No. 26499-4-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,

vs.

JEFFREY C. HALLS, SR.,
Respondent,

and

JUNE ARDEN,
Appellant.

BRIEF OF AMICUS CURIAE, COMMITTEE FOR INDIGENT REPRESENTATION AND CIVIL LEGAL EQUALITY

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I. SUMMARY OF ARGUMENT

Article I, §10 of the Washington Constitution guarantees that civil litigants have a right of access to Washington courts. This right is hollow if a civil litigant is unable to navigate complex judicial proceedings. When a litigant is unable to effectively navigate the court system, a trial court must be empowered to consider whether the right of access requires the appointment of counsel. Ms. Arden was deprived of her right of access because she was unable to effectively navigate the court system in a series of hearings involving a child custody dispute with her ex-husband. As a result, Ms. Arden's relationship with her children changed in a fundamental manner, she was found in contempt of court, and she was imprisoned.

Washington courts have recognized that art. I, § 10 of the Washington constitution provides an express right of access to justice in open courts. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1992).[1] Inherent in this right of access is the need for legal representation. *Miranda v. Sims*, 98 Wn. App. 898, 909, 991 P.2d 681 (2000) (Ellington, J., concurring) (stating "If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason.").

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[1] "Justice in all cases shall be administered openly, and without unnecessary delay." WASH. CONST., art. I, § 10.

In adversarial proceedings that involve the potential for incarceration, a finding of contempt, or the modification or deprivation of the parent-child relationship, legal representation is required, often as a matter of due process. *See In RE Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995); *see also In RE Luscier*, 84 Wn.2d 135, 139, 524 P.2d 906 (1974) (citing WASH. CONST. art. I, § 3 and recognizing that the nature of parental-right termination proceedings requires the appointment of counsel as a matter of constitutional right). Although the courts have not yet articulated which constitutional source gives rise to the right of appointed counsel, the courts have been clear that the right exists and that it is fundamental. *See Housing Authority of King County v. Saylors*, 87 Wn.2d 732, 742, 557 P.2d 321 (1976).

Article I, § 10 provides a basis for the right to appointed counsel for indigent civil litigants. A civil litigant's right to counsel is properly analyzed under art. I, § 10 of the Washington constitution, as an incident of the fundamental right of access to the courts. The right to counsel under art. I, § 10 should be analyzed using an access-based test, in contrast to the interest-based test utilized in due process cases. This access-based analysis should include, among other factors, an examination of: 1) the indigent civil litigant's education, 2) the complexity of the case, 3) the consequences if counsel is not appointed, 4) the opposing party's resources, and 5) the litigant's interests at stake. This Court should reverse

the trial court's ruling and further hold that Ms. Arden has the right, under art. I, § 10 of the Washington constitution, to have appointed counsel.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Committee for Indigent Representation and Civil Legal Equality ("CIRCLE") is a committee comprised of individuals and organizations who are committed to the principle that equal justice for all is fundamental to the justice system. CIRCLE embraces the principle that the right to representation by competent counsel in judicial proceedings is fundamental and cannot be denied for want of adequate funds.

CIRCLE is committed to ensuring the rights of indigent persons to competent representation in non-criminal judicial proceedings in Washington. CIRCLE appears as amicus curiae to brief this Court on June Arden's right to counsel guaranteed by the Washington constitution.

III. STATEMENT OF THE CASE

The facts of this case have been well stated by the Appellant and other amicus curiae. Therefore, to avoid repetition in consideration of RAP 10.3(e), CIRCLE will incorporate by reference the statements of the case submitted by Appellant and the Northwest Women's Law Center, amicus curiae.[2]

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[2] At the time of filing this brief, Respondent had not filed a brief in this matter.

IV. ARGUMENT

A. The Right to Appointed Counsel for Indigent Persons Inheres in the Right of Access to Justice in Open Courts Under Article I, § 10 of the Washington Constitution.

The Washington constitution grants every Washingtonian the right of access to justice in open courts. WASH. CONST., art. I, § 10 For indigent litigants, this right is meaningless if counsel is not appointed when a litigant is unable to effectively navigate the judicial system. Existing law requires that counsel be appointed for indigent Washingtonians in civil proceedings that 1) involve the resolution of a fundamental liberty; 2) modify the parent-child relationship; 3) subject a party to a finding of contempt; or 4) subject a party to imprisonment. *See Miranda v. Sims*, 98 Wn. App. 898, 902, 991 P.2d 681 (2000).

While the right to appointed counsel clearly exists, its full contours have not been defined nor have the courts articulated its underlying source. CIRCLE believes that the basis for the right to appointed counsel for an indigent civil litigant lies in art. I, § 10. CIRCLE requests this Court to hold that Ms. Arden had the right to appointed counsel under art. I, § 10 and that the trial court failed to uphold that right.

In order to understand the fundamental nature of the right of access, and its concomitant right of appointed counsel in certain circumstances, it is necessary to examine the line of cases that lead to

Miranda, the text and structure of the Washington constitution, and the local interests that are affected when this right goes unfulfilled.

1. The Fundamental Right of Access to Courts, and the Concomitant Right to Counsel, Is Protected by Provisions of the Washington Constitution.

The right of access to courts is protected by the Washington constitution. In *Carter v. Univ. of Washington*, 85 Wn.2d 391, 536 P.2d 618 (1975), a plurality of the Washington Supreme Court agreed that state policy and art. I, § 4 of the Washington constitution entitled an indigent appellant to the waiver of an appeal filing fee and costs bond because of the fundamental right of access to the courts. *Carter*, 85 Wn.2d at 403. The right to counsel in civil proceedings had previously been determined as a matter of interest, but even under due process, the technical distinctions between the right to counsel in criminal and civil proceedings had been discarded for an approach that examined the litigant's circumstances. *See Tetro v. Tetro*, 86 Wn.2d 252, 253, 255, 544 P.2d 17 (1975).[3] Ultimately, the *Carter* court held that access to the courts, under

[3] Where an "individual's right to remain unconditionally at liberty is not at issue—such as child neglect or parole revocation hearings—the right to counsel turns on the particular nature of the proceedings and questions involved." *Tetro v. Tetro*, 86 Wn.2d 252, 254, 544 P.2d 17 (1975) (citing in comparison *In RE Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975) (holding that indigent parents have a fundamental constitutional right to counsel at trial at public expense when that trial is a dependency action), and *In RE Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974), with *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)). In *Tetro*, the court joined "the great majority of courts" and held that "wherever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation." *Tetro*, 86 Wn.2d at 255.

art. I, § 4, which guarantees the right of petition, was a fundamental right. *Carter*, 85 Wn.2d at 398.

One year later, in *Housing Authority of King County v. Saylors*, 87 Wn.2d 732, 557 P.2d 321 (1976), the court revisited the *Carter* rule. While upholding the right of access, the court held that in *Carter* it had encroached upon the province of the legislature by making broad policy conclusions that all indigents were entitled to entirely free access to the courts in all civil cases. *Saylors*, 87 Wn.2d at 740.

The court, however, failed to identify the provisions of the Washington constitution that protected the right of access to the courts. The court affirmed that the Washington constitution expressly protects the right of access to our courts, stating that the right of "access to the courts is amply and expressly protected by other provisions." *Saylors*, 87 Wn.2d at 742.[4]

2. Parties to Civil Proceedings Have an Express Right of Access to the Courts Under Article I, § 10 of the Washington State Constitution.

The right of access is animated by concomitant, enabling rights. In *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 819 P.2d 370 (1992), the court clarified that art. I, § 10, is the provision that provides the basis

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[4] *Saylors*, thus, did not deny the existence of a fundamental right of access to the courts; it simply held that the earlier opinion of *Carter v. Univ. of Washington*, 85 Wn.2d 391, 536 P.2d 618 (1975) breached the separation of powers by grounding its holding in determinations of state policy, which are the province of the legislature. *Saylors*, 87 Wn.2d at 740.

for the right of access to the courts. *Doe*, 117 Wn.2d at 780. Further, the court held that the concomitant right to discovery was vital to the individual right of access. *See Doe*, 117 Wn.2d at 780–81. The *Doe* court noted that, under *Saylors*, while the right of access does not inhere from the courts' inherent power, from art. I, § 4 (right of petition), or from art. I, § 12 (privileges and immunities), this independent right of access is adequately protected by other provisions. *Doe*, 117 Wn.2d at 781–82. The *Doe* court went on to hold that art I, § 10, is not an abstract theory of constitutional law, but rather, it is the "bedrock foundation upon which rests all the people's rights and obligations." *Doe*, 117 Wn.2d at 780.

Importantly, the *Doe* court found that this right of access under art. I, § 10 was "necessarily accompanied by those rights accorded [to] litigants." *Doe*, 117 Wn.2d at 782. A "plaintiff's interest in his right of access to the courts and his concomitant right of discovery must be accorded a high priority in weighing the respective interests of the parties in litigation." *Doe*, 117 Wn.2d at 783. A similarly concomitant right was required in the instant case: Ms. Arden needed appointed counsel in order to navigate the judicial system.

3. The *Miranda* Opinion and Concurrence: the Continuing Shift from an Interest-Based Analysis to a Focus on Access.

The *Miranda* opinion involved a claim of the right to counsel for a family that was involved in an inquest, and the court held that noting that

the Washington constitution protected a right of counsel when "a controversy is resolved or punishment is determined." *Miranda*, 98 Wn. App. 898, 902, 991 P.2d 681 (2000). The *Miranda* court observed the existing interest-based jurisprudence: "Our 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." *Miranda*, 98 Wn. App. at 902 (citing *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 782–83, 819 P.2d 370 (1991) and *In RE Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995)).[5] However, the court went on to observe that the analysis was access-based, rather than interest-based: "our constitution protects a right of access." *Miranda*, 98 Wn. App. at 902 (citing *Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 156, 713 P.2d 710 (1986)). Judge Ellington agreed:

> I agree with appellants that *the right to access to the courts is fundamental to our system of justice*. Indeed, it is the right "conservative of all other rights." *Chambers v. Baltimore and Ohio*

[5] The only issues presented to the *Grove* court were 1) where there was a statutory right to counsel at all stages of a proceeding, did this include a right to counsel on an appeal of right; 2) if such a right to counsel on appeal existed, then whether it included a right to public funding of appellate expenses; and 3) whether a right to appeal at public expense included a right to move for discretionary review of interlocutory orders. *In RE Grove*, 127 Wn.2d at 227, 229. Commentators agree that, properly viewed, the *Grove* opinion is limited not only to the due process analysis in which it was decided, but it touched only on the right to counsel on appeal. *See* Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571, 579–80 (2004) (hereinafter "Perluss") (determining that the Washington Constitution requires a different, more flexible approach to the appointment of counsel in civil cases, considering art. I, §§ 10, 12, and 32). The *Grove* opinion did not reach the right of access to justice expressed in art. I, § 10.

> *Railroad Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907). I also agree with appellants that meaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant's poverty, then likely so is justice, and for the same reason.
>
> As the majority cogently points out, however, this case does not involve an adjudication of rights or responsibilities. I therefore concur in the result.

Miranda, 98 Wn. App. at 909–10 (Ellington, J., concurring) (emphasis added). The independent constitutional right of access to the courts is properly analyzed by examining the circumstances of a litigant's inability to navigate the judicial system, rather than focusing primarily on a threat to liberties. This is because art. I, § 10 grants a right of access, rather than preserving individual liberties.

4. Constitutional Provisions of "Open Courts" Are Correctly Interpreted as Broadening Individual Rights.

Washington is not alone: other states have state constitutional provisions that are similar to art. I, § 10 and grant a right of access to open courts.[6] Courts have held that these provisions typically expand individual rights, rather than merely mirror rights granted under the federal constitution. *See, e.g., Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n.*, 160 Ariz. 350, 773 P.2d 455 (1989) (holding that access to open

[6] *See Ridenour v. Schwartz*, 179 Ariz. 1, 875 P.2d 1306 (1994) (holding that presiding judge's order to limit public access to proceedings after 3:00 P.M. violated the public's state constitutional and common law right of access to observe court proceedings and noting that to withstand scrutiny an order closing the court must be narrowly tailored to serve compelling government interest).

courts was broader than the first amendment); *see, also Associated Press v. Montana Senate Republican Caucus*, 286 Mont. 172, 180, 951 P.2d 65, 70 (1997) (holding that the judicial adoption of definitional restrictions that limit those who can be sued in Montana's courts "flies directly in the face of the open courts provision");[7] *see also Martinez v. State*, 130 Idaho 530, 944 P.2d 127 (1997) (holding that lack of access to legal reference books or availability of representation made the "Art. I, § 18 guarantee that 'courts of justice shall be open to every person,' a hollow promise"). The *Martinez* opinion demonstrates an access-based analysis,[8] which would be required under art. I, § 10.[9] In *Martinez*, the court importantly noted that Mr. Martinez had made a prima facie showing that he was deprived of meaningful access to Idaho courts, a right protected by art. I, § 18 of the Idaho constitution. *Martinez*, 944 P.2d at 133.[10]

The Oregon constitution is similar.[11] *See, e.g., Brewer v. Dept. of Fish and Wildlife*, 167 Or. App. 173, 193, 2 P.3d 418, 429 (2000)

[7] In Montana, "courts of justice shall be open to every person." MONT. CONST., art. 2, § 16.

[8] This is in contrast to an interest-based analysis, which is typical in due process cases.

[9] Although the *Martinez* opinion involved a criminal defendant, its reasoning—as well as the constitutional provision upon which it was based—contained no language that precludes its application in the civil realm.

[10] The Idaho provision, like the Washington cognate, contains no indication that it is limited to conviction-related matters, stating that "Courts of justice shall be open to every person, and a speedy remedy afforded every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice." IDAHO CONST., art. I, § 18.

[11] "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done in his person, property, or reputation." ORE. CONST., art. I, § 10.

(Landau, P.J., concurring) (reasoning that "the language and history of Article I, section 10, establish that it was intended to function as an 'open courts' clause, to guarantee that everyone will have access to the courts to seek whatever remedies the law may provide, not as a guarantee that the law must provide a remedy"). Although the *Brewer* opinion involved an analysis of this clause as Oregon's remedies clause, the *Brewer* concurrence importantly noted that Oregon's clause is properly viewed as granting a right of access to courts, rather than granting a substantive guarantee to specific remedies. *Brewer*, 167 Or. App. at 193.[12]

Commentators agree that the right of access requires an examination of a civil litigant's ability to navigate the particular circumstances of their case, as well as the system of justice. *See* Perluss at 571, 573. This analysis differs from traditional due process jurisprudence because it looks beyond the individual's interests in rights and liberties, examining a litigant's ability to navigate the judicial system.[13]

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[12] Further, the *Brewer* concurrence arguably performed a kind of recurrence that would be appropriate in Washington under art. I, § 32. *Brewer*, 167 Or. App. at 192–97 (stating, *inter alia*, "I respectfully suggest that the answer lies in returning to first principles" and examining the historical framework of the constitution, along with the development of English common law following the remedies provision in article 40 of the Magna Carta).

[13] This is especially true considering that article I, § 32 states that a "frequent recurrence to fundamental principles is *essential* to the security of individual rights and the perpetuity of free government." WASH. CONST., art. I, § 32 (emphasis added). At least four fundamental principles can be identified as pertaining to this provision: liberty, democracy, natural law, and federalism. *See* Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WASH. L. REV. 669, 670 (1992) (hereinafter "Snure"). The importance of this provision cannot be overstated, because it provides Washington Courts with a constitutional mandate—a mandate that expressly, as well as under art. I, § 29, must be exercised—to expand individual rights. "If section 32 is neglected, individual rights will

B. The Washington Constitution Grants More Protection to Washingtonians' Right of Access to the Courts Than the United States Constitution.

Washington courts examine the non-exclusive *Gunwall* criteria to determine whether the Washington constitution grants broader rights to its citizens than the federal constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Although a *Gunwall* analysis may be unnecessary in this case because the federal constitution does not have an equivalent provision to art. I, § 10, the *Gunwall* factors reveal why the Washington Constitution provides more protection for the right of access to courts. *Gunwall*, 106 Wn.2d at 61-2. Each *Gunwall* factor indicates that the Washington Constitution grants broader protection based on the specifically enumerated right of access to courts.[14]

1. Textual Language of the Constitution

"Justice in all cases shall be administered openly, and without unnecessary delay." WASH. CONST., art. I, § 10. This text has been interpreted as granting a right of access to courts that does not exist in the federal constitution. *See Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 781–82, 819 P.2d 370 (1991). As discussed earlier, art. I, § 10 resembles

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continue to receive less protection than the state constitution is capable of providing." Snure at 690.

[14] Although the *Miranda* court held that the equal protection clause of the Washington State Constitution did not provide more protection than the United States Constitution, the relevant *Gunwall* analysis in this case differs considerably because it concerns a specific and separately enumerated right of access. *See Miranda*, 98 Wn. App. at 907.

other state constitutional provisions that have been viewed as granting a right of access to courts.

2. Differences in the Texts of Parallel Provisions

The United States Constitution does not contain a clause that is similar to art. I, § 10. Since there is no mirroring text in the federal constitution, the Court is best informed by examining the structure of the Washington Constitution, in light of art. I, §§ 29 and 32, as discussed later in this brief.

3. State Constitutional and Common Law History

Washington constitutional and common law history also favors an independent analysis under the state constitution. This history is reflected in the very first section to article I, which indicates that governments are established for the protection of individual rights. *See* WASH. CONST. art. I, § 1. Washington courts have acknowledged that sections 1–31 catalog these fundamental rights. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780–81, 819 P.2d 370 (1991).

In 1889, at the time of the Washington Constitutional Convention, Washingtonians feared governmental tyranny, legislative abuses, and corporate power. *See* Snure at 671–73. The framers sought to balance individual rights with economic growth, while placing numerous checks on governmental power. *Id.* Article I, § 32, reflects this important concern for individual rights, providing for a mandatory recurrence to fundamental

principles. "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." WASH. CONST., art. I, § 32. This recurrence requires that courts exercise their inherent power to safeguard the fundamental rights of Washingtonians where justice so demands. *See In RE Grove*, 127 Wn.2d at 237.

Washington's populist tradition also embodies the fundamental principles to which this Court should recur.[15] The strong commitment to populism, individual liberty, and equality demonstrate that the Washington constitution provides stronger protection than the federal constitution, safeguarding a unique state right of access.

4. Preexisting State Law

Washington courts have acknowledged that citizens have a *fundamental* right of access to the courts. *1519-1525 Lakeview Blvd. Condominium Assoc. v. Apartment Sales Corp.*, 101 Wn. App. 923, 933–34, 6 P.3d 74 (2000).[16] As seen in the reasoning of *Carter*, *Saylors*, *Doe*, and *Miranda*, as well as statutory provisions for representation of indigent persons,[17] preexisting state law favors an independent view of the

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[15] *See Carter*, 85 Wn.2d at 393, 398 (citing Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1964); SOURCES OF OUR LIBERTIES 21 (R. Perry ed. 1959); and M.W. AVERY, HISTORY AND GOVERNMENT OF THE STATE OF WASHINGTON, 199–216 (1961)).

[16] In addition, the Rules of Appellate Procedure have special provisions for indigent litigants. RAP 15.1–15.5.

[17] *See, e.g.*, RCW 13.34.090.

Washington State Constitution, a view that regards the right of access to the courts as independent, constitutional, and fundamental.

5. Structural Differences in the Constitutions

In addition to art. I, § 10, the Washington Constitution contains separate due process and privileges and immunities clauses. *See* WASH. CONST., art. I, §§ 3, 12. All state constitutional provisions are expressly mandatory. *See* WASH. CONST., art. I, § 29. Considering the requirements of § 29 and the many provisions of the constitution, art. I, § 10 must be viewed as having a different, yet complimentary, function.

The Washington constitution expressly regards the recurrence to fundamental principles as "essential" to individual rights. WASH. CONST., art I, § 32. *See also Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 781, 819 P.2d 370 (1991) (citing Wash. Const., art. I, § 32 in its discussion of the constitutional right to access to the courts). The uncommon structure of the Washington constitution calls for a unique and separate analysis, apart from due process or equal protection jurisprudence.

6. Matters of State and Local Concern

The right of access to courts, and the concomitant right to counsel, is plainly a matter of local concern. In 2003, the Washington Supreme

Court, through its Task Force on Civil Equal Justice Funding, reported on the legal needs of indigent Washingtonians.[18] The results were profound.

Indigent civil litigants have extraordinary difficulty in navigating the judicial system. "[M]ore than three-quarters of all low-income households in Washington state experience at least one civil (not criminal) legal problem each year." STUDY at 8.[19] Low-income citizens "face more than 85 percent of their legal problems without help from an attorney." *Id.* This statistic does not significantly differ from region to region. *Id.* at 43.[20] However, citizens who live in rural areas have less knowledge of, access to, and success in utilizing legal resources, especially technology-based services. *Id.* at 45.[21] When low-income people have legal assistance, the rate of positive or satisfactory outcomes triples. *Id.* at 55.[22]

At each significant stage of Ms. Arden's case, she did not understand the legal ramifications of her circumstances. Once she began to

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[18] Task Force of Civil Equal Justice Funding, Washington Supreme Court, The Washington State Civil Legal Needs Study (September 2003), *available at* http://www.courts.wa.gov/newsinfo/CivilLegalNeeds%20093003.pdf (hereinafter Study)

[19] The legal challenges facing this population of Washingtonians are comprised primarily of family matters, domestic violence, economic security, housing, and basic needs. *Id.* at 8, 33.

[20] Further, Washington's specific demographic changes, including an increased immigrant Latino population, distinguish Washington from other states and from the country at large. *See* STUDY at 43.

[21] It is important to note that Ms. Arden's case comes from Jefferson County, an area with scant pro bono resources and no staffed legal services office. The traditional resources of free legal assistance are simply not available in such areas.

[22] The main reason that low-income citizens fail to seek legal assistant is because they do not understand that laws exist to protect them or that any form of relief is available to them. *Id.* at 47.

realize what she was facing, she tried—to no avail—to help herself and to find representation. Because of her personal, educational, and financial circumstances, she was simply unable to navigate the judicial system. This denial of counsel deprived her of meaningful access to the courts, just like the barriers that were found in the 2003 study. The legal need of Washington's low-income and indigent citizens is plainly a matter of state concern.[23] History also shows that access to courts for indigent persons is an important first principle of civilized society.[24]

The fundamental right of access to courts requires an access-based test, rather than the interest-based test utilized in due process cases. Courts must have the inherent authority to carry out the promise of article I, § 10. An access-based test necessarily includes an examination of the civil litigant's individual circumstances, including the matter of indigency, the litigant's ability to navigate the specific judicial proceedings before them,

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[23] This, of course, is no new revelation to the Washington Supreme Court. *Carter*, 85 Wn.2d at 394 (stating "there is a direct relation between access to the courts and the exertion of power within the system relative to the evaluation and resolution of citizens' grievances").

[24] The need for counsel to indigent litigants has long been recognized as fundamental to a civilized society, since the drafting of the Magna Carta through modern times. *See Carter*, 85 Wn.2d at 393, 398; *see also* 11 Hen. 7, c. 12 (1495); *see also* Perluss at 585–87. Indigent litigants in early English courts were allowed free counsel and the waiver of all fees. *See* Perluss at 585–86 (citing MAURO CAPPELLETTI, ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES at 204 (Vincenzo Varano ed., 1975)). William Blackstone wrote of this as well, noting that the right to apply to a court for the redress of a remedy was a sacred right, written in the Magna Carta and revered in the common law. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, A FACSIMILE OF THE FIRST EDITION OF 1765–1769, Vol. III of Private Wrongs at 137 (1768) (1979). These sources of old law are critical foci for a recurrence to fundamental principles, favoring an independent view of the Washington Constitution regarding a citizen's right of access to the courts.

the legal complexity of the case, the negative ramifications that may result if counsel is not appointed, the resources that are available to the opposing party, and the litigant's interests that are at stake.

V. CONCLUSION

Ms. Arden was denied her fundamental right of access to the courts because she was without counsel. She was without counsel because she was indigent. She was without counsel during a civil proceeding that not only resolved a controversy regarding her individual and parental rights but also found her in contempt of court and alienated her fundamental liberty interest in parenting. In such circumstances, the fundamental right of access to the courts—a right expressly stated in the Washington Constitution—requires the appointment of counsel.

Because counsel was not appointed, Ms. Arden was deprived of meaningful access to the courts in several ways, including the following: 1) she was uninformed as to the consequences of the proceedings; 2) she was unable to understand the nature of the proceedings and fashion legal arguments in her defense; 3) she unable to adequately present her case to the court; 4) she was unable to adequately respond to an obviously hostile court, especially as to the impropriety of a *sua sponte* modification of the parenting plan; and 5) she was at a significant disadvantage, competing against an aggressively represented adversary at every stage of the

proceedings. Without appointed counsel, these factors denied Ms. Arden meaningful and effective access to justice.

CIRCLE respectfully submits that the trial court should have the authority to consider whether Ms. Arden needed appointed counsel to ensure her meaningful and effective access to justice, and that the denial of such authority violates article I, § 10 of the Washington constitution. Accordingly, the ruling below should be reversed and remanded.

Respectfully submitted this 15th day of October, 2004.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 15 day of October, 2004, she placed for service on Counsel of Record, or Pro se, via [ ] Legal Messenger / [X] Facsimile / [X] U.S. Mails / [ ] Hand-Delivery / [ ] Express Delivery and/or [ ] Electronic Mail, a true and correct copy of the foregoing.

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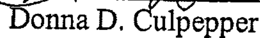
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



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