls. CP 1. Respondent Mr. Halls is the father of all three children. *Id.* A final parenting plan ("Original Parenting Plan") was entered on February 4, 2003 in a proceeding in which both parties were represented by counsel. CP 1-8. The plan provided that the children resided with Ms. Arden nearly full-time, but stayed with Mr. Halls on two weekends of each month, during the month of July, and on certain holidays every other year. CP 2-4. The parents had joint decision-making power. CP 6.

In April 2003, Ms. Arden was evicted. CP 166. Facing potential homelessness, she moved with the children to Red Wing, Minnesota, where she had family. CP 20, 164, 166; 1 RP 21-23.[1] Shortly after she and the children arrived in Minnesota, Ms. Arden telephoned Mr. Halls, who was in Wisconsin at the time, and told him where she and the children were staying. CP 10. The children missed their next scheduled weekend visit with Mr. Halls. CP 20.

Through his attorney, Mr. Halls filed a motion seeking to hold Ms. Arden in contempt for violating the Original Parenting Plan by failing to provide notice of relocation prior to leaving for Minnesota and failing to make the children available for his weekend visit. CP 9-11. The motion sought Ms. Arden's imprisonment as a sanction. CP 10.

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[1] This appeal consolidates two separate Notices of Appeal, case numbers 30761-8-II and 30948-3-II. Citations to the verbatim report of proceedings from each case will be cited as "1 RP" and "2 RP," respectively.

After Mr. Halls filed this motion, four hearings were held, as set forth in more detail in Ms. Arden's brief on appeal. At the first hearing on May 9, 2003, Ms. Arden represented herself via telephone. 1 RP 12. She was held in contempt for taking the children out of state without proper notice and was taken into custody. CP 19-25.

At the second hearing on May 30, 2003, Ms. Arden again represented herself. 1 RP 18. Despite determining that counsel should be appointed to represent Ms. Arden because she faced the possibility of incarceration and was indigent, the court nevertheless proceeded with the hearing. 1 RP 18-30; CP 27-32.

At the third hearing, held on June 13, 2003, Ms. Arden was not present. CP 50. The Clallam-Jefferson Public Defender initially appeared on her behalf, but was allowed to withdraw without notice to Ms. Arden when Mr. Halls' attorney declined to seek additional incarceration. 1 RP 33-34. Despite the fact that Ms. Arden was not present and was not represented by an attorney, the court *sua sponte* entered a new parenting plan ("First Modified Parenting Plan"), which essentially reversed the existing residential schedule but kept decision-making joint. CP 40-48.

Temporarily represented by an attorney, Ms. Arden filed a motion for reconsideration, which the court denied. CP 51-60, 122-23. In its order, the court explicitly stated that Ms. Arden had not been represented by counsel for the "parenting plan issues." CP 123. On August 19, 2003, Ms. Arden filed a *pro se* notice of appeal. CP 124.

While Ms. Arden's appeal was pending, Mr. Halls for the first time filed a petition to modify the Original Parenting Plan. CP 152-61. Ms. Arden filed a *pro se* response. CP 162-69. On September 5, 2003,

the court conducted the fourth hearing, noted as a show cause hearing for contempt. CP 170; 2 RP 1. Ms. Arden represented herself. 2 RP 1. At the hearing, the court held Ms. Arden in contempt for failing to comply with the First Modified Parenting Plan by not returning the children to their father at the required time. CP 171-75.

Based on the September 5 hearing, the court entered a third parenting plan ("Second Modified Parenting Plan"). This plan differs significantly from the Original Parenting Plan and the First Modified Parenting Plan. CP 176-85. The Second Modified Parenting Plan provides that the children will reside nearly full-time with Mr. Halls. CP 177-79. They are allowed to be with Ms. Arden only for two weekends a month, for two blocks of two weeks each during the summer, and on certain holidays every other year. *Id.* Ms. Arden may call the children two nights a week for no more than half an hour. CP 180. In addition, rather than the joint decision-making ordered by the prior plans, the Second Modified Parenting Plan gives Mr. Halls the sole power to make decisions concerning the children's education, non-emergency health matters, and religious upbringing. CP 181-82. The court also issued a "temporary" order restraining Ms. Arden from entering the children's schools and from removing them from the county until 2013, at which time the youngest child will be two months shy of 18 years old. CP 186-88.

On October 3, 2003, Ms. Arden filed a second notice of appeal challenging the contempt order, the Second Modified Parenting Plan, and the restraining order. On November 14, 2003, this appeal was consolidated with her earlier appeal.

IV. ARGUMENT

A. Federal Law Recognizes the Fundamental Rights of Parents and Requires That Counsel Be Appointed on a Case-By-Case Basis.

Federal law recognizes the fundamental nature of marital and parental rights, which are "libert[ies]" protected by the due process clause of the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (stating that "liberty" includes the "right of the individual . . . to marry, establish a home and bring up children"); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (acknowledging that the right to procreate and raise children is among "the basic civil rights of man"). The Supreme Court has specifically recognized the primacy of a parent's interest in raising his or her child. *See Stanley v. Illinois*, 405 U.S. 645, 657, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (holding that because a parent's right to custody of his or her children is so fundamental, an individualized determination of the parent's fitness is required prior to removal of the children); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .").

The Supreme Court has recognized that due process may require that counsel be appointed in civil cases affecting parental rights depending on the particular circumstances of the case. In *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), the Court considered whether federal due process required that a mother be appointed counsel in a termination of parental rights proceeding. The Court refused to apply a bright line rule. Instead, the Court held that

whether there is a federal due process right to counsel in a proceeding resulting in the termination of parental rights is determined through case-by-case analysis using the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). To perform this analysis, courts should consider: (1) the private interests of the parent, which "warrant[] deference and, absent a powerful countervailing interest, protection," *Lassiter,* 452 U.S. at 27 (internal quotation marks and citation omitted); (2) the State's interest in a correct decision as well as the State's financial interests, *id.* at 27-28; and (3) the complexity of the proceeding and the risk of an erroneous deprivation of parental rights, *id.* at 28-29.

Applying the test, the Court in *Lassiter* determined that, on the facts of the case, the mother had no right to court-appointed counsel. *Id.* at 32-33. The mother was imprisoned for second-degree murder, had made no attempt to contact or remain involved with her child, and had "expressly declined" to attend the original hearing in the case. *Id.* Further, the case "presented no specially troublesome points of law, either procedural or substantive." *Id.* at 32. Thus, the mother had not shown that the presence of a lawyer would make a determinative difference, and she therefore had no right to counsel in the termination proceeding. *Id.* at 33.[2]

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[2] Although it has not directly considered the right to counsel in a private custody case, the Supreme Court has considered other aspects of due process in such proceedings. In *M.L.B. v. S.L.J.*, 519 U.S. 102, 107, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the father, who was the custodial parent, sought to terminate the mother's parental rights so that his new wife could adopt the children. After the court terminated the mother's parental rights, the mother sought to appeal, but her appeal was dismissed because she could not afford the statutorily required transcript preparation fee. 519 U.S.. at 108-09. The Court held that it violates due process for a state to condition the right to appeal a termination of parental rights resulting from a private adoption proceeding on the payment of a transcript preparation fee. *Id.* at 128.

In contrast to the facts of *Lassiter*, the facts of this case demonstrate that Ms. Arden was entitled to court-appointed counsel under the U.S. Constitution. The first *Eldridge* factor points in her favor, because her private interest in maintaining a relationship with her children is high. *See* 452 U.S. at 27. The second *Eldridge* factor is neutral. The State has a significant interest in a correct decision protecting the best interests of the child. *See id.* at 27-28. However, the State also has a pecuniary interest in not paying for counsel. *See id.* at 28. Here, the third *Eldridge* factor, as in *Lassiter*, is dispositive. Ms. Arden at all times was able to parent and interested in parenting her children, and she vigorously attempted to protect her rights and articulate her position to the court, all to no avail because of the complexities of the case and the superior skill of opposing counsel. Under these circumstances, the risk that she was erroneously denied her parental rights is high.

B. The Washington Constitution Provides Broad Due Process Rights, Including a Right to Counsel When Procedural Fairness Demands It.

The vast majority of states provide due process safeguards for parents above and beyond what is required under the U.S. Constitution.[3] Sixteen states, including Washington as discussed below, require counsel to be appointed in every proceeding where termination of parental rights is at issue. *See* Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to*

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[3] The *Lassiter* Court noted that although the federal due process clause will not always mandate the appointment of counsel, a State's sound public policy might require it: "A wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution." 452 U.S. at 33-34.

Lassiter, 14 Touro L. Rev. 247, 276-77 (1997). In 28 additional states and the District of Columbia, counsel is required upon request. *Id.*

Washington has relied on its more liberal state constitutional provisions[4] to expand indigents' right to counsel beyond the protections that may be afforded by federal law. Thus, the appointment of counsel is constitutionally required in Washington "when procedural fairness demands it." *Tetro v. Tetro*, 86 Wn.2d 252, 253, 544 P.2d 17 (1975) (holding that indigents charged with contempt are entitled to state-paid counsel when the contempt proceedings may result in incarceration); *see also In re Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (right to counsel exists where physical liberty or a liberty interest similar to the parent-child relationship is at risk); *In re Marriage of Haugh*, 58 Wn. App. 1, 790 P.2d 1266 (1990) (right to counsel exists in civil contempt proceeding even where sanction sought is coercive rather than punitive).

Washington courts have repeatedly recognized the fundamental nature of the right to raise one's children. The right to the care, custody, and companionship of one's child is described as a "sacred right," *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980), which is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *In re Welfare of Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975). It is considered "'more precious to many people than the right of life itself.'" *Luscier*, 84 Wn.2d at 137 (quoting *In re Welfare of Gibson*,

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[4] The Washington courts cite three provisions of the Washington Constitution as authority for access to justice rights: Article I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."); Article I, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law."); Article I, § 32 ("A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.").

4 Wn. App. 372, 379, 483 P.2d 131 (1971)). Although the right is not absolute, it "cannot be abridged without due process of law." *Wash. State Coalition for Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 930, 949 P.2d 1291 (1997) (enforcing state statute requiring state agency to develop and implement plan for providing services to homeless children). The fundamental rights involved in child custody disputes therefore require strict compliance with due process safeguards. *See In re Marriage of Ebbighausen*, 42 Wn. App. 99, 103-04, 708 P.2d 1220 (1985) (holding that father's due process rights were violated when court resolved joint custody issue in chambers without testimony on the merits).[5]

1. The Washington Supreme Court Has Interpreted the Washington Constitution to Require Court-Appointed Counsel in Child Deprivation Proceedings.

In light of the fundamental rights of parents to raise their children, the Washington Supreme Court has unanimously found a per se right to counsel in termination proceedings under Article I, § 3 of the Washington Constitution. *Luscier*, 84 Wn.2d at 139. In reaching this decision, the court considered the inequity of one party proceeding *pro se* while the other party is represented by counsel. *Id.* at 137. Particularly compelling to the court was a law review note that concluded:

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[5] In *Miranda v. Sims*, 98 Wn. App. 898, 903, 991 P.2d 681 (2000), the court held that family members of a man who died while in police custody were not entitled to appointed counsel during an inquest proceeding. The court distinguished the case before it from other cases involving the right of access to the courts, stating: "[O]ur courts have limited the right to appointed counsel in civil cases to proceedings where the litigant's physical liberty is threatened or where a fundamental liberty interest, similar to the parent-child relationship, is at risk." 98 Wn. App. at 902. Here, that fundamental interest in parenting a child is involved.

> "[A] significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings."

Id. at 138 (quoting Note, *Child Neglect: Due Process for the Parent*, 70 Colum. L. Rev. 465, 476 (1970)). Thus, the court considered it "readily apparent that the lack of counsel, in itself, may lead improperly and unnecessarily to deprivation of one's children." *Id.*

In *Myricks*, the Washington Supreme Court extended *Luscier* to temporary child deprivation proceedings where the likelihood of permanent deprivation is substantial. In *Myricks*, a child was temporarily taken from his father's custody pending further child deprivation proceedings. 85 Wn.2d at 253. Although the father was indigent and requested an attorney for the hearing, the trial court denied his request. *Id.* Refusing to distinguish the case from *Luscier* on the basis that the deprivation was temporary, the court found a per se right to counsel where a parent is substantially likely to be permanently deprived of his or her child. *Id.* The court considered the fundamental rights of a parent "too basic to expose to the State's forces without the benefit of an advocate." *Id.* at 254.

2. The Washington Legislature Recognizes the Fundamental Nature of Parental Rights and the Corresponding Need for Due Process When Those Rights Are at Risk.

The Washington Legislature has codified the importance of parental rights. RCW 26.09.002 states that Washington recognizes

> the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.

Because parental rights are so important, the legislature has established that parents have a right to be represented by an attorney at all stages of a dependency proceeding and may receive court-appointed counsel if they are indigent. RCW 13.34.090(2). This right to counsel applies even though dependency proceedings may not result in the permanent deprivation of parental rights. *See In re Key*, 119 Wn.2d 600, 609, 836 P.2d 200 (1992) (noting that a finding of dependency does not always lead to the termination of parental rights). Furthermore, the right to counsel in dependency proceedings is not limited to actions filed by the State, as RCW 13.34.040 provides that "[a]ny person" may file a dependency petition.

In addition, the Washington Legislature has recognized that both parties should have access to representation in dissolution proceedings. RCW 26.09.140 provides that after considering the financial resources of the parties, the court may order one party to pay the other party's reasonable attorneys' fees.[6]

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[6] Washington courts have the discretion to grant requests for attorneys' fees pursuant to RCW 26.09.140 in cases involving parental rights. *See In re Marriage of*

Thus, the Washington courts and Legislature have provided substantial protection of the due process rights of parents faced with the potential loss of their children, including the right to counsel.

C. Child Custody Disputes in Which Parental Rights Are Drastically Curtailed Are Akin to Child Deprivation Proceedings.

In Washington, the termination of parental rights permanently severs "all rights, powers, privileges, immunities, duties, and obligations, including any rights to custody, control, visitation, or support existing between the child and parent." RCW 13.34.200. Although some cases distinguish between termination proceedings and child custody disputes, the difference between the two often is not great, particularly with respect to indigent parents. *See* Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. Rev. 241, 254-57 (2000).

In a practical sense, a judgment of custody for one parent is not very different from a termination of parental rights for the indigent parent losing custody. *Id.* at 257. While custody orders can be modified, it is rare that they are modified by the agreement of the parties because the parent with custody is unlikely to agree to modification. *Id.* at 254. When litigants cannot afford counsel, judicial modification is also improbable. *Id.* When an indigent parent loses significant parental rights, that determination may effectively operate as a termination of parental rights.

Trichak, 72 Wn. App. 21, 26, 863 P.2d 585 (1993) (the trial court did not abuse its discretion when it denied attorneys' fees in child support modification proceeding where the parents' incomes were not widely disparate); *In re Custody of Salerno*, 66 Wn. App. 923, 925-26, 833 P.2d 470 (1992) (trial court acted within its discretion when it granted attorneys' fees in custody dispute between mother and grandparents).

The Washington Legislature has recognized the importance of counsel in parental rights proceedings, requiring that counsel be appointed for indigent parents at all stages of a dependency proceeding. RCW 13.34.090(2). Because Ms. Arden faced a loss of her parental rights similar to that faced by parents in a dependency or termination proceeding, this Court should provide similar safeguards by requiring the appointment of an attorney given the facts of this case.

D. Due Process Demands That Ms. Arden Be Provided with the Same Procedural Safeguards as Those Provided in Child Deprivation Proceedings.

Given the facts of Ms. Arden's situation, due process requires a right to counsel for several reasons. First is the substantial and erroneous infringement of Ms. Arden's fundamental parental rights, in which the court drastically curtailed her right to care for and raise her children. Second is Ms. Arden's indigency as established by her financial inability to obtain a lawyer without substantial hardship. Third is the profound disparity of power between Ms. Arden, who was unrepresented, and Mr. Halls, who had an attorney, in the face of a fourth factor, the complex legal and procedural issues involved in the proceedings. Under these unique circumstances, the trial court's failure to appoint counsel for Ms. Arden violated her constitutional due process rights.

1. Ms. Arden Faced the Prospect of Losing, and Did Indeed Lose, Her Right to Nurture and Care for the Children She Had Mothered for Twelve Years.

At the time of the initial contempt motion on April 22, 2003, Ms. Arden was vested with greater custodial rights than Mr. Halls under the Original Parenting Plan. At that time, the children resided with

Ms. Arden and Mr. Halls was entitled to visitation. Ms. Arden and Mr. Halls shared decision-making power.

Over the course of four contempt hearings in which Ms. Arden had virtually no legal assistance, the children were not only taken from her custody and care, but most of her parental rights were effectively terminated. The Second Modified Parenting Plan provides that the children shall reside with Mr. Halls and Ms. Arden's contact with them is limited to short visitation periods. She is no longer entitled to speak to her children over the telephone more than two times each week. She has no power to make major decisions in their lives, including decisions about their education, health care, and religious upbringing.[7] She is also "temporarily" restrained from going to her children's schools until 2013—at which time the youngest child will be two months shy of the age of majority.

Taken together, these modifications to Ms. Arden's relationship with her children in effect stripped her of fundamental parental rights. Although her rights have not been terminated altogether, she has lost the right to have her children live with her and the power to decide many of the major issues in their lives.

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[7] The importance of having the right to make such decisions for one's child was recently illustrated by the United States Supreme Court in *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2303, 2004 WL 1300159, at *10 (June 14, 2004) (holding that because a child's mother had "exclusive legal custody," the father did not have standing and therefore could not challenge the constitutionality of the school district's policy regarding recitation of the pledge of allegiance).

2. Ms. Arden Is Indigent and Without Means to Secure Legal Representation.

Ms. Arden established with the trial court that she is unable to obtain a lawyer without substantial hardship to herself or her family. CP 27. She is therefore indigent under RCW 10.101.010(1)(d) (providing that a person is indigent if "his or her available funds are insufficient to pay any amount for the retention of counsel").

3. Mr. Halls' Vigorous Representation by Counsel Placed Ms. Arden at an Unfair Disadvantage and Denied Her an Adequate Hearing by the Court.

As discussed above, the court in *Luscier* recognized the imbalance of power that occurs when one party is represented and the other is unrepresented in proceedings affecting parental rights. 84 Wn.2d at 137. Ms. Arden faced this inequity, as she was required to proceed *pro se* due to her indigency against Mr. Halls' experienced and vigorous attorney. Not only did counsel for Mr. Halls repeatedly charge Ms. Arden with contempt of court in a period of a few months, he successfully persuaded the court to modify the parenting plan on the basis of contempt findings alone.

4. The Case Presented Complex Legal Issues That Ms. Arden Was Unable to Address Adequately Without the Assistance of Counsel.

The proceedings included several complicated issues relating to relocation, contempt, and the procedural and substantive standards for modifying a parenting plan. In addition, the trial court contributed to the complexity of the issues by committing various legal and procedural errors. *See* Appellant's Br. at 10-21. As a *pro se* litigant, Ms. Arden was

wholly unable to present her case or have a meaningful hearing on these issues.

Considering that Mr. Halls was represented and that the proceedings involved complex legal and procedural issues, Ms. Arden was at a decisively unfair disadvantage throughout the proceedings. Given this inequity, Ms. Arden's indigency, and the strength of the interest at stake, due process requires that she be appointed an attorney.

E. Washington Should Follow Alaska by Requiring Counsel in Cases Involving Circumstances Such as Those Faced by Ms. Arden.

The Alaska Supreme Court has required court-appointed counsel in private custody disputes in circumstances similar to those faced by Ms. Arden. Given Washington's policy of protecting parental rights, this Court should adopt the same rule.

1. Alaska Recognizes That Due Process Requires That Counsel Be Appointed in Some Private Custody Disputes.

The Alaska Supreme Court has held that in certain cases, indigent parents are entitled to court-appointed counsel in private child custody proceedings. *See Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979). In *Flores*, the court based its holding on the due process clause of the Alaska Constitution, which is identical to the due process clause of the Washington Constitution. *Id.* at 895 n.6; *see also* Alaska Const. art. I, § 7; Wash. Const. art. I, § 3.[8]

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[8] Other states have not extended the right to court-appointed counsel to custody proceedings in which the state is not a party. *See, e.g.*, *Poll v. Poll*, 256 Neb. 46, 53-54, 588 N.W.2d 583, 588 (Neb. 1999), *disapproved of on other grounds by Gibilisco v. Gibilisco*, 637 N.W.2d 898, 904 (Neb. 2002); *Meyer v. Meyer*, 414 A.2d 236, 238 (Me. 1980). However, as discussed in the text, it is the position of the NWLC that Alaska's

Flores stemmed from a divorce proceeding in which custody of the couple's child was the only contested issue. 598 P.2d at 894. The mother was located in California; the father and the child were located in Alaska. *Id.* Both parents were indigent, but the father was represented by the Alaska Legal Services Corporation ("ALSC"), a legal aid organization. *Id.* The court ruled that the mother had the right to court-appointed counsel. *Id.* at 895-96.

In reaching this decision, the court rejected the idea that there is a per se difference between proceedings involving parental rights to which the state is a party and private disputes solely between parents. *Id.* at 895. The court quoted with approval the following language from a decision of the Ninth Circuit Court of Appeals:

> "Parents are entitled to a judicial decision on the right to counsel in each case. The determination should be made with the understanding that *due process requires the state to appoint counsel whenever an indigent parent, unable to present his or her case properly, faces a substantial possibility of the loss of custody or of prolonged separation from a child.*"

Id. (quoting *Cleaver v. Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974) (emphasis added in *Flores*)). Thus, in deciding whether there was a right to counsel, the court focused on the practical effect of the proceeding on the parent's relationship with the child, rather than on whether the state was actually party to the proceeding. *See id.* at 895-96 ("[M]arriages and divorces are wholly creations of the state. Any provision for child custody in a divorce order is fully enforceable by the state. In this case, [the

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rule is more sound, because as a practical matter there is no difference between losing contact with a child after a state-initiated proceeding or a private custody dispute.

mother] stands to lose a basic 'liberty' just as surely as if she were being prosecuted for a criminal offense.") (footnotes omitted).

The court also emphasized the key role played by counsel in such proceedings, particularly when, as in the present case, the other parent is represented. The court explained that a parent without the aid of counsel is at a

> decided and frequently decisive disadvantage which becomes even more apparent when one considers the emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.

Id. at 896.

Although the court in *Flores* stated that it considered the fact that the father's attorney was in part supported by public funds as relevant, *id.* at 895, 896 n.12, a later case and logic indicate that this is neither a necessary nor determinative factor.[9] Several years after *Flores*, the Alaska Supreme Court held that an indigent father was entitled to court-appointed counsel in a private adoption proceeding in which the mother of his child, represented by private counsel, sought to terminate his rights so that her new husband could adopt the child. *See In re K.L.J.*, 813 P.2d 276, 283-84 (Alaska 1991).

Thus, in Alaska an indigent parent has the right to court-appointed counsel in a private custody dispute if the other parent has counsel and if the case is complex enough to warrant the appointment of counsel.

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[9] Dissenting in part and concurring in part, Justice Connor in *Flores* emphasized that notwithstanding its public support, ALSC is a private corporation, not an agency of the federal or state government. *Flores*, 598 P.2d at 900 n.8 (Connor, J., dissenting in part and concurring in part). In *In re K.L.J.*, 813 P.2d 276, 284 n.10 (Alaska 1991), the majority of the court appeared to accept this view.

2. This Court Should Adopt a Similar Rule Under the Washington Constitution.

The facts of the present case are similar in important respects to the facts of the *Flores* case. First, Ms. Arden risked losing substantial contact with her children. Second, Ms. Arden is indigent. Third, Mr. Halls was represented by counsel, while Ms. Arden was not. Fourth, the case presented complex legal issues.

This Court should follow the lead of the Alaska Supreme Court and recognize that in these unique circumstances, when the opposing party is represented by counsel and severe curtailments of parental rights are on the table, an indigent parent has a right to court-appointed counsel.

V. CONCLUSION

For the foregoing reasons, the NWLC as *amicus curiae* respectfully requests that this Court reverse the orders entered below, remand this case to the trial court, and order the appointment of counsel on remand.

RESPECTFULLY SUBMITTED this _____ day of July, 2004.

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