No. 30761-8 II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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

v.

Jeffrey C. Halls, Sr., Respondent,

and

June Arden, Appellant.

BRIEF OF APPELLANT

Carol Vaughn, WSBA #16579
Jason Vail, WSBA #32244
Attorneys for Appellant June Arden

Northwest Justice Project
401 Second Avenue South, Suite 407
Seattle, WA 98104
(206) 464-1519

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3. The Superior Court erred by entering the Order on Show Cause re Contempt dated May 30, 2003. CP 28-32.

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5. The Superior Court erred by entering the Judgment and Order Determining Parenting and Granting Additional Relief (CP 35-39) and the final Parenting Plan (CP 40-48) dated June 13, 2003.

6. The Superior Court erred by allowing Ms. Arden's court-appointed counsel to withdraw without any notice to her during the hearing held June 13, 2003. 1 RP 33-34.

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9. The Superior Court erred by failing to appoint counsel for Ms. Arden at the hearing held September 5, 2003.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a Superior Court lack authority to modify a final parenting plan absent a petition for modification and application of the criteria of RCW 26.09.260? (Assignments of Error 5 and 7.)

2. Does a Superior Court err under RCW 26.09.260 by modifying a final parenting plan based solely on the custodial parent's contempt of court? (Assignments of Error 5, 7, and 8.)

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5. Does a Superior Court lack authority to modify a final parenting plan on the basis of contempt findings that were entered in

violation of due process? (Assignment of Error 8.)

6. Was the indigent parent in this case (Ms. Arden) entitled to appointed counsel in responding to the petition for modification of parenting plan either as a matter of due process or the fundamental right of access to justice guaranteed under Washington law? (Assignments of Error 6, 7, 8 and 9.)

III. STATEMENT OF THE CASE

Original Parenting Plan.

The parties have three minor children, Trina Halls (age 12), Jeffery Halls (age 11), and Selma Halls (age 8). CP 1. A final parenting plan ("Original Parenting Plan") was entered on February 4, 2003. CP 1–8. Under this parenting plan, the children resided with Ms. Arden (also referred to as "mother") and had residential time with Mr. Halls (also referred to as "father") from "Saturday 9AM to Sunday 7 PM the first and third week of the month." CP 2.

Motion for Contempt.

On April 22, 2003, Mr. Halls filed a motion for contempt against Ms. Arden. CP 9-11. The motion alleged that Ms. Arden had violated the Original Parenting Plan by denying Mr. Halls visitation on April 19-20 and by failing to provide statutorily-required notice of relocation prior to leaving for Minnesota. CP 10. The motion was filed two days after the

missed visitation and sought imprisonment "as a sanction." Id.

Contempt Hearing: May 9, 2003.

The first return hearing on Mr. Halls's contempt motion occurred May 9, 2003. 1 RP 11.[1] Ms. Arden appeared telephonically and represented herself.[2] 1 RP 11-17. The trial court found Ms. Arden in contempt of the Original Parenting Plan (CP 19) based on her relocation of the children to Minnesota without notice to Mr. Halls and her failure to return the children to Washington for his weekend residential time. CP 20. The trial court ordered the mother "confined to the Jefferson County Jail," placed the children with Mr. Halls until further order of the court, and set a review hearing on June 27, 2003. CP 21. In making this ruling, the presiding judge stated to the mother "I suggest that you get a lawyer," but did not inquire as to her ability to afford counsel. 1 RP 16.

Incarceration of the Mother.

Pursuant to the contempt order issued May 9, 2003, Ms. Arden was taken into custody. CP 25. On May 12, 2003, the trial court ordered Ms. Arden's release and set a return hearing on May 30, 2003. Id. Ms. Arden was ordered to appear on that date and show cause why Mr. Halls "should

[1] This appeal consolidates two separately-filed Notices of Appeal, case numbers 30761-8-II and 30948-3-II. For purposes of clarity, citations to the verbatim report of proceedings from each case will be designated "1 RP" and "2 RP," respectively.

not have primary residential care of the children." CP 25-26. Counsel was not appointed to represent the mother and no modification petition had been filed under RCW 26.09.260.

Return Hearing: May 30, 2003.

At the return hearing on May 30, 2003, Ms. Arden again represented herself. 1 RP 18-30. For the first time, the trial court determined that counsel should be appointed to represent Ms. Arden (1 RP 25, 26), but nevertheless proceeded with the hearing, found Ms. Arden in contempt (CP 30), and ordered imprisonment if she failed to deliver the children to the father. Id. Though no petition for modification was pending and the father had filed no motion since the April 22 motion for contempt,[3] the trial court also granted Mr. Halls "sole custody" of the children. CP 30. A review hearing was set for June 13, 2003. CP 31.

Review Hearing: June 13, 2003.

On June 4, 2003, the Clallam-Jefferson Public Defender filed "Notice of Appearance for Civil Contempt Proceedings" on behalf of Ms. Arden. CP 34. The public defender appeared at the June 13 hearing for Ms. Arden, who was not present. 1 RP 31-32. Although Ms. Arden had complied with the court's order requiring her to place the children with the

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[2] Also present was an attorney, James Bendell, who had withdrawn as the mother's counsel and did not represent her. 1 RP 11-17.

father (1 RP 32), the presiding judge asked the father's counsel, "Want me to put her in jail or are you satisfied?" 1 RP 33. When the father's counsel responded that he did not seek additional incarceration, the public defender moved to withdraw as Ms. Arden's counsel. Id. Mr. Halls supported the request, id., and, without notice to Ms. Arden, the trial court allowed the public defender to withdraw as her counsel. 1 RP 34.

At the same time, Mr. Halls moved for entry of a parenting plan that he asserted "reflects what's going on now." 1 RP 33. The trial court entered a final judgment and parenting plan ("First Modified Parenting Plan") (CP 35-48), without inquiring whether the mother had received notice or copies of the proposed final orders. 1 RP 31-34. The public defender did not represent Ms. Arden's interests in the entry of these orders, as he had been permitted to withdraw. 1 RP 33-34.

The First Modified Parenting Plan changed the primary residence of the children. CP 41. Under the Original Parenting Plan, the children resided with Ms. Arden (CP 2), and under the First Modified Parenting Plan, the children resided with Mr. Halls. CP 41. No petition for modification of parenting plan was filed prior to entry of the First Modified Parenting Plan.[4]

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[3] A copy of the SCOMIS docket listing all documents filed with the trial court is in the Appendix at pages A-1 through A-7.

[4] *See* trial court SCOMIS docket Appendix at A-4 – A-5.

Motion for Reconsideration.

Ms. Arden filed a motion to reconsider and vacate the First Modified Parenting Plan and contempt order dated May 30, 2003. CP 51-60. On July 21, the trial court issued a memorandum opinion denying the motions. CP 122-123. The memorandum opinion states: "Finding that it was not in the children's best interest to be denied visitation with their father, the Court changed their residence. It's up to the father's lawyer to straighten out the paperwork." CP 123.

Notice of Appeal and Petition for Modification of Parenting Plan.

Ms. Arden filed a notice of appeal to this Court on August 19, 2003. CP 124. Two days later, Mr. Halls filed a petition for modification of the Original Parenting Plan. CP 152-158. Appearing *pro se*, the mother filed a response in opposition to the petition for modification on August 29, 2003. CP 162.

Contempt Hearing: September 5, 2003.

On September 5, 2003, the trial court conducted a hearing noted as a show cause hearing for contempt. CP 170; 2 RP 1. Ms. Arden represented herself at the hearing. 2 RP 1. Mr. Halls sought an order finding the mother in contempt of the First Modified Parenting Plan and entry of yet another final parenting plan that he asserted "doesn't leave any room for error." 2 RP 3. Mr. Halls alleged that Ms. Arden had

violated the First Modified Parenting Plan by failing to return the children after a weekend visitation (2 RP 3-4) and Ms. Arden alleged that her actions complied with the parenting plan's summer visitation schedule. 2 RP 4, 9.

The trial court found Ms. Arden in contempt (CP 171), entered a new final parenting plan ("Second Modified Parenting Plan") (CP 176-185), and entered a temporary order ("Temporary Order") restraining the mother from certain acts, including entering the children's schools and removing them from Jefferson County. CP 186-186. Though entitled a "temporary order," the restrictions remain in effect for 10 years until the year 2013. CP 188.

The trial court did not enter written findings of fact or conclusions of law in support of the Second Modified Parenting Plan or Temporary Order.[5] Instead, the presiding judge stated in his oral ruling, "All it takes is two contempts and the Court can change the Parenting Plan without further findings." 2 RP 8.

Second Modified Parenting Plan.

The Second Modified Parenting Plan (CP 176-185) significantly differed from the Original Parenting Plan (CP 1-8), as well as the First Modified Parenting Plan. CP 40-49. The Second Modified Parenting Plan

ordered that the children reside with the father (CP 177), contrary to the residential provisions of the Original Parenting Plan. CP 2. The Second Modified Parenting Plan also found that the mother's contact with the children should be restricted based on parental conduct (CP 177) and gave the father sole decision-making (CP 182), contrary to both of the prior final parenting plans. CP 2, 6, 41, 45.

Second Notice of Appeal.

On October 3, 2003, Ms. Arden filed a second notice of appeal challenging the contempt order, Second Modified Parenting Plan and Temporary Order. On November 14, 2003, Commissioner Schmidt ordered both appeals consolidated under this case number.

IV. SUMMARY OF ARGUMENT

This is an appeal from rulings that changed the primary residence of three minor children outside the mandatory framework of RCW 26.09.260. The trial court committed legal and procedural errors of egregious proportions in entering orders that modified a final parenting plan as a sanction for the mother's alleged contempt. No petition for modification was filed before the parenting plan was substantially and permanently changed. The mother's court-appointed public defender withdrew mid-hearing with no notice to the mother. No other counsel was

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[5] *See* Appendix at A-6.

appointed to represent the mother at any phase of the proceedings. After the mother appealed entry of the modified parenting plan, the father for the first time invoked the modification procedures of RCW 26.09.260 by filing and serving a petition for modification. Two weeks later, the trial court granted the father's petition for modification over the mother's objections. Without a trial or even a properly noted adequate cause hearing, the court entered a second modified final parenting plan and a "temporary order" restraining the mother's contact with her children for the next ten years. The actions of the trial court violated RCW 26.09.260, due process notice and hearing rights, the right to appointed counsel in contempt proceedings, and the right to appointed counsel as a matter of federal due process and the fundamental right of access to justice guaranteed by article I, §§ 10 and 32 of Washington's Constitution.

V. ARGUMENT

A. Entry of the Modified Parenting Plans Violated RCW 26.09.260 and Due Process.

The trial court entered a series of orders that violated the substantive and procedural rules governing the modification of final parenting plans. Modification of parenting plans are reviewed for abuse of discretion. In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). An abuse of discretion occurs when the superior court's ruling is

manifestly unreasonable or is based on untenable grounds or untenable reasons. Id. at 46-47. As described below, the trial court's disregard of the governing statute, RCW 26.09.260, was obvious: it modified a final parenting plan without a pending petition for modification, an adequate cause hearing, or consideration of the statutory criteria. Even more remarkable was its disregard of basic notice and hearing rights guaranteed by due process.

1. RCW 26.09.260 Is the Exclusive Source of Authority to Modify a Parenting Plan Even in Cases of Contempt.

The sole source of authority to change residential provisions of a final parenting plan is RCW 26.09.260.[6] Under subsection (1) of the statute, the court "shall not modify a prior custody decree or a parenting plan unless it finds … a substantial change has occurred in the circumstances of the child or the nonmoving party and that modification is in the best interest of the child and necessary to serve the best interests of the child."[7] Subsection (2) directs the court to retain the residential schedule established in the parenting plan unless specific enumerated circumstances support modification.[8] Failure to apply the criteria of RCW 26.09.260 when modifying a final parenting plan is error of law

[6] The full text of RCW 26.09.260 appears in the Appendix at A-11 – A-13.

[7] RCW 26.09.260(1).

constituting an abuse of discretion. In re Marriage of Hoseth, 115 Wn. App. 563, 569, 63 P.3d 164, *rev. denied,* 150 Wn.2d 1011 (2003), *citing* In re Marriage of Shryock*,* 76 Wn. App. 848, 852, 888 P.2d 750 (1995). *See also* In re Marriage of Tomsovic, 118 Wn. App. 96, 103, 74 P.3d 692 (2003); Bower v. Reich, 89 Wn. App. 9, 14, 964 P.2d 359 (1997).

Even in cases of contempt and parental misconduct, authority to modify a final parenting plan derives solely from RCW 26.09.260. Neither the statute governing contempt of parenting plans, RCW 26.09.160, nor a Superior Court's inherent contempt power conveys authority to modify a final parenting plan as a sanction for contempt. A court's statutory contempt powers are expressly limited to awarding make-up residential time, attorneys' fees, costs, and imprisonment for no more than 180 days if deemed necessary to coerce compliance with the court's order.[9] A court may resort to its inherent contempt power only if there is no applicable contempt statute or it makes a specific finding that statutory remedies are inadequate.[10] No such findings were made in this case.

Even if the trial court had resorted to its inherent contempt power

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[8] RCW 26.09.260(2).

[9] RCW 26.09.160(2) and (3). The full text of RCW 26.09.160 appears in the Appendix at A-8 through A-10.

[10] In re Marriage of Farr, 87 Wn. App. 177, 187, 940 P.2d 679 (1997), *citing* In re Marriage of King, 44 Wn. App. 189, 194, 721 P.2d 557 (1986). *See also* In re Marriage of James, 79 Wn. App. 436, 441, n.3, 903 P.2d 470 (1995).

to modify the Original Parenting Plan, this would have been error of law. Residential placement cannot to be used to punish a parent for wrongful conduct.[11] The best interests of the child must be the controlling consideration.[12] Thus, even in the face of serious parental misconduct giving rise to multiple findings of contempt, "Once a court enters a parenting plan and neither party appeals it, the plan can only be modified pursuant to RCW 26.09.260." In re Marriage of Schroeder, 106 Wn. App. 343, 350, 22 P.3d 1280 (2001) (holding that two findings of contempt against custodial parent did not automatically justify modification of final parenting plan and that compliance with statutory criteria of RCW 26.09.260 was mandatory).

2. The Trial Court Completely Ignored RCW 26.09.260 When It Entered the First Modified Parenting Plan.

a. There was no petition for modification.

The father had not invoked the trial court's authority under RCW 26.09.260 at the time the First Modified Parenting Plan was entered on June 13, 2003. Commencement of a modification action is governed by

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[11] Thompson v. Thompson, 56 Wn.2d 244, 250, 352 P.2d 179 (1960); In re Marriage of Murphy, 48 Wn. App. 196, 200, 737 P.2d 1319 (1987).

[12] Thompson v. Thompson, 56 Wn.2d at 250; Marriage of Murphy, 48 Wn. App. at 200. *See also* RCW 26.09.002 ("In any proceeding between parents under this chapter, the

RCW 26.09.270.[13] The statute requires the filing and service of a motion or petition for modification and a supporting affidavit or declaration that sets forth "specific factual allegations, which if proven would permit a court to modify the plan under RCW 26.09.260."[14] Entry of a modified parenting plan absent a petition for modification is an abuse of discretion.[15] When the trial court entered the First Modified Parenting Plan, the father had not filed or served a petition or motion for modification.[16] In the present case, the only motion filed was the motion for contempt filed in April seeking enforcement of the Original Parenting Plan and "make up residential time."[17]

Nothing in the contempt motion filed April 22 can be construed as a request for modification of the Original Parenting Plan.[18] The father sought an order returning the children so that he could exercise his missed

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best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities.").

[13] The full text of RCW 26.09.270 appears in the Appendix at A-14. *See also* In re Parentage of Jannot 149 Wn.2d 123, 124, 65 P.3d 664 (2003).

[14] Bower v. Reich, 89 Wn. App. 9, 14, 964 P.2d 359 (1997), *citing* RCW 26.09.270 and In re Marriage of Mangiola, 46 Wn. App. 574, 577, 732 P.2d 163 (1987). *See also* Jefferson County Local Rule LSPR 94(g)(1), which appears in the Appendix at A-15.

[15] *See, e.g.,* In re Marriage of Christel and Blanchard, 101 Wn. App. 13, 23-24, 1 P.3d 600 (2000).

[16] *See* Appendix at A-4 – A-5.

[17] CP 10.

residential time, which at the time of the motion consisted of one weekend.[19] The contempt motion did not request a wholesale change of the residential schedule. No proposed parenting plan had been filed and served as required by RCW 26.09.181(1)(b).[20] The father also failed to comply with the process mandated by the Jefferson County local rules, which require a petition and "affidavits as required by RCW 26.09.270."[21]

b. The trial court made no findings and conclusions relating to RCW 26.09.260.

In addition to lacking a petition for modification, the trial court completely ignored RCW 26.09.260 in its order changing custody. A trial court's failure to make findings reflecting application of each relevant statutory factor in modifying a prior custody decree or parenting plan is error.[22] This reading of the statute flows from its plain language ("the court shall not modify a prior custody decree or a parenting plan unless it finds . . .")[23] and the well-established presumption against modification.[24]

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[18] *See* CP 9-11.

[19] Id.

[20] RCW 26.09.181(1)(b) states: "In proceedings for a modification of custody or a parenting plan, a proposed parenting plan shall be filed and served with the motion for modification and with the response to the motion for modification."

[21] Jefferson County Local Rule LSPR 94(g)(1). Appendix at A-15.

[22] In re Marriage of Shryock, 76 Wn. App. 848, 888 P.2d 750 (1995); In re Marriage of Stern, 57 Wn. App. 707, 789 P.2d 807 (1990).

[23] RCW 26.09.260(1).

The trial court entered the First Modified Parenting Plan without any reference to RCW 26.09.260, much less specific findings relating to the statutory criteria of RCW 26.09.260.[25]

3. The Trial Court's Order on Reconsideration Compounded Its Violations of RCW 26.09.260.

When the trial court denied the mother's motion for reconsideration of the First Modified Parenting Plan, it committed additional errors of law. First, at the time the trial court denied reconsideration, there still was no petition or motion for modification. The trial court's direction to the father's counsel to "straighten out the paperwork"[26] did not cure this egregious procedural defect. There is no authority for the proposition that failure to file a petition can be cured *after* final judgment is entered. Such an idea violates basic notions of fairness and the cornerstone of due process, which requires notice and an "opportunity for a hearing appropriate to the nature of the case."[27] A

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[24] Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification. *See* In re Marriage of Stern, 57 Wn. App. at 712; Anderson v. Anderson, 14 Wn. App. 366, 541 P.2d 996 (1975).

[25] 1 RP 31-34; CP 39-48.

[26] CP 123.

"court is without jurisdiction to grant relief beyond that which the allegations and prayer of the complaint may seek."[28] Consequently, the trial court committed an error of constitutional magnitude when it directed the father's counsel to prepare necessary paperwork (presumably a petition for modification under RCW 26.09.260) after it already entered the First Modified Parenting Plan.

Second, the trial court's finding "that it was not in the children's best interest to be denied visitation with their father" does not satisfy the mandatory criteria of RCW 26.09.260(1) for modification of a final parenting plan. As discussed above, the statute prohibits the court from modifying a parenting plan "unless it finds . . . the modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). Finding that denial of visitation was not in the best interests of children does not address whether changing the children's primary residence was in their best interest. As a matter of law, maintaining a relationship with both parents is in the best interest of children.[29] However, it is a far leap from that principle to the finding that

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[27] In re C.R.B., 62 Wn. App. 608, 614, 814 P.2d 1197 (1991), *citations omitted. See also* Washington Constitution, art. I, § 3.

[28] Ware v. Phillips, 77 Wn.2d 879, 884, 468 P.2d 444, 447 (1970).

[29] RCW 26.09.002 (recognizing "the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests.").

would be necessary to uphold modification of the parenting plan: namely, that removal of the children from their mother's care was necessary to serve the children's best interest.

4. The Second Modified Parenting Plan Dispensed With Mandatory Procedures and Was Based on Error of Law.

The trial court made multiple errors in granting the petition for modification filed by the father after Ms. Arden appealed the First Modified Parenting Plan. First, the most basic mandatory procedures were ignored. No adequate cause threshold hearing was held, as required by RCW 26.09.270 and Jefferson County Local Rule 94(g)(1). In disregard of these procedures and the summons served on the mother,[30] the court proceeded directly to final judgment only 14 days after the petition for modification was filed, without conducting a trial, adequate cause hearing, or summary judgment hearing. This shortcut violated not only the applicable state law and court rules; it also denied Ms. Arden her constitutional right to "a hearing appropriate to the nature of the case."[31]

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[30] CP 159-160. The summons states in pertinent part: "The court shall deny the petition [for modification] unless it finds that adequate cause for hearing the petition is established, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted." CP 160.

Second, the trial court based its order on the erroneous conclusion that "[a]ll it takes is two contempts and the Court can change the Parenting Plan without further findings."[32] This conclusion violates the plain language of RCW 26.09.260(1), which expressly precludes modification unless the court finds that it is necessary to serve the best interests of the children. The trial court's interpretation also is in direct conflict with In re the Marriage of Schroeder, 106 Wn. App. at 350, which held that two contempt findings against the custodial parent did not automatically satisfy the statutory criteria for modification.[33] In Schroeder, the custodial parent had been found in contempt of court two times within three years. Nevertheless, the Court of Appeals upheld the trial court's denial of modification, holding that the controlling consideration was the best interest of the child.[34]

Third, by proceeding with entry of the Second Modified Parenting Plan and Temporary Order subsequent to the mother's appeal, the trial

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[31] In re C.R.B., 62 Wn. App. at 614, *citations omitted. See also* Washington Constitution, art. I, § 3.

[32] 2 RP 8. Consequently, as with the First Modified Parenting Plan, the trial court failed to enter findings of fact relating to the mandatory statutory criteria of RCW 26.09.260.

[33] *See also* Thompson v. Thompson, 56 Wn.2d 244; Marriage of Murphy, 48 Wn. App. 196.

[34] As argued below, even if RCW 26.09.260 could be construed to permit modification of a final parenting plan based solely on two findings of contempt, the findings of contempt

court also violated RAP 7.2(e). RAP 7.2(e) requires a trial court to seek the appellate court's permission before making a determination that would change a decision currently under review. Orders entered in contravention of RAP 7.2(e) should be vacated. *See* In re Leland, 115 Wn. App. 517, 530, 61 P.3d 357, *rev. denied,* 149 Wn.2d 1025, 77 P.3d 650 (2003); State v. Moro, 117 Wn. App. 913, 924, 73 P.3d 1029 (2003); State ex rel. Shafer v. Bloomer, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999). The Second Modified Parenting Plan and Temporary Order--entered 19 days after the mother appealed entry of the First Modified Parenting Plan--changed a decision being reviewed by giving the father sole decision-making (CP 182) when, in the First Modified Parenting Plan, decision-making was joint (CP 45) and by entering a restraining order against the mother (CP 187) when, in the first Judgment and Order, no restraining order was entered. CP 35-39.

5. Entry of the 10-year Temporary Order Was an Impermissible Modification of the Parenting Plan.

Permanent modification of a final parenting plan under the auspices of a temporary order violates RCW 26.09.260. As stated above, all permanent changes must comply with the criteria of RCW 26.09.260. This requirement was reiterated in Marriage of Christel and Blanchard,

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against Ms. Arden were void because the trial court failed to appoint Ms. Arden counsel as required by due process and Tetro v. Tetro, 86 Wn.2d 252, 544 P.2d 17 (1975).

101 Wn. App. at 22, where the appellate court overturned an order that changed dispute resolution provisions of a final parenting plan without a petition for modification under RCW 26.09.260.[35]

The 10-year Temporary Order entered against the mother in the present case is a more severe curtailment of parental rights than the order overturned by the appellate court in Christel. The Temporary Order restricts the mother's right to travel with the children outside of Jefferson County and prohibits her from going to the children's residence or schools.[36] These restrictions prospectively changed the Original Parenting Plan and the First Modified Parenting Plan. In effect, the Temporary Order is permanent because it will not expire until 2013, after all of the children have reached the age of majority. It has all the characteristics of a permanent change rather than a temporary order. Therefore, the Temporary Order should be invalidated for the same reasons as the Second Modified Parenting Plan: namely, it violated due process and the compulsory modification criteria.

B. Because the Contempt Orders Entered Against Ms. Arden Are Constitutionally Invalid, They Cannot Be A Basis for Modification.

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[35] In Christel, 101 Wn. App. at 23, the order at issue specified the process for determining changes to school enrollment in the future, and warned that missed deadlines would be deemed a waiver of the parental right to seek a change in school enrollment for the following year. The appellate court held that these terms imposed new, permanent limits on parental rights, and therefore required a modification action.

[36] CP 187.

Independent of the violations of RCW 26.09.260 described above, the Second Modification of Parenting Plan must be overturned because it is premised on findings of contempt that were entered in violation of due process. As discussed below, denial of Ms. Arden's right to appointed counsel renders the findings of contempt that formed the basis for the Second Modification of Parenting Plan void.

1. Ms. Arden Had a Constitutionally Grounded Right to Counsel in the Contempt Proceedings.

The Washington Supreme Court has determined that indigent parties charged with civil contempt are entitled to appointed counsel. Tetro v. Tetro, 86 Wn.2d 252, 254-255, 544 P.2d 17 (1975), held:

> Whatever due process requires when other types of deprivation of liberty are potentially involved, when a judicial proceeding may result in the defendant being physically incarcerated, counsel is required regardless of whether the trial is otherwise 'criminal' in nature.

This rule has been reaffirmed repeatedly. *See* In re Grove, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) (finding right to counsel in civil cases where the litigant's physical liberty is threatened or where a fundamental liberty interest, similar to the parent-child relationship, is at risk); In re Marriage of Wulfsberg, 42 Wn. App. 627, 630, 713 P.2d 132 (1986) (holding that an indigent charged with contempt for noncompliance with a child support order is entitled to appointed counsel); In re Marriage of

Haugh, 58 Wn. App. 1, 790 P.2d 1266 (1990) (holding that an indigent parent in a civil contempt proceeding is entitled to appointed counsel even if the sanction being sought is merely coercive and not punitive).

2. The Due Process Right to Counsel Was Denied Ms. Arden Throughout the Contempt Proceedings.

The trial court unquestionably breached Ms. Arden's right to appointed counsel at the contempt hearings held May 9 and May 30, where incarceration was not only expressly sought, but also ordered. Mr. Halls's motion for contempt specifically requested imprisonment as a sanction. CP 10. At the May 9 hearing, the trial court did not appoint counsel (1 RP 12) and Ms. Arden was later incarcerated. CP 21. At the May 30 contempt hearing, the trial court again ordered imprisonment as a coercive sanction without appointing counsel for Ms. Arden. 1 RP 18. At one point in the May 9 hearing, the presiding judge suggested Ms. Arden "get a lawyer" (1 RP 16), yet despite Tetro and its progeny, made no inquiry into her ability to afford one.

At the June 13 contempt hearing, after finally appointing counsel for Ms. Arden, the trial court committed new error by allowing counsel to withdraw. Washington's Supreme Court has made clear that where the right to counsel attaches, it applies to all stages of a proceeding. In re Grove, 127 Wn.2d at 233. Further, under the Rules of Civil Procedure,

court-appointed counsel may not withdraw without leave of court, which must be preceded by notice to the client of the motion to withdraw and the date and location of the hearing. WASH. R. CIV. P. 71.[37] Nevertheless, the trial court allowed Ms. Arden's appointed counsel to withdraw soon after the hearing began and without any notice to her. 1 RP 33-34. Prior to the withdrawal, the attorney made no effort to represent Ms. Arden's interests. Ms. Arden who was not present at the hearing was given no opportunity to object to the attorney's withdrawal.

The fact that Mr. Halls informed the court during the hearing that he no longer sought incarceration of Ms. Arden did not extinguish her right to appointed counsel or justify violation of the notice and hearing rights guaranteed by Civil Rule 71. Ms. Arden's right to appointed counsel derived from due process guarantees, *see* Tetro, 96 Wn.2d at 253, and cannot be eviscerated by the tactical decision of the opposing party who stood to benefit from the withdrawal of counsel charged with representing Ms. Arden's interests. Regardless of the moving party's decision during the hearing to withdraw his request for incarceration, imprisonment continued to be a possibility. The trial court had authority to order incarceration pursuant to RCW 26.09.160 and its inherent contempt

[37] *See also* RCW 10.101.005 ("effective legal representation should be provided for indigent persons . . . consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches").

powers. The trial judge in fact asked whether Mr. Halls wanted him to exercise this authority and "put her in jail."[38] 1 RP 33. Due to this very real threat of incarceration, Ms. Arden remained entitled to appointed counsel until the conclusion of the contempt proceeding and proper withdrawal pursuant to Civil Rule 71.

For the same reasons, the trial court's failure to appoint counsel for Ms. Arden at the September 5 contempt hearing was also constitutional error. Invoking the trial court's contempt powers pursuant to RCW 26.09.160, Mr. Halls created a new threat of incarceration. His proposed Order on Show Cause included a provision that in fact would have confined Ms. Arden to the Jefferson County Jail. CP 173. Although the trial court declined to incarcerate Ms. Arden this time, conduct of the hearing, with the threat of incarceration looming and without appointed counsel, violated Ms. Arden's due process rights as articulated by Tetro and reiterated by In re Grove.

3. The Contempt Orders Are Void.

[38] As Ms. Arden had already placed the children with Mr. Halls as ordered, further incarceration would have been punitive, not remedial, in nature. The trial court seemed willing to order a punitive contempt sanction if requested by Mr. Halls. To have done so would have compounded the violation of Ms. Arden's due process rights. Courts may not impose criminal or punitive contempt sanctions unless the contemnor has been afforded the same due process rights as other criminal defendants. In re M.B., 101 Wn. App. 425, 439-440, 3 P.3d 780 (2000) (citations omitted).

The denial of Ms. Arden's right to appointed counsel was not just legal error, it was a violation of constitutional due process that rendered the resulting contempt orders void. Whether or not Ms. Arden directly appealed the contempt orders,[39] she has a clear right to attack them collaterally in this appeal because they were entered in violation of due process and are thus void. *See* Bresolin v. Morris, 86 Wn.2d 241, 245, 543 P.2d 325 (1975) (holding a final judgment may be vacated during a collateral proceeding by demonstrating that it is void). An order void as a violation of the right to appointed counsel cannot be the predicate of subsequent orders and is subject to collateral attack. State v. Ponce, 93 Wn.2d 533, 540, 611 P.2d 407 (1980) (holding that a traffic conviction entered in violation of the constitutional right to counsel cannot be considered in a subsequent habitual traffic offender civil proceeding).[40] Because the contempt findings are void, the resulting Second Modification of Parenting Plan must be overturned. The trial court's oral ruling ("all it

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[39] The contempt order dated May 9 was not directly appealed within 30 days. The contempt order entered at the review hearing on May 30 was the subject of a motion to vacate that was denied and timely appealed. The contempt ordered entered September 5 was directly appealed within 30 days. The validity of all of the contempt orders is properly before this Court as they erroneously formed the sole basis for the Second Modification of Parenting Plan that was timely appealed and is properly before the Court. An inquiry as to the validity of the contempts is inseparable from and intrinsic to the modification order.

[40] *See also* Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967) (holding that felony convictions void on their face for denial of counsel cannot be used to support subsequent charge brought under state recidivist statute).

takes is two contempts"[41]) makes clear that the Second Modification of Parenting Plan was predicated on the contempt orders.

Moreover, no future modifications can be based on the void contempt orders and they must be vacated. Courts have a nondiscretionary duty to vacate void orders. In re Dependency of A.G., 93 Wn. App. 268, 276, 968 P.2d 424 (1998). Therefore, the constitutionally invalid contempt orders entered against Ms. Arden May 9, May 30 and September 8 must be vacated.

C. The Federal and State Constitutions Compel Appointment of Counsel for Ms. Arden in the Modification Proceeding.

Ms. Arden's right to appointed counsel is not limited to contempt proceedings where incarceration was at issue. Under the unique facts of this case, where significant restrictions on parental rights flowed directly from contempt proceedings and where Ms. Arden struggled to represent herself against aggressive opposing counsel and a hostile court, Ms. Arden was entitled to appointed counsel under independent provisions of the state and federal constitutions: specifically, the due process clause of the Fourteenth Amendment to the United States Constitution and article I, §§10 and 32 of Washington's Constitution. Though the statutory and constitutional violations described above allow this Court to overturn the

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[41] 2 RP 8.

trial court's decisions without reaching this issue, Appellant urges this Court to provide guidance to the trial court on remand and to declare that the particular facts of this case compel appointment of counsel for Ms. Arden in the modification action.[42] Failure to appoint counsel to represent Ms. Arden upon remand will result in the continued deprivation of her fundamental rights.

1. Ms. Arden Is Entitled to Appointed Counsel as a Matter of Federal Due Process.

In Matthews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the United States Supreme Court established a balancing test to determine in a particular case what process is "due." Under that test, a court must weigh three factors: First, the private interest at stake; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and, third, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Id. This is decidedly a case-by-case determination. Proper balancing of these

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[42] Due to the egregious errors by the trial court and the important issues before this Court, the Northwest Justice Project (NJP) agreed to represent Ms. Arden on appeal to help her vacate the orders below. However, NJP does not maintain a staffed office in Jefferson County due to very limited resources and is unable to represent appellant on the merits of the modification proceedings upon remand.

factors in this case requires appointment of counsel for Ms. Arden in the modification of parenting plan proceeding to meet the requirements of federal due process.

a. The private interests at stake are fundamental.

Ms. Arden has a fundamental and compelling liberty interest in preserving her custodial rights. A parent's interest in the custody and control of minor children has long been recognized as a fundamental liberty interest to be protected, as it is a "sacred" right, "more precious to many people than the right to life itself." In re Luscier, 84 Wn.2d 135, 137, 524 P.2d 906 (1974).[43] Where the private interests at stake are custodial rights, Washington's Supreme Court has found parental interests entitled to greater protection than has the United States Supreme Court. For example, Washington's Supreme Court has found that a parent's fundamental interest in the custody of her children establishes a categorical right to appointed counsel in child deprivation hearings,[44] whereas the United States Supreme Court has held that, while due process may require appointment of counsel in some such cases, it does not

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[43] *See also* Grove, 127 Wn.2d at 237; In re Myricks, 85 Wn.2d 252, 253-54, 533 P.2d 841 (1975) ("The right of a natural parent to the companionship of his or her child must be included within the bundle of rights associated with marriage, establishing a home and rearing children. This right must therefore be viewed as so rooted in the traditions and conscience of our people as to be ranked as fundamental." [Citations omitted]).

[44] *See* Myricks, 85 Wn.2d at 255; Luscier, 84 Wn.2d at 139.

require appointment of counsel in every parental termination proceeding.[45] Nevertheless, despite these shades of distinction, federal and state courts agree that a parent's interest in the custody of her children is "a commanding one."[46]

While Ms. Arden's relationship with her children is a "fundamental liberty interest" which must be accorded a heightened level of due process, several factors augment the private interest at stake in this case and thus mandate even more careful scrutiny. *See, e.g.,* Tetro v. Tetro, 86 Wn.2d at 253-54 (more careful scrutiny of proceedings required when interests at stake are higher). First, as the primary residential parent under the Original Parenting Plan, Ms. Arden was vested with greater custodial rights than Mr. Halls and therefore more fundamental interests to protect than what might otherwise exist in a custody case between two parents. Second, not only did Ms. Arden lose custody of her children, she is now restrained from engaging in a variety of normal parental functions such as decision-making and contacting the children at home or school.

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[45] *See* Lassiter v. Department of Social and Health Services, 452 U.S. 18, 32-33, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

[46] Id. at 27. *See also* Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); May v. Anderson, 345 U.S. 528, 73 S. Ct. 840, 97 L. Ed. 1221 (1953); Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

Accordingly, the first prong of the Eldridge due process analysis weighs heavily in favor of appointment of counsel.

Because of the fundamental nature of Ms. Arden's parental rights, this case contrasts sharply with In re Perkins, 93 Wn. App. 590, 969 P.2d 1101 (1999), which held that the liberty interest at stake in initial truancy petition hearings does not require appointed counsel for the alleged truant. Contrasting the "sacred" interests at stake in the present case, the liberty interests at issue in Perkins were very limited. At the initial truancy hearing, appellants were potentially subject to an order requiring them to attend school, change schools, or appear before a community truancy board, whose role is to work with truants to find methods and incentives to abate the truancy. Perkins expressly discounts the significance of these liberty interests in comparison to the creation or termination of a parent-child relationship. Id. at 593.

b. The risk of erroneous deprivation is high without appointed counsel for Ms. Arden.

This factor weighs more heavily the greater the interest at stake. Matthews v. Eldridge, 424 U.S. at 341-43. The risk of erroneous deprivation also directly correlates to the complexity of the proceedings and the inability of the indigent party to effectively represent herself. *See* Myricks, 85 Wn.2d at 254; Luscier, 84 Wn.2d at 137-38. The present case

involves legal issues that Ms. Arden is and was unequipped to address. The modification arose out of a relocation dispute, which necessitated application of RCW 26.09.430 - .480 and a lengthy section of the Original Parenting Plan. CP 4-5.[47] Further, the case ultimately turned on a purely legal issue – whether two contempt findings alone can establish a basis for modification under RCW 26.09.260(1).

While these issues might not typically render a case complex enough to support the appointment of counsel, they must be considered in light of the broad range of legal and procedural errors committed by the trial court. *See supra* at 10 - 21. The myriad of errors described above overwhelmed the proceedings below and will greatly complicate this case on remand. Even with instructions to the trial court for remand, this case is a procedural nightmare. As such, Ms. Arden has little chance of protecting her parental rights without appointed counsel. Moreover, Ms. Arden will be returning to a forum that has demonstrated such indifference toward her clearly defined procedural rights that it is suggestive of hostility and bias. The record demonstrates a high risk of erroneous deprivation if Ms. Arden must defend against the modification petition without benefit of counsel.

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[47] Section 3.14 of the Original Parenting Plan concerns relocation of a child. It contains over one page of single spaced text.

c. Appointment of counsel for Ms. Arden serves governmental interests.

Several significant governmental interests favor appointment of counsel for Ms. Arden in the modification action. First, the State has an interest in judicial enforcement of the modification statute, RCW 26.09.260, which in turn promotes the fundamental overriding consideration in all parenting plan cases – the best interests of the children.[48] Codifying a presumption against modification of parenting plans, RCW 26.09.260 erects mandatory procedural and substantive thresholds to protect children from changes in their residential schedule except where necessary for their best interests.[49] The record amply demonstrates that without counsel Ms. Arden was powerless to prevent the trial court from running roughshod over these mandatory statutory criteria and procedures. Appointment of counsel on remand will promote the government's interest in enforcement of child custody laws enacted to ensure the best interests of children.

In addition, appointment of counsel for Ms. Arden will further the government's interest in the fair administration of its laws. As shown in the previous sections, the record demonstrates gross violations of

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[48] *See* RCW 26.09.002; RCW 26.09.260; Thompson v. Thompson, 56 Wn.2d at 250; Marriage of Murphy, 48 Wn. App. at 200.

procedural norms mandated by state law and due process. Without counsel for Ms. Arden, the government's interest in the administration of justice is at risk.

d. The federal presumption against appointment of counsel is overcome.

Federal jurisprudence creates a presumption against appointment of counsel under the due process requirements of the Fourteenth Amendment in cases where physical liberty is not threatened. Lassiter, 452 U.S. at 31. However, the presumption articulated by Lassiter is still subject to the Matthews v. Eldridge balancing test and can be rebutted as a factual matter on a case-by-case basis. Significantly, Lassiter did not categorically exclude persons whose physical liberty is not at stake from the entitlement created by the Fourteenth Amendment to appointed counsel. In fact, just the opposite is true. Lassiter makes clear that what process is due turns on the particular facts of each case. Based on the facts before it, where the custodial parent had been convicted of second-degree murder and sentenced to 25 to 40 years of imprisonment, the Lassiter Court determined that due process did not compel appointment of counsel for the parent in the termination of parental rights proceedings because counsel could not have "made a determinative difference." Id. at 33.

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[49] In re Marriage of Stern, 57 Wn. App. at 712; Anderson v. Anderson, 14 Wn. App. 366.

However, as explained above, Washington's Supreme Court has compelled appointment of counsel when fundamental custodial rights are at stake.

The facts of this case overcome the federal Lassiter presumption and entitle Ms. Arden to counsel as a matter of due process. As shown above, all three of the Matthews v. Eldridge balancing factors strongly favor appointment of counsel for Ms. Arden in the modification proceeding. In addition, the facts of this case contrast sharply with the factors that the Lassiter court considered significant in finding no federal right to appointed counsel.

In denying appointed counsel to the indigent parent in a parental rights termination case, Lassiter cited the parent's failure to make reasonable efforts to contest the proceeding, id. at 33, and the relative procedural and substantive simplicity of the proceeding, id. at 32, as reasons for concluding that counsel "could not have made a determinative difference." Id. at 33. By contrast, Ms. Arden vigorously opposed the loss of custody by attending hearings, trying to represent herself against experienced counsel and a hostile court, filing a timely written response and declarations opposing modification, and securing *pro bono* counsel to help her file for reconsideration. Further, unlike Lassiter, which presented "no specially troublesome points of law," id. at 32, this case turned on a

legal issue (whether two contempts automatically satisfy the statutory criteria for modification). Moreover, it arose out of a relocation dispute, which, as reflected by the amount of litigation making its way to the courts of appeal in this state, is one of the most troublesome points of family law.

In summary, the facts of this case tip the Matthews v. Eldridge balance in favor of appointed counsel and overcome the Lassister presumption against appointed counsel. Consequently, Ms. Arden is entitled to appointed counsel in defending against the modification petition under the Fourteenth Amendment of the U.S. Constitution.

2. Under the State Constitution, Ms. Arden Is Entitled to Appointed Counsel.

While the Superior Court should appoint counsel for Ms Arden as a matter of federal due process, the case for appointment of counsel is more emphatic under state law. Access to justice itself is a fundamental right under Washington law. As discussed below, this Court should hold that Ms. Arden's fundamental right to access justice compels the appointment of counsel to represent her in responding to the modification petition filed by Mr. Halls. Again, the appellant does not claim that appointment of counsel is required in every modification action brought against an indigent parent. Rather, under the particular facts of this case,

which include an imbalance of power, a hostile bench, significant restrictions on a parent-child relationship flowing directly from findings of contempt, and difficult legal and factual issues, failing to appoint counsel violates Ms. Arden's state constitutional right of access to justice.

a. Washington's Constitution creates a fundamental right of access to justice.

While counsel may be appointed as a matter of federal due process, an independent basis for appointment of counsel lies in several provisions of the Washington Constitution.

Washington Constitution, Article I, § 10. In addition to the state constitution's guarantee of due process,[50] article I, § 10 mandates "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Article I, § 10 has been cited as the source of the established right of access to justice. [51] The appellate courts of Washington have repeatedly declared that access to justice holds a prominent place among the individual rights protected by the Washington Constitution. *See, e.g.*, Seattle School District v. State, 90 Wn.2d 476, 502,

[50] Article I, § 3 of the Washington Constitution guarantees "[n]o person shall be deprived of life, liberty, or property, without due process of law."

[51] *See* Doe v. Puget Sound Blood Center, 117 Wn.2d 772, 780-81, 819 P.2d 370 (1991) (reciting history of cases establishing a right to "access to justice"); King v. Olympic Pipeline, 104 Wn. App. 338, 362, 16 P.3d 45 (2000) (recognizing the right of civil access to the courts extends equally to defendants and plaintiffs); Housing Authority of King County v. Saylors, 87 Wn.2d 732, 742, 557 P.2d 321 (1976) (holding a right of access to

585 P.2d 71 (1978) (listing article I, § 10 as one of the mandatory "personal guarantees" in the Washington Constitution). Indeed, it is the "bedrock foundation upon which rests all the people's rights and obligations." Doe v. Puget Sound Blood Center, 117 Wn.2d at 780 n.44.

Washington Constitution, Article I, § 32. Article I, § 10 and Washington's due process guarantee must be read together with article I, §32, which provides:

> A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.

There is no equivalent to article I, § 32 in the federal constitution.[52] The Washington Supreme Court has employed this constitutional mandate both to interpret other provisions in the state constitution[53] and as an independent source of substantive rights not expressly set out in the constitution.[54]

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justice does not inhere in the right to petition under article I, § 4; however, "access to the courts is amply and expressly protected by other [constitutional] provisions.")

[52] Because the appellant's state constitutional claim is premised on textual provisions that have no equivalent in the federal constitution, article I §§ 10 and 32, it is not necessary to engage in the analysis articulated by Gunwall v. State, 106 Wn.2d 54, 58, 720 P.2d 808 (1986), which applies when arguing that a state constitutional provision should yield a different outcome than its federal counterpart.

[53] *See* Seeley v. State, 132 Wn.2d 776, 809-12, 940 P.2d 604 (1997); Southcenter Joint Venture v. National Democratic Policy Comm., 113 Wn.2d 413, 439, 780 P.2d 1282 (1989) (Utter, J., concurring).

[54] *See* State v. Strasburg, 60 Wash. 106, 113, 110 P. 1020 (1910) (right to insanity defense); Dennis v. Moses, 18 Wash. 537, 571, 52 P. 333 (1888) (liberty right to incur

Article I, § 32 injects notions of fundamental principles grounded in natural law and essential human rights that must be considered when determining individual rights under Washington's Declaration of Rights, article I, §§ 1-31. Seeley v. State, 132 Wn.2d 776, 811-12, 940 P. 2d 604 (1997) (finding no evidence of a natural right to use marijuana in existence at the time of the constitution's adoption that would support inferring such a right pursuant to art. I, § 32). Certainly, one source of fundamental principles grounded in natural law to which the court may recur is the common law.

At common law, a right to counsel existed in civil proceedings, as a matter of equal justice.[55] Blackstone cited the statute of 11 Hen. 7, ch. 12[56] as the source of the right to counsel in civil proceedings. Blackstone, *Commentary on Law* (1780). The right to counsel at common law was firmly grounded in notions of "access to justice," its purpose being to

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debt). *But see* Brower v. State, 137 Wn.2d 44, 69, 969 P.2d 42 (1998) ("Article I, § 32 has not been interpreted as providing substantive rights in and of itself.").

[55] Johnson, Earl Jr., J. *Toward Equal Justice: Where the United States Stands Two Decades Later,* 5 Md. J. Contemp. Legal Issues 199, 204, n.11 (1994) citing Stat. 11 Hen. 7, ch. 12:

> A rather primitive right to equal justice came to America from England along with the rest of our common law system. At the time the colonists were settling our nation, this right had existed under the common law of England for several hundred years. In 1495, during the reign of Henry V, the English Parliament enacted a statute guaranteeing free counsel and waiving all fees for indigent civil litigants.

[56] The full text of this statute appears in the Appendix at A-48 – A-51.

ensure that civil litigants had effective access to the King's court.[57] The only factor considered in appointing counsel under this mandate was the litigant's indigency; the nature of the action or the rights to be enforced was irrelevant.[58] The value of access to justice and the importance of legal assistance for the poor as a core element of fair judicial proceedings were carried to the American colonies by the English and find expression in Washington judicial decisions, including Myricks and Luscier.

International law, and in particular international human rights law, is also a source of fundamental principles to which the court may recur to interpret provisions of Washington's constitution under article I, § 32. For example, in Eggert v. City of Seattle, 81 Wn. 2d 840, 841, 505 P. 2d 801 (1973) (citing the Magna Carta's concern for paupers' freedom), the Washington Supreme Court cited the Universal Declaration of Human Rights as a source for finding an unwritten constitutional right to travel. Nearly all of the European nations have a right to counsel in civil matters in one form or another.[59] The European Court of Human Rights has

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[57] It was this "right of every Englishman…of applying to the courts of justice for redress of injuries" as enscribed in the Magna Carta that we held sacred at common law. Blackstone, *Commentaries (Vol. 1)* 145 (1765).

[58] Maguire, John MacArthur, *Poverty and Civil Litigation,* 36 Harv. L. Rev. 361, 373 (1926) (appointed counsel "was meant to carry the poor man through the ins and outs of an action at common law.").

interpreted article 6, the "access to justice" provision of the European Convention on Human Rights, to require appointment of counsel to an indigent spouse in divorce proceedings in order to ensure "fair" access to justice.[60]

Another source of fundamental principles to which the court may recur under article I, § 32 is the jurisprudential considerations reflected in decisions of the Washington courts. For example, in the due process cases referenced above, the Washington Supreme Court is as concerned about a litigant's *access* to the process involved in a judicial proceeding as it is about the nature of the proceeding or of the rights at stake. For example, in Myricks, the court was concerned about the unrepresented parent's inability to effectively confront and cross-examine expert witnesses, to know and conform to the rules of evidence, to deal effectively with documentary evidence, to dispute facts, and of course, to articulate an effective legal argument. Similarly, in Honore v. State Bd. of Prisons, 77 Wn.2d 660, 673, 466 P. 2d 485 (1970), again citing the Magna Carta, it was the need to present "extraneous legal or evidentiary matters which

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[59] Johnson, Earl, Jr., J., *The Right to Counsel in Civil Cases: An International Perspective,* 19 Loy.L.A.Rev. 341 (1985).

[60] Airey v Ireland, 2 Eur. Ct. H.R. Rep. 305 (1979). This decision appears in the Appendix at A-16 – A-47.

must be researched, marshaled, and intelligibly presented" that supported the right to counsel in civil habeas corpus proceedings.

Taken together, these provisions of the Washington Constitution grant a broader right to counsel for indigent civil litigants than granted under the federal constitution's Fourteenth Amendment. In a wide range of decisions, state constitutional provisions have been the basis for providing indigent litigants greater access to justice. *See, e.g.,* O'Connor v. Matzdorff, 76 Wn.2d 589, 458 P.2d 154 (1969) (waiver of fees and costs in litigation); Ashley v. Superior Court, 82 Wn.2d 188, 509 P.2d 751 (1973) (waiver of filing fee and less expensive alternative to service by publication in divorce cases); Iverson v. Marine Bankcorporation, 83 Wn.2d 163, 517 P.2d 751 (1973) (waiver of appeal bond and free transcript on appeal); and Doe v. Puget Sound Blood Center, 117 Wn.2d at 780-83 (right to discovery is aspect of right of access to the courts).

While recent cases have not found a right to counsel in civil proceedings where physical incarceration or fundamental rights are not at stake, none of these cases have analyzed the right under article I, § 10 *when read in conjunction with article I, § 32*. Miranda v. Sims, 98 Wn. App. 898, 991 P.2d 681 (2000), discussed access to justice under article I, § 10, without "recurrence to fundamental principles," and in so doing emphasized the non-adversarial nature of the inquest proceedings at issue.

Perkins, 93 Wn. App. 590, which found no right to appointed counsel at the first stage of truancy proceedings, engaged in a straight interest-based analysis consistent with Mathhews v. Eldridge, and did not consider state constitutional provisions at all. Moreover, as every right to counsel decision makes clear, the crux of each analysis turns on the particular facts of each case, and both Miranda and Perkins involved starkly different facts than the present case. The concurring opinion in Miranda expressly left the door open for appointment of counsel pursuant to the fundamental right of access to the courts based on different facts.[61]

In summary, Washington has a long history of securing access to justice and appointed representation for indigent litigants as a matter of state constitutional law, informed by recurrence to fundamental principles. For the reasons set forth below, Ms. Arden was and is entitled to appointed counsel in the modification action based on her right to access justice as created by Washington's Constitution.

b. The right to appointed counsel extends to the present modification action.

[61] Miranda v. Sims, 98 Wn. App. at 909 (Ellington, J. concurring) ("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.' [Citations omitted.] 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.").

There were a number of factors present in this case upon which the trial court should have appointed counsel to further Ms. Arden's right to access justice. First, there was a profound disparity of power between Ms. Arden, who was unrepresented, and Mr. Halls, who had an attorney. Compounding this disparity was the open hostility directed from the bench to Ms. Arden, as is plainly demonstrated in the verbatim report of proceedings. The power imbalance was most pronounced at the June 13 hearing where Mr. Halls effectively dictated whether Ms. Arden would have representation for the remainder of the hearing simply by withdrawing his request for imprisonment.

Also, these proceedings gave rise to a number of complicated legal issues that Ms. Arden could not competently address without counsel. She was forced to deal with the complexities of the relocation statute, the legal basis claimed to support the orders of contempt. She was ill-equipped to address the specific violations of statutory procedure occurring throughout the course of the proceedings. Consequently, she could not fully recognize the error in changing custody absent a petition for modification or entry of findings relating to the best interests of the children.

Appointment of counsel in the modification action is well-grounded upon the state constitutional guarantees of due process and access to justice, as derived from recurrence to fundamental principles.

Appointed counsel would have served as a procedural safeguard for Ms. Arden's personal liberty when Mr. Halls sought imprisonment, and for her custodial rights when he did not. These fundamental interests are so inextricably intertwined in this case that it is not reasonably possible for Ms. Arden to defend on the contempt issues without being simultaneously and effectively represented on the modification issues. For example, absent counsel to identify the obvious procedural and statutory defects in the modification process, the trial court entered another contempt against Ms. Arden on September 5. This case exemplifies the point made by the concurring opinion in Miranda v. Sims, 98 Wn. App. at 909:

> 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.

VI. CONCLUSION

The appellant June Arden respectfully requests that the Court of Appeals vacate the orders of contempt dated May 9, May 30, and September 8; reverse the final parenting plans and other orders entered June 13, 2003 and September 8, 2003; remand this case to the trial court for disposition of the motions for contempt and petition for modification filed by the father; and order appointment of counsel for those proceedings. Pending the trial court's disposition of the father's contempt

motion and petition for modification, the appellant requests immediate return of the children to her care, pursuant to the final parenting plan dated February 4, 2003.

Respectfully submitted this ___ day of February, 2004.

NORTHWEST JUSTICE PROJECT

_____
Carol Vaughn, WSBA #16579
Jason Vail, WSBA #32244
Attorneys for Appellant June Arden

Northwest Justice Project
401 Second Avenue S, Suite 407
Seattle, Washington 98104
Phone: (206) 464-1519 Fax: (206) 624-7501