IN THE SUPREME COURT OF THE STATE OF ALASKA

OFFICE OF PUBLIC ADVOCACY,

Appellant,

vs.

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
THE HONORABLE MARK RINDNER, JUDGE

BRIEF OF APPELLEE ALASKA COURT SYSTEM

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Constitutional Provision:

Alaska Constitution, Article I, § 7

> **Due Process.** No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Statute:

AS 44.21.410 Powers and Duties.

(a) The office of public advocacy shall

(1) provide the duties of the public guardian under AS 13.26.360 – 13.26.410;

(2) provide visitors and experts in guardianship proceedings under AS 13.26.131;

(3) provide guardian ad litem services to children in child protection actions under AS 47.17.030(e) and to wards and respondents in guardianship proceedings who will suffer financial hardship or become dependent upon a government agency or a private person or agency if the services are not provided at state expense under AS 13.26.025;

(4) provide legal representation in cases involving judicial bypass procedures for minors seeking abortions under AS 18.16.030, in guardianship proceedings to respondents who are financially unable to employ attorneys under AS 13.26.106(b), to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency, to indigent parents or guardians of a minor respondent in a commitment proceeding concerning the minor under AS 47.30.775;

(5) provide legal representation and guardian ad litem services under AS 25.24.310; in cases arising under AS 47.15 (Uniform Interstate Compact on Juveniles); in cases involving petitions to adopt minor under AS 25.23.125(b) or petitions for termination of parental rights on grounds set out in AS 25.23.180(c)(3); in cases involving petitions to remove the disabilities of a minor under AS 09.55.590; in children's proceedings under AS 47.10.050(a) or under AS 47.12.090; in cases involving appointments under AS 18.66.100(a) in petitions

for protective orders on behalf of a minor; and in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests;

(6) develop and coordinate a program to recruit, select, train, assign, and supervise volunteer guardians ad litem from local communities to aid in delivering services in cases in which the office of public advocacy is appointed as guardian ad litem;

(7) provide guardian ad litem services in proceedings under AS 12.45.046 or AS 18.15.355 – 18.15.395;

(8) establish a fee schedule and collect fees for services provided by the office, except as provided in AS 18.85.120 or when imposition or collection of a fee is not in the public interest as defined under regulations adopted by the commissioner of administration;

(9) provide visitors and guardians ad litem in proceedings under AS 47.30.839;

(10) provide legal representation to an indigent parent of a child with a disability; in this paragraph, "child with a disability" has the meaning given in AS 14.30.350;

(11) investigate complaints and bring civil actions under AS 44.21.415(a) involving fraud committed against residents of the state who are 60 years of age or older; in this paragraphs, "fraud" has the meaning given in AS 44.21.415

(b) The commissioner of administration may

(1) adopt regulations that the commissioner considers necessary to implement AS 44.21.400 – 44.21.470;

(2) report on the operation of the office of public advocacy when requested by the governor or legislature or when required by law;

(3) solicit and accept grants of funds from governments and from persons, and allocate or restrict the use of those funds as required by the grantor.

ISSUES PRESENTED

1. If the trial court was correct when it ruled that indigent parties facing opponents represented by private counsel in custody disputes must be given their own counsel at State expense, then should it be the Office of Public Advocacy that supplies the appointed counsel pursuant to AS 44.21.410(a)(4) rather than the Alaska Court System under Administrative Rule 12?

2. Alternatively, did the trial court err when it held that the due process clause of the Alaska Constitution requires the State to provide counsel to indigent parties facing opponents represented by private counsel in custody disputes, given that the State has not brought its resources to bear on the other side of the dispute, as in *Flores v. Flores*;[1] that there are statutory and other procedural protections that govern a custody decision; and that the cost and administrative burden to the State in providing counsel under such common circumstances are likely to be very high?[2]

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[1] 598 P.2d 893, 896 (Alaska 1979).

[2] This presents an alternative ground in support of the trial court's decision to relieve the Court System of the burden of providing appointed counsel. *See Brannon v. Continental Casualty Co.*, 137 P.3d 280, 289 n. 44 (Alaska 2006); *Cabana v. Kenai Peninsula Borough,* 50 P.3d 798, 801 (Alaska 2002) ("We are not bound by the reasoning articulated by the superior court and can affirm a grant of summary judgment on alternative grounds, including grounds not advanced by the superior court or the parties") (internal quotation marks and citations omitted). Although OPA chose not to directly raise or brief the argument of whether appointed counsel was constitutionally required at all, the Court System must assume that this Court would want to address whether appointed counsel was necessary before deciding which entity should provide it. The issue was fully briefed below (*see* Exc. 97-109, 137-49); and the briefing schedule here has been rearranged specifically to ensure that Jonsson has the opportunity to meet it in her brief, *see* Appellee Jonsson's Unopposed Motion to Alter the Briefing Schedule, July 16, 2008; Order for Extension, July 31, 2008. .

SUMMARY OF ARGUMENT[3]

The Court System recognizes the hardship that a lack of legal representation can cause to civil litigants in almost any context. It recognizes that the number of unrepresented parties in custody proceedings is among the highest in all categories of civil cases.[4] This means that the appointment of counsel for indigent parties in private custody disputes under Administrative Rule 12(e), in contexts not anticipated up to now, is likely to have dramatic effects on the Court System's budget.

If the trial court was correct when it ruled that due process requires publicly-appointed counsel for indigent parties facing opponents who are represented by *private* counsel, then the severability doctrine of constitutional interpretation requires that it be OPA, not the Court System, that provides appointed counsel under AS 44.21.410 (a)(4).

Alternatively, the Court should decide that due process does not require the appointment of counsel in cases like this one, because the State has not brought its resources to bear on one side of the dispute, as in *Flores*; because of the statutory and other procedural protections that govern a custody decision; and because of the likely

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[3] The Court System accepts OPA's well-crafted Statement of the Case (OPA Brief at 2-13).

[4] In FY 2007, Anchorage courts heard 526 divorce cases with children, 334 custody actions between unmarried parents, and 716 post-judgment actions to modify custody, support, or visitation. *See* "FY-07 – Fourth Quarter Filings and Dispositions" (August 2007), published by the Office of the Administrative Director, Alaska Court System; and a special statistical report produced by the same office on September 17, 2007. *See also* Exc. 173-74.

cost and administrative burden to the State. Public policy may require it, but the Constitution does not, and it is therefore an issue for the legislature.

ARGUMENT

A. If AS 44.21.410(a)(4) Unconstitutionally Discriminates, the Offending Classification May be Severed, Leaving the Responsibility to Provide Counsel with OPA, Where the Legislature Intended It

In *Flores v. Flores,*[5] this Court applied the due process clause of the Alaska Constitution to hold that if one litigant in a private custody dispute had counsel provided by the State, the opposing litigant, if also indigent, was entitled to State-appointed counsel as well. "We emphasize that our holding in this opinion is limited to cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency." *Id.* at 896 n. 12. The Alaska legislature conformed statutory law to the *Flores* decision when it created OPA in 1984. By statute, "the office of public advocacy shall . . . provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel *provided by a public agency. . . .*" AS 44.21.410(a)(4) (emphasis added).

In this case, the father was represented by private counsel, and the mother was unrepresented, at least initially. *See* Exc. 3-4, 7. In evaluating the mother's request for appointed counsel, the trial court concluded that the distinction made by the OPA statute – whether the opposing party's counsel was "provided by a public agency" – was not a meaningful one for equal protection purposes. The trial court reasoned:

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[5] 598 P.2d 893, 896 (Alaska 1979).

> In effect, [under AS 44.21.410(a)(4)] parents who have spouses who are poor enough to get the assistance of a legal services attorney are afforded the opportunity to meaningfully access the courts to fight for custody, while those who have resourced opposing parties are not. In this case, had Mr. Gordanier been as poor as Ms. Jonsson and able to get representation through a public agency, Ms. Jonsson would have representation also. The distinction between a poor vs. a resourced opposing litigant should not be the deciding factor as to whether someone can adequately protect their rights to their child.

Exc. 72.

If the trial court was right in ruling that Ms. Jonsson has a due-process right to counsel, then there is no good basis for the OPA statute's distinction between litigants with "a poor vs. a resourced opposing litigant." The right to equal protection "is a command to state and local governments to treat those who are similarly situated alike." *Stanek v. Kenai Peninsula Borough*, 81 P.3d 268, 270 (Alaska 2003). The equal protection clause "guarantees not only equal 'protection,' but also equal 'rights' and 'opportunities' under the law." *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005). Disparate treatment of those who are similarly situated can only be justified by a legitimate reason, and "the enactment creating the classification [must bear] a fair and substantial relationship to that reason." *Stanek*, 81 P.3d at 270, *quoting Gonzalez v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994).

The only reason that AS 44.21.410 makes the distinction it does is because providing appointed counsel to parents whose opponents are represented by a public agency was required after *Flores*, whereas providing appointed counsel to parents in Ms.

Jonsson's position was not.[6] If this is a constitutionally deficient rationale – if *Flores* actually encompasses both categories of parents – then there is no "legitimate reason" for the statutory classification. The pertinent question is simply whether "the challenged law treats similarly situated persons differently." *ACLU v. State*, 122 P.3d at 787. Expanding the class of people who are entitled to receive a particular government benefit or service is a common result of an equal protection analysis. *See State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 914 (Alaska 2001) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963), among other cases in which "a judicial decision upholding constitutional rights required state expenditures to support those rights").

1. An unconstitutional limitation may be severed

The legislative distinction that the trial court found objectionable comes entirely from the five-word statutory phrase "provided by a public agency." That phrase can be severed from AS 44.21.410(a)(4) without doing violence to either the statute's remaining language or, more importantly, its intent. Since severance would maintain the effectiveness of the bulk of the statute, it is by far the preferred judicial course. And under the statute as constitutionally applied, it is OPA – not the Court System – that has the responsibility to provide appointed counsel in a case like this one.

The Alaska Statutes contain a general severability clause:

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[6] That the classification in AS 44.21.410 (a)(4) was drawn from *Flores* is not debatable, as OPA demonstrated to the satisfaction of the Court of Appeals in *Office of Public Advocacy v. Superior Court*, 779 P.2d 809, 810 (1989). OPA argued unsuccessfully in that case that the language at issue here did not require it to provide counsel to indigent parents in a delinquency proceeding.

> Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language: "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

AS 01.10.030. This statute "reverses the common law presumption against severability and creates a slight presumption in favor of severability." *State v. Kenaitze Indian Tribe*, 894 P.2d 632, 639 (Alaska 1995). The "key question" to severability "is whether the portion remaining, once the offending portion of the statute is severed, is independent and complete in itself so that it may be presumed that the legislature would have enacted the valid parts without the invalid part." *Kenaitze Indian Tribe*, 894 P.2d at 639, *quoting Sonneman v. Hickel*, 836 P.2d 936, 941 (Alaska 1992).

In *Kenaitze Indian Tribe*, this Court reviewed a complex, multi-factor statutory test for "Tier II" permits for subsistence hunting and fishing. One factor, "the proximity of the domicile of the subsistence user to the stock or population," was found to be unconstitutional on several grounds. The Court applied the doctrine of severability, however, to rescue the remainder of the statute. *Kenaitze Indian Tribe*, 894 P.2d at 639. First, the Court concluded that simply eliminating the offending factor from the statutory test resulted in a law that "as thus redacted is logically complete and capable of being given legal meaning." *Id.*

The Court next observed that, although "[w]hether the legislature would have intended the subsection as redacted to stand had it known that the proximity of the domicile clause would be held unconstitutional is a question which cannot be answered

with complete confidence," subsistence was such an important issue that the legislature must have intended a test of some kind to be permanently in place, in order to avoid "periods in which individuals needfully dependent on subsistence are deprived of an opportunity to harvest fish or game." *Id.* Given both the importance of the subject-matter and "the statutory presumption in favor of severability," the Court severed the "proximity of the domicile" factor from the statute and upheld what remained. *Id.* at 639-42.

2. Here, a redacted statute is still logical

The *Kenaitze Indian Tribe* analysis yields a similar result here. Alaska Statute 44.21.410(a)(4) currently requires that OPA "provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel *provided by a public agency"* (emphasis added); but the statute will be just as "logically complete and capable of being given legal meaning" if the italicized phrase is redacted:

> The office of public advocacy shall . . . provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel. . . .

AS 44.21.410(a)(4). The redacted form of the statute effectuates the trial court's Order, just as the statute in its original form effectuated *Flores*.

The redacted statute also remains flexible enough to accommodate situations in which one party can be made to bear the financial burden of opposing counsel. In any case involving OPA appointments, the court is required by rule to consider a variety of factors in its indigency determination, including "the person's ability to afford

representation based on the particular matter and the complexity of the case." *See* Administrative Rule 12(c)(2). In the particular context of a civil custody case, a "person's ability to afford representation" is based not just on his or her own resources but "on the relative economic situations and earning powers of the parties." *Pugil v. Cogar*, 811 P.2d 1062, 1067 (Alaska 1991), *quoting Bergstrom v. Lindback*, 779 P.2d 1235, 1238 (Alaska 1989). Under the redacted version of AS 44.21.410 (a)(4), thus, the court retains the latitude to decide, under Administrative Rule 12(c)(2), that it is the opposing party rather than OPA who should pay for counsel for the indigent party.

3. A redacted statute still meets the intent of the legislature

More importantly, the OPA statute as redacted continues to effectuate the intent of the legislature. The bill creating OPA, SB 312, was introduced by the Governor at the behest of the Court System and was intended to shift responsibility for court-appointed counsel from the Court System – an agency that was essentially judicial – to a new executive agency to be administered by the Department of Administration. OPA was to have its own staff attorneys and its own appointment lists, and it was expected to be both more cost-effective and more capable of serving an advocacy function than the Court System was proving to be.

The legislative history includes an explanation of the bill's intent by Karla Forsythe, then-General Counsel for the Court System, who testified before the House Judiciary Committee in March 1984.

> Karla Forsythe takes the witness chair. The Court System asked this [SB 312] to be introduced.

> [SB 312] [c]reates an office of public advocacy. Takes several functions already established[,] basically public guardian and criminal representation when the attorney has a conflict of interest[,] and transfers these functions from the Court System to the Administration. The reason we asked the Governor to introduce this bill is because it will be the executive branch that will be in charge of these functions. *Transfer non-judicial services from the court.* Guardian, paying and appointed defenders. It is viewed that money can be saved by creating this new office. The savings come from using staff attorneys and contracts. This office will take care of attorneys that contest that the defenders appointed are not always a specialist in the area. There are some cases in court concerning this now.
>
> Rep. Liska asks if she feels that the Department of Administration can handle this area better than the Court System.
>
> Ms. Forsythe answers yes because of *theadvantages of having an office that is specialized in one area.* She believes that it will be administered efficiently.

Exc. 111 (emphasis added). In later testimony before the House Finance Committee, Forsythe reiterated the functional advantage of separating the advocacy function from the judicial:

> [She] said that the administration of advocacy services would be something the court should not be involved with. She said the court should be impartial, and shouldn't be helping out on one particular side as was happening at this time.

Exc. 120; *see also* Exc. 126 ("Senator Josephson advised of a question of inappropriateness in having a judge appoint the advocate who is to persuade the judge. Removal of this process from the court system is deemed desirable").

Further testimony before both the House and Senate Finance Committees stressed the financial as well as the logistical advantages of transferring advocacy functions from the Court System to OPA. Testifying before the Senate Finance Committee, Art Snowden, then-Administrative Director of the Court System, emphasized the financial

difficulties that the Court System was having in providing appointed counsel under the administrative rules when the hourly rates it was allowed to pay were dramatically below market. *See* Exc. 123. The Court System was defending several lawsuits in which attorneys challenged their appointments on constitutional grounds. *See* Exc. 123-24, 124-25. Snowden noted that regardless of the Court System's low hourly rates, the Public Defender Agency had proven itself able to handle cases much more efficiently with its own staff attorneys, and it was expected that OPA would follow the Public Defender model. Exc. 124, 125 (comparing average costs of cases handled by Public Defender and private bar under appointment by Court System). Fiscal notes from the Court System and the Division of Administration thus contemplated the transfer of "the Court System's [entire] budget for the advocacy function to Administration," reduced only to reflect OPA's anticipated increase in efficiency. *See* Exc. 127; Exc. 121-22.

While this history does not discuss civil custody cases directly, it strongly supports the conclusion that the OPA law was intended to transfer *away from* the Court System as much of the advocacy function as could reasonably be identified at the time to OPA, an agency of the executive with a particular expertise in matters of guardianship, the rights of minors, and custody. Alaska Statute 44.21.410, which lists OPA's duties, encompasses practically every proceeding in which state-appointed counsel may be required and was not already provided by the Public Defender Agency: guardianship proceedings, minor abortions, civil commitments, petitions for the termination of parental rights, petitions to remove the disability of minority, petitions for protective orders on behalf of minors, actions involving the defrauding of elder Alaskans, and cases in which

the Public Defender Agency has conflicts of interest. The statute's history of regular amendments shows a constant expansion of the law to cover whatever new appointments were required by either court decision or statute. In short, there is no reason to believe that the legislature would not have used SB 312 to accommodate the result of the 1979 *Flores* decision no matter what it had been – even if it had concluded that *every* indigent parent involved in a civil custody dispute had a right to counsel. Had that been the requirement of *Flores*, there is little doubt but that the legislature would have passed the OPA law in the redacted form the Court System advocates here.

4. That Administrative Rule 12(e) Provides a Back-up for the Provision of Counsel Does Not Resolve the Issue

One of OPA's primary contentions on appeal is that there cannot be an equal protection problem in the OPA statute, justifying severance, because it is not "the only source through which an indigent party could obtain representation in a civil custody case when the opposing party is represented by counsel." OPA Brief at 16. Under OPA's reasoning, as long as Administrative Rule 12(e) (1) exists as a sort of backstop to catch all constitutionally-required appointments not expressly addressed by statute, any law that provides counsel to some litigants but not others cannot fail on equal protection grounds. *See* OPA Brief at 16-24.

This argument is circular. Administrative Rule 12(e) (1) authorizes appointments only when "the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, *but in the opinion of the court is required by law or rule.*" (Emphasis added.) Appointment of counsel for Ms. Jonsson in this case is not "required by law or rule" unless it is the

Alaska Constitution that requires it; and if the Alaska Constitution requires it, then the classification that AS 44.21.410(a)(4) drew from *Flores* has no "legitimate reason" and violates equal protection. *See Stanek,* 81 P.3d at 270.

As OPA formulates the issue, Alaska's courts would never have to decide that a statutory classification with regard to the appointment of counsel is unconstitutional, no matter how invidious, because Administrative Rule 12(e)(1) is always there as a backstop. But it is the court's responsibility to decide constitutional issues that are fairly presented. Suppose, for example, that the OPA statute provided counsel for fathers whose spouses were represented by public agencies but not for mothers facing the same type of opposition. According to OPA, this would not implicate equal protection concerns because counsel for mothers, if required by due process, could always be provided by Rule 12(e)(1); the only remedy for the legislature's discrimination is legislative change.

But those who are similarly situated must be treated "alike" (*Stanek*, 81 P.3d at 270), not just similarly under roughly equivalent government programs. If court-appointed counsel is required for persons in Ms. Jonsson's circumstances, then the OPA statute must be read to provide it.

B. The Court May Affirm the Trial Court's Order on the Basis of the GAL Appointment

In requiring OPA to provide appointed counsel in this case, the trial court did not rely on the Court System's suggestion that it simply sever the classification in AS 44.21.410 (a)(4) that it found constitutionally suspect. The court used a different rationale: that the OPA-provided guardian *ad litem* ("GAL") was an "opposing party" for purposes of the OPA statute, thus triggering the other side's right to an OPA lawyer. *See* Exc. 238-42.

OPA is statutorily required to "provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency." AS 44.21.410(a)(4). If this Court accepts the trial court's conclusion that a child represented by a GAL is a publicly-represented "opponent" for purposes of the right to appointed counsel under *Flores*, it follows that the child is an "opposing party . . . represented by counsel provided by a public agency" for purposes of the statute, triggering representation by OPA, the agency with the relevant institutional expertise.

The phrase "opposing party" has no fixed meaning but should be interpreted broadly to accomplish the purpose of the statute or rule that employs it.[7] It cannot be disputed that the purpose of AS 44.21.410(a)(4) was to effectuate the constitutional principle declared in *Flores*. *See Office of Public Advocacy v. Superior Court*, 779 P.2d

[7] *See Transamerica Occidental Life Insurance Co. v. Aviation Office of America, Inc.*, 292 F.3d 384, 391 (3rd Cir. 2002) (term "opposing party" in Fed.R.Civ.P. 13(a), addressing when counterclaims are compulsory, is broadly construed to include non-parties in privity with litigants).

809, 810 (Alaska App. 1989) ("OPA has demonstrated . . . that the language of the statute was derived from *Flores*," construing statute as also encompassing delinquency proceedings in which State seeks custody). If *Flores* requires appointed counsel when a GAL is involved in a civil custody suit, then AS 44.21.410(a)(4) should be read, if possible, to accommodate that appointment.

This does not do violence to the statute's plain language. First, a child may be viewed as a "party" to custody litigation. "[T]he child is the person most interested in litigation over his custody, even though his name is not on the caption of the pleadings, which indicate that formally the litigation is between his parents." *Veazey v. Veazey*, 560 P.2d 382, 386-87 (Alaska 1977); *see also id.* at 387 n. 6 ("the child ought to be treated as a player, not as the football, in the game of life").

Second, the child's representation is sometimes (though need not always be) "opposing" the interests of the indigent parent. The GAL, in representing the child, "is in every sense the child's attorney, with not only the power but the responsibility to represent his client zealously and to the best of his ability." *Id.* at 387. Independent representation of the child's best interests often leads to conflicts with the interests of one or both parents. *Id.* at 388-89. Indeed, this Court has observed that "many, though not all, guardians ad litem will . . . advocate that custody be given to one parent and not the other," *id.* at 389, thus drawing an even starker adversarial relationship between the GAL and one parent.

It is not a semantic stretch, therefore, to conclude that a GAL-represented child may, at least in some cases, be an "opposing party." If a GAL-represented child is an

"opponent" for purposes of triggering the right to appointed counsel under *Flores*, then logically he or she must be an "opposing party" for purposes of imposing the obligation to provide counsel upon OPA. Logical inconsistency can thus be avoided while satisfying both the language and the intent of AS 44.21.410(a)(4).

C. Alternatively, Due Process Did Not Require State-Appointed Counsel in This Case

If this Court does not affirm the trial court's decision to require OPA to bear the cost of Ms. Jonsson's appointed counsel, then, rather than shifting the cost to the Court System under Administrative Rule 12(e), the Court should decide whether the trial court was constitutionally required to appoint counsel to represent Ms. Jonsson in the first place. Every other reported decision of the issue disagrees with the trial court's conclusion in this case.[8] The State's mere provision of a judicial forum for the resolution of a private custody dispute in which one party is represented by *private* counsel is sharply distinct from the situation in *Flores* and, under basic principles of constitutional law, satisfies due process without the appointment of publicly-funded counsel.

A right to appointed counsel in a civil case remains an exception to the general rule. *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111 (Alaska 2002). As the trial recognized in its Order (at Exc. 66-67), Alaska courts faced with deciding whether

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[8] *See Haller v. Haller*, 423 N.W.2d 617, 618 (Mich.App. 1988) ("We hold that plaintiff had no due process right to counsel"); *Poll v. Poll*, 588 N.W.2d 583, 588 (Neb. 1999), *overruled in part on other grounds, Gibilisco v. Gibilisco*, 647 N.W.2d 898 (Neb. 2002) ("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"); *In re Marriage of King*, 174 P.3d 659, ___ (Wash. 2007) ("we cannot conclude that the *Matthews* factors overcome the presumption against a right to appointment of counsel in cases like this one").

due process requires the appointment of counsel use the balancing test originating in *Matthews v. Eldridge*, 424 U.S. 319 (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.

Midgett, 53 P.3d at 1111, *quoting In the Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991), and *Keyes v. Humana Hospital Alaska, Inc.*, 75` P.2d 343, 353 (Alaska 1988). A weighing of these three factors in this case shows that due process is satisfied without the appointment of counsel.

1. Private interest affected by official action

a. The private interest. The Court System acknowledges that "the right to direct the upbringing of one's child" is "one of the most basic of all civil liberties." *Flores*, 598 P.2d at 895. How that right is affected by various legal proceedings, however, moves along a continuum from "not at all" to "termination without recourse." To find a due process right to counsel, the trial court relied primarily on *Matter of K.L.J,* 813 P.2d at 279, an adoption case (*see* Exc. 67-69). In *Matter of K.L.J.,* this Court began its discussion of the "private interest affected" by stating, "The private interest of a parent *whose parental rights may be terminated via an adoption petition* is of the highest magnitude." *Matter of K.L.J.,* 813 P.2d at 279 (emphasis added). In a lengthy footnote it emphasized the finality of an adoption decree. *Id.* at 279 n. 2.

A custody determination, by contrast, begins with the presumption that both parents will retain both their legal status as parents and some measure of physical custody. *See* AS 25.20.060 (b) and (c); *Holl v. Holl*, 815 P.2d 379, 381 (Alaska 1991) (recognizing "the presumption for shared custody declared by the legislature in the legislative intent found in ch. 88, section 1, SLA 1982, and approved by the court"). The presumption of shared custody was not found in state law in 1979, when *Flores* was decided.

Furthermore, whatever a trial court decides about custody, the decision is never final. An award of custody may be modified whenever the trial court determines that modification is justified by a substantial change in circumstances, and parties may seek modification again and again. *See* AS 25.20.110(a). A parent who loses an issue of custody today may challenge it tomorrow; a parent who lacks the resources to hire a lawyer today, or who has too many resources to qualify for *pro bono* representation today, may be represented by counsel tomorrow. Thus, while the parent's interest in a custody proceeding is similar to that at issue in *Matter of K.L.J.*, it is highly unlikely to be affected by the litigation in the same drastic and permanent way.

In rejecting a due process right to counsel in circumstances like these, other states' courts have also stressed these differences between custody disputes, on the one hand, and the sorts of proceedings that may result in the termination of parental rights on the other. One example is *King,* a decision of the Washington Supreme Court that is both recent (decided December 6, 2007) and directly on point. Washington's trial courts, like Alaska's, are tasked with creating a "parenting plan" that will best effectuate the declared

legislative purpose "of continued parental involvement in the children's lives" by both parents. Such a purpose, the Washington Supreme Court observed, "does not equate to an action where the State is seeking to terminate any and all parental rights and parental involvement with the children, severing the parent-child relationship permanently":

> Entry of such a parenting plan does not terminate the parental rights of either parent, but rather allocates or divides parental rights and responsibilities in such a way that they can be exercised by parents no longer joined in marriage. Even where a parenting plan results in a child spending substantially more, or even all, of the child's time with one parent rather than the other, both parents remain parents and retain substantial rights, including the right to seek future modification of the parenting plan.

King, 174 P.3d at ___, 162 Wn.2d 378, 385-86. Other courts have used the same rationale to reject a due process right to appointed counsel. *See Haller,* 423 N.W.2d at 618 ("a custody decree does not constitute a complete termination of the parental bond. Full parental rights are retained including reasonable visitation");[9] *Poll,* 588 N.W.2d at 588 ("The subject matter of the [custody] proceeding is the adjustment of visitation, not the initiation or termination of parental rights;" custody issues "remain subject to modification following dissolution" of the marriage, and the parent's "legal interest in his child is unaffected"); *see also In re Guardianship of Brittany S.*, 792 A.2d 384, 386 (N.H. 2002) (declining to find due-process right to counsel in guardianship proceeding, in part because guardianship "has a finite life and is subject to periodic review by the probate

[9] The Michigan court further observed that "the element of finality . . . is not present in a custody proceeding," since "a custody decree is subject to modification for proper cause shown or because of a change in circumstances, in the best interest of the child," and in any event "is only effective until the minor attains the age of majority." *Haller*, 423 N.W.2d at 618.

court", and "may be ended or modified and the parental ties are not permanently severed").

b. The official action. No matter how important the "private interest" at stake, also critical to the constitutional analysis – and central to *Flores* – is the extent to which that private interest is affected by "official action." This is a fundament of constitutional law that rests on a "long-standing legal principle: . . . that the constitution protects individuals *from state action* but not from similar deprivations by private actors." *Belluomini v. Fred Meyer of Alaska, Inc.*, 993 P.2d 1009, 1015 (Alaska 1999) (emphasis added); *Miner v. Commercial Fisheries Entry Comm'n,* 635 P.2d 827, 829 (Alaska 1981) ("It is a basic tenet of due process that its prerequisites are *state action* and the deprivation of an individual interest of sufficient importance to warrant constitutional protection") (emphasis added).

Thus, the conclusion that parental rights in custody disputes are important enough to justify the appointment of counsel proves too much standing alone; neither this Court in *Flores* nor the trial court's order below would require the appointment of counsel in every child custody case between private individuals. Both *Flores* and the order on appeal address only the imbalance created when one side is represented and the other is not. And in *Flores,* unlike this case, the "official action" at issue was the opposing side's advocacy.[10] Unless this Court accepts the trial court's conclusion that the child's GAL

[10] Justice Connor contended in his dissent in *Flores* that Alaska Legal Services Corporation ("ALSC"), the "public agency" representing the father, was actually "a non-profit enterprise" and therefore not "a 'public agency,' in the sense of being an agency of the government." *Flores*, 598 P.2d at 900 n. 8. It is true, however, that ALSC, at least at

fulfills the role of "opposing party" for purposes of AS 44.21.410(a)(4), thus justifying appointment of an OPA lawyer under the OPA statute, the "official action" aspect of the analysis is completely lacking in this case.

Unlike adoption or other terminations of parental rights that can only be effected through state sanction, child custody does not depend on the courts. Parents can agree to whatever custody arrangement suits them, and the courts will not intervene unless one parent petitions for a judicial resolution pursuant to AS 25.20.060. *See Flores*, 598 P.2d at 898 (Connor, dissenting in part and concurring in part: "child custody litigants are not compelled to go to court to settle their claims"). The court's role is not to advocate for one side or the other, but rather to safeguard a third objective in which the State has its own independent interest: protecting the best interests of the child.[11] And while this Court held in *Flores* that even civil custody disputes involved state action, it repeatedly emphasized, and noted again in later decisions, the importance of the fact that the opposing litigant was represented by a public agency:

> It is true that both *Reynolds[v. Kimmons*, 569 P.2d 799 (Alaska 1977)] and *Cleaver[v. Wilcox*, 499 F.2d 940 (9th Cir. 1974)] were prosecuted by the state, but that does not remove the present case from the scope of their rationale. Although a private individual initiated the proceeding below, he was represented by counsel provided by a public agency. Fairness alone dictates that the petitioner should be entitled to a similar advantage.

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that time, was dependent for much of its funding on the federal government – enough so that it was forced to accept unwelcome congressional restrictions on its litigation activities. *See Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3D 1017 (9th Cir.), *cert. denied,* 525 U.S. 1015 (1998) (ALSC one of named plaintiffs).

[11] *See Haller*, 423 N.W.2d at 618 ("The interest of the state, exercised through its judiciary, is to advance and protect the best interests of the child").

Flores, 598 P.2d at 895. *See also id.* at 896 (the disadvantage of being unrepresented "is constitutionally impermissible *where the other parent has an attorney supplied by a public agency"*)(emphasis added); *id.* at 896 n. 12 ("We emphasize that our holding in this opinion is limited to cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency").

In *Reynolds,* 569 P.2d at 799, this Court had addressed "the right of an individual defendant to appointment of counsel in a paternity suit in which the plaintiff is represented by the state," finding that such a right exists. The Court noted the many serious consequences of a paternity determination, including the criminal penalties that may flow from a failure to comply with paternal obligations. *Id.* at 801-02. The Court then explained:

> The analogy to other cases in which we have held that a right to counsel exists is further strengthened by the fact that this proceeding is being prosecuted by the Attorney General rather than private counsel. The lawsuit was initiated by the Child Support Enforcement Agency, although the lawsuit was brought in the name of the child's mother.

Id. at 802. After summarizing the "significant effects of this litigation," including the assumption of non-dischargeable debt and liability for support and medical care, the Court again stressed:

> We also note that, as in *Cleaver*, this case is prosecuted by the state with all its resources and power. The same considerations as to the nature of the right in question and the relative power of the antagonists apply.

Id. at 803. The Court concluded: *"In light of the fact that paternity suits, in effect, are brought by the state,* the significance of the parent-child relationship involved and the

peculiar problems presented, we hold that due process requires the appointment of counsel for an indigent defendant." *Id.* (emphasis added).

This Court again stressed this important aspect of *Reynolds* in *State, Department of Revenue v. Superior Court*, 907 P.2d 14 (Alaska 1995). The State in its representative capacity had brought a paternity suit in order to enforce a child-support obligation. The defendant was in the armed services and was given appointed counsel under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. § 520 (1990). The trial court construed the then-current version of Administrative Rule 12 to require that the State, as a non-indigent "opposing party," advance the costs of appointed counsel. The State petitioned for review, contending, in part, that it was not the "opposing party" because "it is not acting as a private litigant in a paternity case, but rather in a representative capacity," citing a statement in *Reynolds* that the mother in that paternity suit was actually "the real party in interest." *State v. Superior Court*, 907 P.2d at 17.

This Court, however – 16 years after *Flores* – once again emphasized the importance of the fact that it was the State that was bringing its power to bear:

> The State fails to note one predicate for the court's holding [in *Reynolds*]:
>
> > In light of the fact that *paternity suits, in effect, are brought by the State,* the significance of the parent-child relationship involved and the peculiar problems presented, we hold that due process requires the appointment of counsel for an indigent defendant.
>
> *Id.* at 803 (emphasis added).

State v. Superior Court, 907 P.2d at 17 (emphasis added by the Court in *State v. Superior Court*).

Again, courts in other jurisdictions that have rejected a due process right to appointed counsel in these cases rely on the fact that the state has not brought its own – and presumably overwhelming – force to bear on one side or the other. The Washington Supreme Court explained in *Marriage of King*:

> [T]he State's involvement is meaningfully different [than in a termination case]. The proceeding is not instituted by the State. The State is not a party to the proceedings with regard to determining the manner in which parental rights are divided under the parenting plan, nor does the State seek custody of any children or any rights with respect to the child.

Marriage of King, 174 P.3d at ___, 162 Wn.2d at 386. The Michigan Court of Appeals reasoned similarly:

> First, and foremost, a custody proceeding is a civil action initiated by and on behalf of the litigants. In contrast to *Artibee [v. Cheboygan Circuit Judge*, 243 N.W.2d 248 (Mich. 1976), a paternity case], where the resources of the state were arrayed against the defendant, the state is not a party in a custody proceeding. The interest of the state, exercised through its judiciary, is to advance and protect the best interests of the child.

Haller, 423 N.W.2d at 618 (citations omitted). *See also Poll*, 588 S.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"); *Meyer v. Meyer,* 414 A.2d 236, 238 (Maine 1980) (no right to counsel in proceeding to terminate father's visitation rights, where the "full panoply of the traditional weapons of the state" have not been "marshaled against the defendant parents").

The Court System does not dispute that this Court's rationale in *Flores* need not be stretched very far in order to justify a due process right to appointed counsel in *all* private custody disputes, not just those in which an opposing party is represented by a public

agency. But this Court very deliberately refused to go that far in *Flores*. It purposefully limited its holding to the situation in which the power of the state has at least theoretically been brought to bear *in an advocacy role on one side of the case.* It is that kind of "official action" that triggers constitutional protections and justifies a departure from the usual rule in civil cases brought by private parties; and that kind of official action has no counterpart here.

2. Risk of erroneous determination

Also important to a due process determination are "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." *Matter of K.L.J*, 813 P.2d at 279, *quoting Keyes*, 750 P.2d at 353. The trial court addressed this factor in its Order Granting Defendant's Motion for Appointment of Counsel:

> The proceedings may require a complex digestion and presentation of medical and psychiatric witnesses and records, evidentiary rules, and child custody statues. While resources such as the Family Law Self Help Center and pro se clinics offer some guidance to parents in Ms. Jonsson's situation, they cannot offer legal advice and are not a substitute for having a trained attorney drafting pleadings, negotiating with parties and arguing in court.

Exc. 69.

However, the trial court overlooked or minimized a number of substantive and procedural safeguards that help ensure a fair result in a child custody case even to an unrepresented party. First, as already noted above, the case begins with the presumption that both parents will share custody. AS 25.20.060 (b) and (c); *Holl*, 815 P.2d at 381. Further, regardless of whether one, both, or neither parent is represented, the trial court is

required by Alaska law to appoint counsel to represent the children's interests if it determines that separate representation is necessary. Once the court is notified that custody is at issue,

> the court shall determine whether the minor or other child should have legal representation or other services and shall make a finding on the record before trial. If the parties are indigent or temporarily without funds, the court shall appoint the office of public advocacy. The court shall notify the office of public advocacy if the office is required to provide legal representation or other services. The court shall enter an order for costs, fees, and disbursements in favor of the state and may further order that other services be provided for the protection of the minor or other child.

AS 25.24.310(a). Furthermore, "[i]nstead of, or in addition to, appointment of an attorney" pursuant to this statutory authority, the court may appoint a guardian *ad litem* ("GAL") to represent the child's best interests. AS 25.24.310(c); Civil Rule 90.7. The court may also appoint a custody investigator pursuant to Civil Rule 90.6, whose duties would include an impartial investigation and a report to the court. "[C]ourt-appointed custody investigators are officers of the court and perform quasi-judicial functions." *Ogden v. Ogden,* 39 P.3d 513, 516 (Alaska 2001). Where a party's mental health is at issue, the court may order a mental examination pursuant to Civil Rule 35.

As referenced in the trial court's order (Exc. 69), the Court System funds and maintains a "Family Law Self-Help Center" directed toward unrepresented parties; the Center provides information on procedures and terms relevant to many types of family-law matters, including child custody.[12] The Court System provides free custody mediation for parents whose combined incomes are less than $100,000, and it describes

[12] *See* www.state.ak.us/courts/selfhelp.htm.

the process and the benefits of custody mediation on-line, by video, and in booklet form.[13] The Court System provides a simple standardized "Motion for Mediation Through Child Custody & Visitation Mediation Program" (Form No. DR-405), by which either parent may request mediation.

Again regardless of whether one, both, or neither parent is represented by counsel, the trial court itself has a unique statutory obligation to determine custody "on the basis of the best interests of the child," AS 25.20.060 (a), taking into account a number of specific factors set out by statute, AS 25.24.150(c)(1)-(9). This often means that the trial court is more involved in eliciting evidence that it would be if only required to determine which of two contesting parties had met its burdens of proof and persuasion. "[A]s in any case, the court itself may call, question, and cross-examine witnesses in an effort to determine the best interests of the child." *Flores*, 598 P.2d at 899 (Connor, J., concurring and dissenting). The trial court's unique statutory obligations in this context, combined with the lack of a jury, magnify its role as fact-finder, meaning that "there is no special need for 'the guiding hand of counsel . . . to marshal the evidence into a coherent whole' for the jury; rather, the judge, experienced in piecing together unassembled facts, is

[13] *See* www.state.ak.us/courts/mediation.htm#Programs; "Child Custody and Visitation Mediation Program: Helping Parents Resolve Custody and Visitation Disputes," Alaska Court System PUB-26 (6-08); Alaska Court System Video, "Two Homes" (also hosted at www.ktoo.org/gavel/help.cfm).

capable of fully evaluating the evidence in favor of, and against, both sides." *Flores*, 598 P.2d at 899 (Connor, J., concurring and dissenting).[14]

Finally, whatever the court's ultimate decision on custody, the parties may move to revisit it any time there is a substantial change in circumstances, and the court will again be required to reach whatever conclusion it deems to be in the child's best interests regardless of the parties' arguments. *See T.M.C. v. S.A.C.*, 858 P.2d 315, 318-19 (Alaska 1993).

In *Bustamante v. Alaska Workers' Compensation Board*, 59 P.3d 270 (Alaska 2002), the Supreme Court declined to find a due process right to appointed counsel for a workers' compensation claimant on appeal. Though contrasting the claimant's interest in "an unlitigated claim" with more important rights, including "the custody of children," the Court noted several factors with direct parallels here. It noted:

> Without counsel, a litigant's chance of success on a workers' compensation claim may be decreased. However, it is not clear that failing to appoint counsel in a workers' compensation case results in an erroneous deprivation of a litigant's rights, especially considering that the workers' compensation board has extensive experience with *pro se* litigants and considering the statutory framework for the recovery of attorney's fees for successful workers' compensation claimants.

Bustamante, 59 P.3d at 274.

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[14] Justice Connor identified several of these procedural safeguards in his concurring and dissenting opinion in *Flores*, 598 P.2d at 899, but the majority presumably weighed them in the balance and found them insufficient. Given the express narrowness of the holding in *Flores*, these safeguards should carry more weight in circumstances like those here, where the state action at issue does not include the appearance of a public agency in the role of advocate for one party.

Here, similarly, "a litigant's chance of success . . . may be decreased" without counsel; but that does not necessarily equate to "an erroneous deprivation of a litigant's rights." Like the workers' compensation board, the superior courts have extensive experience with *pro se* litigants and have made special efforts to ensure that they understand the process and can participate fully and intelligently. The statutory framework in custody cases, and the special obligations and resources it gives to the trial courts (*e.g.*, presumption of shared custody, appointment of counsel and guardians *ad litem* for children, need for specific findings) help ensure that the disadvantage suffered by an unrepresented party will not result in a deprivation of due process.

Again, the Washington Supreme Court in *Marriage of King* recently considered the issue and concluded that the procedural protections inherent in custody litigation weigh heavily against finding that the lack of appointed counsel violates due process:

> [W]e recognize that while parenting plan statutes focus on the best interests of the children, they also provide protections for both parents from erroneous decisions. These safeguards include, where the court deems appropriate the appointment of an attorney to represent the children's interests at public expense when the parties are indigent. Additionally, the trial court may seek the advice of professional personnel concerning the provisions of a parenting plan. The court may also appoint a guardian ad litem (GAL) for the purpose of preparing an investigation and report concerning parenting arrangements. The GAL is provided at public expense where both parents are indigent. In counties where a unified family court is established, state law authorizes the appointment of court facilitators "to provide assistance to parties with matters before the unified family court." Where no parental indigency exists, the court has the authority, in appropriate cases, to shift expenses between the parties, somewhat equalizing the resources available to both parents. Hence, statutory provisions advance the best interests of the child and also provide protections for both parents from erroneous decisions.

Marriage of King, 174 P.3d at __, 162 Wn.2d at 387 (numerous statutory citations omitted).

3. The government's interest, and the role of the legislature

Finally, the government has a legitimate interest in seeking to minimize "the fiscal and administrative burdens that [the appointment of counsel] would entail." *Keyes*, 750 P.3d at 353. In *Bustamante,* this Court described as "very strong" the state's "interest in not appointing counsel for workers' compensation litigants": it would be "an extraordinary fiscal burden." *Bustamante*, 59 P.3d at 274. Providing counsel to indigent litigants in child custody cases could prove to be as extraordinary, as OPA agrees:

> The number of custody filings statewide is enormous. If the court decides that counsel is constitutionally required, the agency charged with representing parents would need a significant appropriation. Currently no agency or system within the state is sufficiently funded to provide such representation.

Exc. 39 (OPA's "Amicus Position"); *see also* Exc. 169-70.

In *Frase v. Barnhart,* 840 A.2d 114 (Md.App. 2003), the Maryland Court of Appeals expressly declined to decide whether the failure to appoint counsel to represent an indigent mother in a private custody dispute violated the state's due process clause. The court made note, however, of the financial realities that such a decision would necessarily leave unaddressed:

> If a right is to be found under [the Maryland Constitution], either the State or the counties would presumably have to set up a system to appoint and pay the attorneys. . . . Recognition of the right would carry an enormous fiscal impact and require a substantial administrative structure, yet counsel has given us not a clue, in their briefs or at oral argument, how this right could, in fact, be implemented.

Frase, 840 A.2d at 128 n. 10. The Maryland court went on to note that "[i]n States where this right is recognized, it has been provided by statute." *Id.*

The Court System can agree with many of the arguments made in support of the appointment of counsel in cases like these – *e.g.,* that the potential affect on parental rights is significant, that an unrepresented litigant is at a disadvantage when her opponent is represented, and that the trial courts' burden is significantly heavier when one side, or both, are unrepresented. From the standpoint of good public policy, it may well be that all custody litigants should have the benefit of counsel. But questions of what constitutes good public policy are for the legislature; they are not for the court unless the Constitution dictates a particular result. New York, for example, has a broad statute-based right to appointed counsel in custody cases, but its courts have repeatedly recognized that there would be no right absent the statute. *See Borkowski v. Borkowski,* 396 N.Y.S.2d 962, 963 (Sup.Ct. 1977), citing *Matter of Smiley,* 330 N.E.2d 53, 56-58 (N.Y. 1975). Acting with assistance from many state's bars and civil rights groups, "Civil Gideon" advocates have drafted model legislation, *e.g.* the State Equal Justice Act,[15] which may succeed in bringing legislatively what the trial court imposed judicially here.[16]

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[15] *See* www.brennancenter.org.page/-/d/download_file_38656.pdf.

[16] It bears noting that Superior Court Judge Mark Rindner brought to the case his own years of involvement in the appointed-counsel issue as a member and subsequently Chair of the Access to Justice Subcommittee, a part of the Alaska Supreme Court's Fairness and Access Implementation Committee. *See* "2007 Status Report of the Alaska Supreme Court Fairness and Access Implementation Committee," March 6, 2007, at pp. 26-27 and 37 (available on-line at www.state.ak.us/courts/fairaccess2007.pdf); "Access to Civil

The question for this Court is thus not whether the appointment of counsel is likely to be helpful to the litigant, or whether it is likely to lessen the burdens on the court, or whether in myriad other ways it serves individual and societal interests that a legislature may find persuasive. The question is whether providing counsel at public expense is *constitutionally required,* taking into account the nature of the parents' rights affected by official action, the risk of an erroneous deprivation of those rights through the procedures used, and the relative significance of the government's interest. *See Homer v. Department of Natural Resources*, 566 P.2d 1314, 1319 (Alaska 1977). Under this test, appointed counsel is not constitutionally required in private litigation in which child custody is at issue and neither party has counsel provided by a public agency.

CONCLUSION

This Court may affirm the trial court's order requiring OPA to bear the cost of appointed counsel, either under the doctrine of severability (redacting the constitutionally-suspect classification from AS 44.21.410(a)), or on the basis of the trial court's rationale equating the GAL with the "opposing party." Otherwise, the Court should reverse the court's finding of a due-process right to counsel, on grounds that (1) the parent's rights are not subject to termination in a civil custody dispute; (2) the power of the State has not been brought to bear on one side; (3) there are

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Justice Task Force: Report and Recommendations," May 2000, at p. 44 (available on-line at www.state.ak.us/courts/civjust.pdf). The judge's work in the area is commendable but may beg the question of whether his mind was already made up.

a number of procedural safeguards that ensure due process even to unrepresented parties; and (4) the cost and administrative burden to the State is likely to be extraordinary.

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