

MAR 21 2007

No. 57831-6-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

In re the Marriage of:

MICHAEL STEVEN KING, Respondent,

v.

BRENDA LEONE KING, Appellant.

**BRIEF AMICUS CURIAE OF RETIRED WASHINGTON
JUDGES IN SUPPORT OF APPELLANT**

(See inside cover for list of Amici)

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Richard P. Guy, Judge, Superior Court, Spokane County (1977-1981, 1985), Justice, Supreme Court (1989-2001), Chief Justice (1999-2001)

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John W. Riley, Judge, Superior Court, King County (1985-1991)

Richard J. Schroeder, Judge, Superior Court, Spokane County (1990-2003)

Steven Scott, Judge, Superior Court, King County (1988-2005)

Gerard M. Shellan, Judge, Superior Court, King County (1977-1989)

Charles Z. Smith, Judge, Seattle Municipal Court (1965-1966),
Superior Court, King County, (1966-1973), Justice, Supreme Court
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Robert F. Utter, Judge, Superior Court, King County (1964-1969),
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INTRODUCTION

Amici curiae, all of whom have been Washington state Superior Court judges, and are now retired, submit this brief in support of Appellant, Brenda King, to urge reversal of the Superior Court's denial of a new trial. Amici agree with Ms. King's argument that she was denied a fair trial because she was entitled to the appointment of counsel but was compelled to appear *pro se*.

In this brief, amici describe studies that demonstrate the dramatic impact that lack of counsel has on the fairness of judicial proceedings, especially where basic human needs, which includes child custody, are at stake. Amici also describe harms to the judicial system and society that occur when indigent litigants are forced to defend their basic human needs in legal proceedings without the assistance of counsel.

INTEREST OF AMICI

Amici have all served as Washington state Superior Court judges and are now retired. They support efforts to assure that the Washington Constitution's guarantee of access to the courts is available to all persons, regardless of wealth or level of income. They

are dedicated to ensuring that judicial proceedings and their outcomes are fair to all parties, and are conducted in a manner that is efficient and promotes respect for our judicial system. All of these interests are implicated by the issue presented on this appeal.

STATEMENT OF ISSUE

Whether the Washington Constitution requires courts to appoint counsel for litigants unable to afford or obtain pro bono counsel in cases where basic human needs are at stake?

SUMMARY OF ARGUMENT

A core principle of our judicial system is that it should provide equal justice for all. The Washington Constitution gives meaning to this pledge through the guarantee of meaningful access to the courts for all citizens.¹ Yet it is self-evident to judges, practicing attorneys, and thoughtful persons, that in most instances indigent persons without counsel are not receiving the same quality of justice as those with counsel and are effectively deprived of meaningful access to the courts.

¹ The Washington Constitution provides that: “[j]ustice shall in all cases be administered openly, and without unnecessary delay.” Const. Art. I, § 10.

Studies show that indigent persons without counsel receive less favorable outcomes dramatically more often than those with counsel. The disparity in outcomes is so great that the conclusion is inescapable – indigent *pro se* litigants are regularly losing cases that they should be winning if they had counsel.

Efforts to provide pro bono representation for indigent litigants in civil cases have not come close to meeting the need. Accordingly, if the constitutional guarantee of access to the courts is to have any meaning, courts must appoint counsel at least where basic human needs are at stake and there is no other pro bono representation available.²

While we recognize concerns about the cost of appointing counsel for indigent litigants, this does not relieve the courts of their obligation to enforce constitutional guarantees. Further, the significant costs to the judicial system and society that result where litigants lack counsel cannot be ignored. These costs include, for example, the burden faced by judges to make correct rulings when the

² An American Bar Association resolution urges a right to counsel at public expense for low income persons in litigation where “basic human needs” such as “shelter, sustenance, safety, health or child custody” are at stake. A.B.A. Civil Right to Counsel Resolution 1 (2006), (available at: <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.)

record is incomplete or contains material that would have been excluded if an unrepresented party had been represented, the extra time required of judges and judicial staff to guide *pro se* litigants through court proceedings, and the burden of litigating cases that both parties represented by counsel would likely have settled. Equally important, these costs also include the erosion of public confidence in the judicial system when disparate and often unjust outcomes for indigents unable to obtain counsel create an appearance of a wealth-based two-tier judicial system and the costs to the community when litigants or other affected persons are unjustly deprived of basic human needs.

Far too many indigent Washington litigants, like Brenda King, are forced to face legal challenges that threaten the basic necessities of life (such as custody of children, shelter and protection from violence) without the assistance of counsel. Because other efforts to address this problem have proved inadequate, the only solution is the judicial appointment of counsel at least in cases involving basic human needs.

I. Counsel Is Essential to Meaningful Access to Courts Where Basic Human Needs Are at Stake

The American judicial system is inherently adversarial and complex. Courts depend on the parties to assume the primary and costly responsibilities of finding and presenting controlling legal principles, uncovering and presenting relevant facts, following complex rules of evidence and procedure and presenting claims in a cogent and efficient manner. Performing these responsibilities requires the expertise that lawyers spend three years of graduate education and years of training and practice to acquire. A.B.A. Presidential Task Force on Access to Civil Justice, *Executive Summary Report with Recommendation on Civil Right to Counsel* 9, Aug. 7, 2006.³

With rare exception, as the Washington State Bar Association's amicus brief well demonstrates, nonlawyers lack the knowledge and expertise to present an effective case and are destined to suffer the consequences. Appellant's brief persuasively details how, in this case, Ms. King's inability to represent herself denied her meaningful access to the courts and a fair trial.

³ Available at: <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

As described below, empirical studies show that Ms. King's experience is all too common and that providing an attorney to indigent parties in civil cases, in which basic human needs are at stake, is essential to ensure fairness and just outcomes.

Empirical studies demonstrate that indigent litigants without counsel receive less favorable outcomes dramatically more often than those with counsel. Stanford University professor Rebecca Sandefur analyzed the results of fourteen published studies on the impact of counsel, which collectively surveyed over 9,000 civil cases in the United States and the United Kingdom. Her analysis found that parties represented by a lawyer, on average, were nearly *three times* more likely to receive a favorable outcome than parties not represented by a lawyer. Rebecca Sandefur, *Lawyer, Non-Lawyer and Pro Se Representation and Trial and Hearing Outcomes* 15 (June 30, 2006) (unpublished manuscript on file with the Brennan Center). This disparity in outcomes is so great that the conclusion is inescapable that *pro se* litigants are losing cases that they should win. Most disturbing, these disparate outcomes occur even in cases affecting the basic

necessities of life, such as the ability to raise one's children, to find shelter, and to be free from violence.

It is clear, for example, that lawyers are critically important to ensure just outcomes in custody proceedings. Harvard law professor Robert Mnookin conducted a comprehensive study of 900 families involved in custody proceedings. The study found that attorney-represented mothers were twice as likely as *pro se* mothers, like Brenda King, to be awarded joint or full custody when opposing fathers are represented by counsel. Robert Mnookin, et al., *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating? In Divorce Reform at the Crossroads*, 37, 63 (New Haven: Yale University Press, 1990). A study of 300 custody cases from King County, Washington, similarly found that shared parenting plans are as much as 42% more likely where both parties are represented by counsel than in cases where one party appears *pro se*. See Jane Ellis, *Plans, Protections and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. Mich. J.L. Reform 65, 132 (1990).

The results of a study examining the effects of legal representation in New York City's Housing Court - where virtually all landlords are represented and only a few low income tenants are represented - found that the availability of counsel dramatically affected the outcomes in litigation. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Review 419, 428 (2001). The study involved randomly providing counsel to tenants waiting in line at the clerk's office in the Manhattan Housing Court and comparing the outcomes for the represented tenants against a control group of unrepresented tenants.

The results of the housing study are striking. Where a tenant was represented, a final judgment was entered against him in only 21.5% of cases, compared with final judgments in 50.6% of cases against unrepresented tenants. *Id.* at 428. Moreover, represented parties were more likely to obtain stipulations of repair (63.8% to 25.4%), and rent abatements (31.3% to 2.3%) and were less likely to receive warrants of eviction (10% to 44.1%). Most importantly, because the study was a true randomized experiment, the "differences

in outcomes can be attributed solely to the presence of legal counsel . . . [not the] merits of the case.” *Id.* at 429.

The critical effect of representation has also been demonstrated in the context of domestic violence cases. University of Baltimore law professor Jane Murphy examined 406 women who sought state intervention to protect themselves from domestic violence. The study found that having an attorney substantially increased the chances of obtaining a protective order: 83% of attorney-represented women received protective orders, while less than 32% of *pro se* women obtained protective orders. Jane C. Murphy, *Engaging the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U.J. Gender Soc. Pol’y & L. 499, 511-12 (2003).

These studies demonstrate that a lawyer is critical to ensure equal justice for indigent litigants in cases where basic human needs are at stake. See A.B.A. *Executive Summary Report on Civil Right to Counsel*, *supra*, at 9 (noting that “studies consistently show that legal representation makes a major difference in whether a party wins in cases decided by the courts,” and passing a resolution calling for an expanded right to counsel in civil cases involving basic human needs).

As we discuss in section IV, efforts to provide pro bono representation for indigent litigants have not come close to meeting the need. Accordingly, the failure to appoint counsel effectively renders the guarantee of access to the courts meaningless.

II. The Washington Constitution's Guarantee of Access to the Courts Requires Courts to Appoint Counsel in Cases Involving Basic Human Needs Where There Is No Other Source of Counsel

As described above, the Washington Constitution's guarantee of access to the courts is rendered meaningless when an indigent party is forced to litigate, without counsel, a case that threatens the loss of basic human needs. Requiring court-appointed counsel for indigents may not be necessary in all cases. But a reading that gives meaning to the Washington Constitution's guarantee of access to the courts requires court appointment of counsel at least where basic human needs are at stake. Determining the scope of constitutional guarantees is "emphatically the province and duty of the judiciary." *See Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 496 (1978). Moreover, when the legislature fails to act, courts have the power to devise effective remedies to enforce constitutional guarantees. *Id.* at

503 (“the Legislature . . . cannot curtail mandatory provisions by its silence. The Judicial obligation to protect constitutionally declared fundamental rights of individuals is as old as the United States”). Accordingly, we submit that a court has no choice but to appoint counsel in cases involving basic human needs where a litigant cannot afford counsel and is unable to obtain pro bono representation through legal aid programs or otherwise.

We recognize there are concerns about the costs of appointing counsel, but that does not relieve the court of its obligation to enforce the Constitution nor change the fact that the court’s failure to appoint counsel denies a right of access to the courts guaranteed all persons by the Constitution. Courts have frequently enforced a person’s constitutional rights of access to courts notwithstanding the costs of enforcing that right. *See Bounds v. Smith*, 430 U.S. 817, 825 (1977) (“[T]he cost of protecting a constitutional right cannot justify its total denial”); *Whitney v. Buckner*, 107 Wn.2d 861, 889-90 (1987) (same). Moreover, as we describe below, concerns about the cost of appointing counsel ignore the significant costs to the judicial system, the parties and society of a failure to appoint counsel.

III. Failure to Provide Counsel in Cases Involving Basic Human Needs Has Costs for the Judicial System and Has Other Social and Economic Costs

Any consideration of the cost of appointing counsel must take into account the significant costs to the judicial system and society where litigants are forced to proceed without counsel.

A. The Costs to the Judicial System

Judges depend on parties to present relevant evidence and focused legal arguments. Without assistance from attorneys, *pro se* litigants frequently fail to present critical facts and legal authorities that judges need to make correct rulings. *Pro se* litigants also frequently fail to object to inadmissible testimony or documents and to counter erroneous legal arguments. This makes it difficult for judges to fulfill the purpose of our justice system - to make correct and just rulings. As Federal District Judge Robert W. Sweet observed, "every trial judge knows [that] the task of determining the correct legal outcome is rendered almost impossible without effective assistance of counsel." Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998).

Judges also face a difficult ethical quandary in *pro se* cases. Without assistance from attorneys, *pro se* litigants frequently expect judges to assist them in navigating complex procedural rules, as well as completing and filing proper forms. A former Chief Disciplinary Counsel of the Washington State Bar Association well summarized the ethical dilemma this poses for judges:

If a judge passively allows a *pro se* to jeopardize his or her claim or defense by significant errors, the unrepresented party may not in fact receive either a meaningful hearing or due process. On the other hand, if a judge assists the unrepresented party, the opposing party and that party's lawyer may well feel they have been denied a fair and impartial hearing since the judge has assisted the *pro se* against them.

Barrie Althoff, *Ethics and the Law: Ethical Considerations for Lawyers and Judges When Dealing with Unrepresented Persons*, Wash. St. Bar News, Jan. 2000.⁴

The lack of counsel also results in time-consuming burdens for judges and the judicial system. The Massachusetts Probate and Family Court Department studied the impact of *pro se* litigation on case management and found that:

⁴ Available at: <http://www.wsba.org/media/publications/barnews/archives/2000/jan-00-ethics.htm>.

Too much time is spent at the judicial level in educating *pro se* litigants, and in determining the procedural status of the case. These problem areas result in serious delays in the case, repeated court appearances, and substantial time demands placed on the judges, registers, and other support staff ... as well as significant expense for the litigant represented by an attorney and frustration for the *pro se* litigant.

Charles P. Kindregan, Jr. et al., Mass. Probate and Family Court Dep't, *Pro Se Litigants: The Challenge of the Future* 16 (1997)⁵; see also Conference of Chief Justices and Conferences on State Court Administrators, *Final Report of the Joint Task Force on Pro Se Litigation* 4 (2002).⁶ The case before the court is illustrative: the trial judge struggled to compensate for Brenda King's unfamiliarity with basic courtroom procedure and expressed frustration with how much time he had to spend explaining how to present evidence, question witnesses and move the case forward. See App. Br. at 7-9.

In addition, unrepresented parties rarely take advantage of dispute resolution tools like mediation or settlement. A study of cases

⁵ Available at <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/prosefinalreport.pdf>.

⁶ Available at http://www.ncsconline.org/WC/publications/Res_ProSe_FinalReportProSeTaskForcePub.pdf.

involving the random provision of counsel to indigent litigants in New York City Housing Court found that attorney-represented parties settled more than 31% of the time, while self-represented parties settled 2% of the time. Seron et al., at 427. This means that judges' time is frequently spent adjudicating cases that would have settled long before had both parties been represented by counsel.

When *pro se* litigants do obtain settlements and judgments, they have a difficult time ensuring compliance. Richard Zorza, *Changing the System so that Self-Represented Litigants Receive Compliance with Judgments and Orders in The Future of Self-Represented Litigation: Report from the March 2005 Summit* 59 (Nat'l Ctr for State Courts 2005). Paula Hannaford-Agor, who has studied *pro se* issues extensively for the National Center for State Courts, explains that lack of understanding of how to obtain enforcement leads these parties back into court:

[S]elf-represented litigants are rarely knowledgeable about how to enforce ... judgments in any meaningful way ... which brings them back to the beginning of the litigation cycle again: diagnosis of their legal options and the associated implications, the logistics of enforcement, and the most effective strategies and resolutions.

Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 Ct. Rev. 8, 13 (2003).

In addition, appointing counsel for indigent litigants would decrease the likelihood of time consuming post-judgment motions. New York City tenants represented by lawyers were considerably less likely than *pro se* tenants to return to Housing Court after a decision had been reached. Seron et al., 35 *Law & Soc'y Rev.* at 428 (finding 13% of represented parties, as compared to 29% of unrepresented parties, filed post-judgment motions). Such motions are “especially burdensome for the Court because they require a case to be reviewed and reopened after what was supposed to have been a final resolution of the dispute.” *Id.*

Finally, the failure to appoint counsel also has another significant cost to the judicial system: because it is a fundamental tenet of our society that, like liberty, justice is “for all”, the disparate and often unjust outcomes received by indigent *pro se* litigants erode confidence in our judicial system. “[E]very day, the administration of justice...is threatened...by the erosion of public confidence caused by

lack of access.” Chief Justice Ronald George, State of Judiciary Address to the California State Bar Association (Sept. 8, 2001).⁷ A national study conducted by Kathleen Hall Jamieson, Director of the Annenberg Center of Public Policy at the University of Pennsylvania, found that 43% of Americans who had recent exposure to the court system believe the courts favor wealthy parties. Press Release, The Annenberg Center of Public Policy Research at the University of Pennsylvania, *Americans Trust Courts But Also Believe Them Biased, Surveys Find 2* (Sept. 28, 2006).⁸

Providing attorneys for indigent litigants would help to improve confidence in the judicial system. In October 2003, the Washington State Supreme Court’s Task Force on Civil Equal Justice Funding issued the results of an exhaustive study assessing the civil legal needs of Washington’s poor (the “Civil Legal Needs Study”). The Civil Legal Needs Study found that only 21 percent of indigent persons, who sought but did not obtain representation for their legal

⁷ Available at: <http://www.courtinfo.ca.gov/reference/soj0901.htm>.

⁸ Available at: http://www.annenbergpublicpolicycenter.org/Releases/Release_Court_20060928/Courts_Release_20060928.pdf.

problems, felt positive about the justice system. Task Force on Civil Equal Justice Funding, Washington Supreme Court, *The Washington State Civil Legal Needs Study*, at 56 (Sept. 2003) (available at <http://www.courts.wa.gov>). By contrast, more than half of indigent litigants in Washington, who sought and received assistance from an attorney, held positive attitudes toward the judicial system. *Id.*

B. The Costs to Society

Unjust outcomes resulting from the inability to afford counsel also have significant costs for society. Tenants unjustly evicted from their homes may swell the rolls of homeless persons, imposing both economic and social costs. Such costs also flow from unjust outcomes in custody cases, where children's education and psychological and social well being are at stake. As studies have shown, "the quality of the relationship between a child and his or her primary residential parent is the strongest predictor of that child's psychological well being." Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 Psychol. Sci. Pub. Int. 1, 14 (American Psychological Society 2005); see also Teresa M. Cooney, *Young Adults' Relations with Parents:*

The Influence of Recent Parental Divorce, 56 J. Marriage & Family 45 (Feb. 1994). Custody outcomes affect children's school achievement, and later rates of unemployment and early childbearing. Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. Fam. Psychol. 91 (2002).

IV. Appointment of Counsel for Indigent Litigants Facing the Loss of Basic Human Needs Is Necessary When Pro Bono Representation is Unavailable

Washington has made a number of efforts to address the critical need for attorney representation for those who cannot afford it. The state has made funding available for civil legal services. See RCW 2.53.030. Nearly every county in Washington offers an organized volunteer legal program that provides free legal services to indigent persons. Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 Seattle J. for Soc. Just. 571, 575 (2004). In addition, the Washington Bar Association strongly encourages attorneys to provide *pro bono* representation for indigent persons.

Despite these efforts, as the Washington State Bar Association's amicus brief and the Civil Legal Needs Study show, the legal needs of indigent persons in Washington remain largely unmet. The stark reality is that too many indigent Washington litigants, like Brenda King, are forced to face legal challenges that threaten basic necessities of life without counsel. If our state Constitution's guarantee of access to courts is to remain meaningful, we submit that courts must appoint counsel for indigent persons in cases where basic human needs are involved and pro bono representation is not available.

CONCLUSION

For the foregoing reasons, we urge the court to reverse the Superior Court's denial of a new trial and direct the new trial to proceed in accord with the principles we respectfully urge in this brief.

RESPECTFULLY SUBMITTED this 21st day of March, 2007.

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⁹ Heather Keegan and Judy Harvey, law students, provided assistance under the supervision of counsel.