IN THE SUPREME COURT FOR THE STATE OF ALASKA

OFFICE OF PUBLIC ADVOCACY, Appellant, v. ALASKA COURT SYSTEM, RANDALL GUY GORDANIER, JR., and SIV BETTI JONSSON Appellees.	)	Supreme Court No. S-12999

Case No. 3AN-06-8887 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE MARK RINDNER, JUDGE

BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS:

Alaska Constitution, Article I.

Section 1. Inherent Rights.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Section 7. Due Process.

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

ALASKA STATUTES:

AS 25.24.310. Representation of minor.

(a) In an action involving a question of the custody, support, or visitation of a child, the court may, upon the motion of a party to the action or upon its own motion, appoint an attorney or the office of public advocacy to represent a minor with respect to the custody, support, and visitation of the minor or in any other legal proceeding involving the minor's welfare or to represent an unmarried 18-year-old child with respect to post-majority support while the child is actively pursuing a high school diploma or an equivalent level of technical or vocational training and living as a dependent with a parent or guardian or a designee of the parent or guardian. When custody, support, or visitation is at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that such a matter is at issue. Upon notification, the court shall determine whether the minor or other child should have legal representation or other services and shall make a finding on the record before trial. If the parties are indigent or temporarily without funds, the court shall appoint the office of public advocacy. The court shall notify the office of public advocacy if the office is required to provide legal representation or other services. The court shall enter an order for costs, fees, and disbursements in favor of the state and may further order that other services be provided for the protection of the minor or other child.

(b) If custody, support, or visitation is at issue, the order for costs, fees, and disbursements shall be made against either or both parents, except that, if one of the parties responsible for the costs is indigent, the costs, fees, and disbursements for that

party shall be borne by the state. If the parents are only temporarily without funds, the office of public advocacy shall provide legal representation or other services required by the court. The attorney general is responsible for enforcing collections owed the state. Repayment shall be made to the Department of Revenue under AS 37.10.050 for deposit in the general fund. The court shall, if possible, avoid assigning costs to only one party by ordering that costs of the minor's legal representation or other services be paid from proceeds derived from a sale of joint, community, or individual property of the parties before a division of property is made.

(c) Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, upon the motion of either party or upon its own motion, appoint an attorney or other person or the office of public advocacy to provide guardian ad litem services to a child in any legal proceedings involving the child's welfare. The court shall require a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from preferences, would serve the welfare of the child. The court in its order appointing a guardian ad litem shall limit the duration of the appointment of the guardian ad litem to the pendency of the legal proceedings affecting the child's interests, and shall outline the guardian ad litem's responsibilities and limit the authority to those matters related to the guardian's effective representation of the child's best interests in the pending legal proceeding. The court shall make every reasonable effort to appoint a guardian ad litem from among persons in the community where the child's parents or the person having legal custody or guardianship of the child's person reside. When custody, support, or visitation is at issue in a divorce, it is the responsibility of the parties or their counsel to notify the court that such a matter is at issue. Upon notification, the court shall determine if a child's best interests need representation or if a minor or other child needs other services and shall make a finding on the record before trial. If one or both of the parties is indigent or temporarily without funds the court shall appoint the office of public advocacy. The court shall notify the office of public advocacy if the office is required to provide guardian ad litem services. The court shall enter an order for costs, fees, and disbursements in favor of the state and may further order that other services be provided for the protection of a minor or other child.

AS 44.21.410. Powers and duties.

(a) The office of public advocacy shall

(1) perform the duties of the public guardian under AS 13.26.360 - 13.26.410;

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

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

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

(5) provide legal representation and guardian ad litem services under AS 25.24.310; in cases arising under AS 47.15 (Uniform Interstate Compact on Juveniles); in cases involving petitions to adopt a minor under AS 25.23.125(b) or petitions for the termination of parental rights on grounds set out in AS 25.23.180(c)(3); in cases involving petitions to remove the disabilities of a minor under AS 09.55.590; in children's proceedings under AS 47.10.050(a) or under AS 47.12.090; in cases involving appointments under AS 18.66.100(a) in petitions for protective orders on behalf of a minor; and in cases involving indigent persons who are entitled to representation under AS 18.85.100 and who cannot be represented by the public defender agency because of a conflict of interests;

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

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

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

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

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

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

(b) The commissioner of administration may

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

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

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

COURT RULES:

Administrative Rule 12. Procedure for Counsel and Guardian Ad Litem Appointments at Public Expense.

(a) Intent. The court shall appoint counsel or a guardian ad litem only when the court specifically determines that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense.

(b) Appointments under AS 18.85.100(a) (Public Defender Agency).

(1) *Appointment Procedure.*

(A) When a person is entitled to counsel under AS 18.85.100(a), appointments shall be made first to the public defender agency. If the agency files a motion to withdraw on the grounds that it cannot represent the person because of a conflict of interest, if the parties stipulate on the record that the agency has a conflict of interest, or if the court on its own motion finds an obvious conflict of interest, the court accepting such motion or stipulation or making such finding shall appoint the office of public advocacy to provide counsel.

(B) The court may appoint an attorney in a case in which the office of public advocacy has been appointed only if:

(i) The office of public advocacy has shown that it is unable to provide counsel either by staff or by contract; and

(ii) The office of public advocacy has provided the court with the name or names of the attorneys who shall be appointed in that particular case.

The office of public advocacy shall be responsible for compensating any attorney appointed under this subparagraph.

(C) All claims for payment for services performed after July 1, 1984, by attorneys appointed by the court shall be submitted to the director of the office of public advocacy, under such procedures as the director may prescribe. The director shall approve, modify or disapprove the claim.

(2) *Determination of Indigency.* Determination of indigency or financial inability for appointments under paragraph (b) of this rule must be made in accordance with the provisions of Criminal Rule 39.

(3) *Assessment of Costs.* When counsel is appointed for a child when the child's parents or custodian are financially able but refuse to employ counsel to assist the

child, the court may, when appropriate, assess as costs against the parents, guardian or custodian the cost to the state of providing counsel.

(c) Appointments under AS 44.21.410 (Office of Public Advocacy).

(1) *Appointment Procedure.* When a person qualifies for counsel or guardian ad litem services under AS 44.21.410, the court shall appoint the office of public advocacy. The court in its order appointing the office of public advocacy must state the authority for the appointment. In the case of a discretionary appointment, the court must give specific reasons for the appointment. In the case of a guardian ad litem appointment, the court shall limit the appointment to the pendency of the proceedings affecting the child's welfare, shall outline the guardian ad litem's responsibilities, and shall limit the guardian's authority to those matters related to the guardian's effective representation of the minor's best interests.

(2) *Indigency Determination.* For appointments of the office of public advocacy under this rule, other than an appointment required because of a conflict of interest with the public defender agency, a person is indigent if the person's income does not exceed the maximum annual income level established to determine eligibility for representation by the Alaska Legal Services Corporation. A person whose income exceeds the maximum amount for legal services representation may be determined indigent only if a judge makes a specific finding of indigency on the record, taking into account the funds necessary for the person to maintain employment, to provide shelter, and to clothe, feed and care for the person and the person's immediate family, the person's outstanding contractual indebtedness, the person's ability to afford representation based on the particular matter and the complexity of the case, the costs of living and attorneys fees in different regions of the state, and any liquid assets which could be counted as income.

(3) *Assessment of Costs.* In an appointment under AS 25.24.310 for representation of a minor, the court shall enter an order for costs, fees and disbursements in favor of the state. If the appointment is made in a proceeding in which custody, support or visitation is an issue, the court shall, if possible, avoid assigning costs to only one party by ordering that costs of the minor's legal representative or guardian services be paid from property belonging to both parents before a division of property is made.

(d) Withdrawal from Unauthorized Appointment. The public defender agency and the office of public advocacy shall accept appointments only in those cases for which the basis for the appointment is clearly authorized. If the agency or office determines that the basis for an appointment is not clearly authorized, the agency or office shall file with the court a motion to withdraw from the appointment.

(e) Other Appointments at Public Expense.

(1) *Constitutionally Required Appointments.*

If the court determines that counsel, or a guardian ad litem, or other representative should be appointed for an indigent person, and further determines that the

appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, but in the opinion of the court is required by law or rule, the court shall appoint an attorney who is a member of the Alaska Bar Association to provide the required services. Other persons may be appointed to provide required services to the extent permissible by law.

(A) Appointments may be made in the following types of cases without prior approval of the administrative director, but only in cases in which the required services would not otherwise be provided by a public agency:

(i) Attorneys for biological parents in adoption cases to the extent required by the Indian Child Welfare Act (25 USC 1901 et seq.),

(ii) Attorneys for minor children and indigent parents or custodians of minor children in minor guardianship cases brought pursuant to AS 13.26.060(d),

(iii) Attorneys for respondents in protective proceedings brought pursuant to AS 13.26 in which appointment of the office of public advocacy is not mandated by statute,

(iv) Attorneys for minor children or incompetents who are heirs or devisees of estates in cases in which the attorneys' fees cannot be paid as a cost of administration from the proceeds of the estate,

(v) Attorneys for indigent putative fathers in actions to establish paternity in which the state of Alaska provides representation for mothers,

(vi) Attorneys to represent indigent respondents in involuntary alcohol commitments brought pursuant to AS 47.37,

(vii) Attorneys for indigent parents who are defending against a claim that their consent to adoption is not required under AS 25.23.050(a).

(B) In all other cases, the court shall inform the administrative director of the specific reasons why an appointment is required prior to making the appointment.

(2) *Servicemembers Civil Relief Act.* When the opposing party is financially unable to pay for such representation, the court shall appoint a member of the Alaska Bar Association to represent an absent service person pursuant to the Servicemembers Civil Relief Act (50 App. U.S.C. § 521). Prior approval of the administrative director is not required.

(3) *List of Private Attorneys.*

(A) The presiding judge shall designate the area court administrator and a clerk of court for each court location in the district to keep and make available to the court in each location lists of attorneys or other persons eligible to receive court appointments under paragraph (e) of this rule.

(B) The attorney lists will first be compiled from names of persons who have volunteered to accept these appointments. If there are insufficient volunteers, the court will make appointments on a rotation basis from lists of eligible attorneys

obtained from the Alaska Bar Association. The court may, in departing from a strict rotation basis, take into account the complexity of the case and the level of experience required by counsel.

(C) Lists of other persons available to provide required services will be compiled from names of qualified persons who have indicated their willingness to provide the required services.

(4) *Appointment Orders.* When the court appoints an attorney or other person under paragraph (e) of this rule, the clerk of the court from which the appointment was made shall immediately send a copy of the appointment order to the administrative director.

(5) *Compensation.*

(A) All claims for compensation must be submitted on forms provided by the court within 30 days following the disposition of a case. Claims will be submitted to the assigned trial judge or master, who shall make a recommendation regarding approval and forward the recommendation to the administrative director. The administrative director shall approve or disapprove the claim.

(B) Attorneys will be compensated at the rate of $75.00 per hour; provided, that total compensation for any case will not exceed $1,000.00 without prior approval of the administrative director.

(C) A person other than an attorney appointed to provide services will receive compensation if the court deems it appropriate not to exceed $25.00 per hour; provided, that total compensation for any case will not exceed $300.00 without prior approval of the administrative director.

(D) Extraordinary expenses will be reimbursed only if prior authority has been obtained from the administrative director, upon recommendation by the assigned trial judge or the presiding judge. The assigned trial judge may recommend extraordinary expenses up to a total amount not to exceed $1,000.00, and the presiding judge may recommend an amount not to exceed an additional $1,500.00. Extraordinary expenses exceeding $2,500.00 may be authorized only in extremely complex cases by the administrative director upon the recommendation of the presiding judge. In this paragraph, "extraordinary expenses" are limited to expenses for:

(i) Investigation;

(ii) Expert witnesses; and

(iii) Necessary travel and per diem expenses. Travel and per diem may not exceed the rate authorized for state employees.

(E) If necessary to prevent manifest injustice, the administrative director may authorize payment of compensation or expenses in excess of the amounts allowed under this rule.

(6) *Recovery of Costs.* When counsel is appointed for a person in a case described in subparagraph 12(e)(1), the court shall order the person, or if the person is a child, the person's parents, guardian or custodian, to pay the costs incurred by the court in providing representation. Before appointing counsel, the court shall advise the person that the person will be ordered to repay the state for the cost of appointed counsel and shall advise the person of the maximum amount that the person will be required to repay. The court shall order the person to apply for permanent fund dividends every year in which the person qualifies for a dividend until the cost is paid in full. The clerk shall determine the cost of representation, and shall mail to the person's address of record a notice informing the person that judgment will be entered against the person for the actual cost of representation or for $500, whichever is less. The person may oppose entry of the judgment by filing a written opposition within 10 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The clerk shall enter judgment against the person for the amount shown in the notice if the person does not oppose entry of the judgment within the 10 days. If the person files a timely opposition, the court may set the matter for a hearing and shall have authority to enter the judgment. Criminal Rule 39(c)(1)(D) and (c)(2) shall apply to judgments entered under this section.

(f) Responsibilities of Appointed Counsel.

(1) An attorney appointed to represent an indigent person must advise the court if the attorney learns of a change in the person's financial status that would make the person financially ineligible for appointed counsel.

(2) An attorney appointed to represent an indigent person must move to withdraw if the attorney reasonably believes that the person has made a material misrepresentation of the person's financial status to the court. A material misrepresentation is a misrepresentation of facts that would make the person financially ineligible for appointed counsel. The attorney is not required to disclose to the court the existence or nature of the misrepresentation unless disclosure is necessary to prevent the person from fraudulently securing the services of appointed counsel.

Civil Rule 90.7. Appointment of Guardian Ad Litem in Child Custody Proceedings.

(a) When Guardian Ad Litem May Be Appointed. In an action under AS 25.20, 25.24, or 18.66 involving custody, support, or visitation of a child, the court may appoint a guardian ad litem for the child only when the court finds separate representation of the child's best interests is necessary, such as when the guardian ad litem may be expected to present evidence not otherwise likely to be available or presented, or the proceeding is unusually complex.

Commentary. -- AS 25.24.310 authorizes the court to appoint a guardian ad litem in any action involving custody, support, or visitation of a child. AS 25.24.310(c) states in part:

Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, upon motion of either party or upon its own motion, appoint an attorney or other person or the office of public advocacy to provide guardian ad litem services to a child in any legal proceeding involving the child's welfare. The court shall require a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from preferences, would serve the welfare of the child.

Courts should not routinely appoint guardians ad litem in custody, support, and visitation proceedings. In most instances, the child's best interests are adequately protected and presented by the parties. In most contested proceedings in which professional input is warranted, a child custody investigator (whether public or private) should be appointed instead of a guardian ad litem. The child custody investigator can provide the court and the parties with an independent analysis of the dispute and may serve as a catalyst to settlement without adding another party to the proceeding.

(b) Qualifications.

(1) A guardian ad litem should possess knowledge, skill, experience, training, or education that allows the guardian ad litem to conduct a thorough and impartial investigation and effectively advocate for the best interests of the child. Specifically, the guardian ad litem should have an understanding of the following as appropriate to the case:

(A) child development from infancy through adolescence;

(B) impact of divorce and parental separation on a child;

(C) unique issues related to families involved in custody disputes;

(D) domestic violence and substance abuse and their impact on children;

(E) Alaska statutes, rules, and supreme court decisions relating to custody, support, and visitation;

(F) the ability to communicate effectively with children and adults; and

(G) other qualifications appropriate to the particular case.

Further, the guardian ad litem should possess the knowledge and skills to effectively negotiate settlements on behalf of the child and to effectively advocate the child's best interests in contested litigation.

(2) Upon request of a party, a guardian ad litem or prospective guardian ad litem shall provide to the parties a written summary of relevant education and experience.

(c) Appointment Order. An order appointing a guardian ad litem must include findings why the appointment is necessary and must set forth the role of the guardian ad litem, the duties to be performed by the guardian ad litem in the case, deadlines for completion of these duties to the extent appropriate, the duration of the appointment, and compensation as provided in paragraph (m). If the court denies a motion for appointment of a guardian ad litem, the court must make findings to explain the denial. An order appointing a

guardian ad litem should authorize the guardian ad litem access, without further release, to all confidential and privileged records of the child, including but not limited to psychiatric records, psychological treatment records, drug and alcohol treatment records, medical records, evaluations, law enforcement records, and school records.

Commentary. -- If the court determines that the appointment of a guardian ad litem is appropriate in a particular case, the court may ask the parties to suggest individuals for appointment.

There is no right to a peremptory change of a guardian ad litem. Allegations that a guardian ad litem appointment is unnecessary, that a particular appointee is unqualified or otherwise unsuitable, or that an appointee is or has become biased should be addressed by trial courts through motion practice.

The appointment order should authorize the guardian ad litem to review confidential and privileged records pertaining to the child. To review records pertaining to a parent, the guardian ad litem must file a motion requesting access to those records unless the parent agrees to sign a release.

(d) Disclosure of Conflicts. The guardian ad litem shall disclose any relationships or associations between the guardian ad litem and any party which might reasonably cause the guardian ad litem's impartiality to be questioned. This disclosure must be made no later than 10 days after appointment.

(e) Role of Guardian Ad Litem. The guardian ad litem shall represent and advocate the best interests of the child. The court may appoint an attorney to advise or represent a non-attorney guardian ad litem if the court finds that legal advice or legal representation of the guardian ad litem is necessary to represent the child's best interests. The guardian ad litem shall be treated as a party to the proceeding for all purposes, except as otherwise provided in this rule.

Commentary. When custody is contested, the court has discretion to appoint a custody investigator, a guardian ad litem, and/or an attorney for the child. See AS 25.24.310(a), (c). The roles of a custody investigator, a guardian ad litem, and an attorney for the child are different and must be clearly distinguished:

- *custody investigator: A custody investigator is an expert witness appointed by the court. The custody investigator's duty is to conduct a thorough investigation and give an expert opinion on the custody arrangement that is in the best interests of the child. A custody investigator does not participate in court proceedings, other than to testify as an expert witness.*

- *guardian ad litem: A guardian ad litem has the duty to conduct a thorough factual investigation. Based on this investigation, the guardian ad litem must decide what course of action is in the child's best interests. The guardian ad litem must then advocate this course of action, regardless of whether the child agrees with the guardian ad litem's position. The guardian ad litem participates as a party in court proceedings that affect the child, but only testifies in exceptional circumstances and*

then only as to factual matters. The guardian ad litem never testifies as an expert witness.

The guardian ad litem must be served with copies of all pleadings and papers relating to the child, see Civil Rule 4(i), and must be given notice of all court appearances and conferences involving issues that affect the child. The guardian ad litem's rights include the right to appear and participate at hearings, engage in motion practice, conduct discovery, introduce evidence, examine and cross-examine witnesses, make objections, and make opening statements and closing arguments.

The guardian ad litem's advocacy need not be confined to custody and visitation issues. If included within the scope of the appointment, the guardian ad litem should be prepared to participate in decisions about any special education or psychological needs of the child (such as counseling) and child support and other financial issues related to the child.

- *attorney for child: A child's attorney represents the child, and it is the child who ultimately decides what position will be advocated in court. The attorney's duty is to conduct a thorough investigation, advise and consult the client, and zealously advocate the client's position in court. See Wagstaff v. Superior Court, 535 P.2d 1220 (Alaska 1975) (concerning child's right to select attorney when child's interests are hostile to parents' interests).*

The court may appoint an attorney to advise or represent a non-attorney guardian ad litem. If the court takes this action, the court should take care to specify the scope and duration of the appointment and the attorney's compensation.

(f) Duty to Investigate. The guardian ad litem shall investigate the pertinent facts of the case.

(1) The guardian ad litem shall review and consider any child custody investigation already conducted in the case and confer with the investigator. The guardian ad litem shall promptly conduct any further investigation necessary to carry out the order of appointment.

(2) If no child custody investigation has been done, the guardian ad litem shall either conduct an appropriate investigation or arrange for a custody investigation under Civil Rule 90.6. The investigation shall be conducted as soon as reasonably possible after the appointment.

Commentary. In developing a position, the guardian ad litem should usually solicit and receive input from professionals and other persons with experience or evidence related to the family, such as mental health professionals, teachers, day care providers, medical providers, close relatives of the child, and other adults residing in the home of either parent.

The guardian ad litem may move for an order requiring the child or one or both parents to undergo evaluation or assessment related to psychological, substance abuse, or other issues raised in the investigation.

Paragraph (m) requires a guardian ad litem to seek court approval before hiring a private custody investigator to conduct an investigation. If the parties cannot afford a private custody investigator, the court may appoint the court custody investigator to conduct the investigation. See Civil Rule 90.6(a).

(g) Contact with Child, Other Parties, and the Court.

(1) *Contact with Child.* The guardian ad litem may meet with the child as often as necessary to ascertain and represent the child's best interests. An attorney for a party shall not have independent contact with the child without the consent of the guardian ad litem or a court order. A party or attorney shall not arrange for mental health evaluations or assessments of the child without the consent of the guardian ad litem or a court order.

(2) *Contact with Other Parties.* A guardian ad litem may communicate with a party who is represented by an attorney unless the party's attorney has notified the guardian ad litem in writing that such communication should not occur outside the attorney's presence.

(3) *Contact with Court.* Unless all parties consent, a guardian ad litem shall not engage in ex parte communications with the court concerning a pending case except for scheduling and other administrative purposes when circumstances require.

(h) Trial or Hearing Brief. The court shall set a deadline for the guardian ad litem to file a trial or hearing brief. The brief must describe the guardian ad litem's investigation, including who was interviewed and what records were reviewed, analyze the facts that the guardian ad litem believes will be presented, explain the position taken by the guardian ad litem utilizing the applicable statutory factors, and address other matters the guardian ad litem believes to be appropriate. If there is a conflict between the guardian ad litem's position and the child's preference, that conflict must be disclosed in the brief.

Commentary. The guardian ad litem's brief cannot be treated as testimony or as evidence of any fact unless agreed to by the parties. Absent a stipulation, facts discussed in the guardian ad litem's brief must be proved at trial.

In many cases, the parties will not know the guardian ad litem's position or what facts the guardian ad litem has relied on until they receive the guardian ad litem's brief. Ideally, that brief should be due at least 30 days before the trial or hearing date so that the parties have sufficient time to prepare evidence in order to respond at trial. An early due date is also desirable because the guardian ad litem's brief often serves as a catalyst for settlement. At a minimum, the brief should be filed before the parties' briefs are due so that the parties can address the guardian ad litem's position in their briefs.

If there is a conflict between the guardian ad litem's position and the child's preference, the court may appoint a separate attorney to represent the child. The court should take this action only if the child's preference cannot be presented adequately by one of the parties. If the court appoints a separate attorney for the child, the court may either discharge the guardian ad litem or continue the guardian ad litem appointment to represent what the guardian ad litem believes to be in the child's best interests.

(i) Testimony.

(1) The guardian ad litem shall not testify at the trial or hearing unless:

(A) the testimony relates to an uncontested issue;

(B) the testimony relates to the nature and value of services rendered by the guardian ad litem in the case; or

(C) the testimony is necessary to present factual evidence on a material issue that is not available from another source.

(2) If the guardian ad litem intends to testify, the guardian ad litem shall file and serve notice of this intent with the trial or hearing brief. The notice must identify the subject of the guardian ad litem's testimony.

(3) Upon receiving notice that the guardian ad litem intends to testify, the court should consider whether the guardian ad litem can still effectively represent the best interests of the child. If not, the court may discharge the guardian ad litem, appoint another guardian ad litem, or appoint an attorney for the guardian ad litem or the child.

(4) If the guardian ad litem testifies, the guardian ad litem may be cross-examined as any other witness.

Commentary. Subparagraph (i)(1) reflects the principles of Alaska Rule of Professional Conduct 3.7(a), which under most circumstances prohibits an attorney from acting as an advocate in a proceeding in which the attorney is likely to be a witness.

In opening statements and closing arguments, a guardian ad litem is free to comment on the evidence and to suggest conclusions that the court should draw from the evidence. But the statements themselves are not and cannot be treated as testimony or evidence.

(j) Discovery.

(1) *Discovery of Documents in Guardian Ad Litem's Possession.* A party may obtain discovery of documents in the possession, custody, or control of the guardian ad litem, subject to the following limitations:

(A) the documents must be discoverable under Civil Rule 26(b)(1); and

(B) trial preparation materials as defined in Civil Rule 26(b)(3) are discoverable only as permitted by that rule.

(2) *Discovery Regarding Guardian Ad Litem's Testimony.* If the guardian ad litem has served notice that the guardian ad litem intends to testify, a party may obtain discovery from the guardian ad litem about the substance of this testimony.

(3) *Other Inquiry.* A party may obtain other discovery from a guardian ad litem only as permitted by the court upon a showing of good cause. The court may permit a party to question a guardian ad litem about the guardian ad litem's professional qualifications and experience or the guardian ad litem's actions in the case. But this inquiry must be conducted in the presence of the court.

(k) Duty to Maintain Confidentiality. The guardian ad litem shall not disclose communications made by the child or reveal information relating to the child, except as necessary to carry out the representation, unless:

(1) the guardian ad litem determines that disclosure is in the best interests of the child;

(2) disclosure would be permitted under Alaska Rule of Professional Conduct 1.6(b) as if the guardian ad litem were the child's lawyer;

(3) disclosure is required under paragraph (h) (duty to tell the court that child's preference differs from guardian ad litem's position); or

(4) disclosure is permitted by court order or by law.

Commentary. A guardian ad litem should advise the child that statements made by the child will ordinarily be kept confidential but may be disclosed if the guardian ad litem determines that disclosure is in the child's best interests and in the other circumstances described in this rule.

(l) Privileges.

(1) The guardian ad litem has a privilege to refuse to disclose and to prevent anyone other than the child from disclosing confidential communications made by the child. This privilege does not apply if disclosure of the communication is required by law or if the court finds there are compelling reasons to reveal the communication.

(2) The attorney-client privilege does not apply to confidential communications between the child and an attorney guardian ad litem.

Commentary. An attorney serving as a guardian ad litem does not act as legal counsel for the child but rather as a party to the proceeding. Therefore, the attorney-client privilege does not apply. But the policy behind the attorney-client privilege is equally compelling in the guardian ad litem-child relationship: to encourage the child to talk openly and candidly to the guardian ad litem so that the guardian ad litem can make the best possible determination about what is in the child's best interests. Therefore, this rule adopts a limited privilege for confidential communications between an attorney or non-attorney guardian ad litem and the child. It also allows the guardian ad litem to protect confidential communications made by the child to other persons.

(m) Compensation. The guardian ad litem, an attorney for a guardian ad litem, and expert witnesses used by the guardian ad litem will be compensated at a rate that the court determines is reasonable. Fees and costs for a private guardian ad litem will be divided equally between the parties unless the court finds good cause to change this allocation. The guardian ad litem must seek court approval before incurring extraordinary expenses, such as expert witness fees. The appointment order, or order authorizing the guardian ad litem to hire expert witnesses, must specify the hourly rate to be paid to the guardian ad litem, attorney, or expert witness, the maximum fee that may be incurred without further authorization of the court, how the fee will be allocated between the parties, and when payment is due. Unless otherwise ordered, bills must be submitted on a monthly basis and must state the total amount billed to date.

JURISDICTION

This is an appeal from the final judgment entered by the superior court, the Honorable Mark Rindner, dated January 23, 2008. This Court has legal authority to consider this appeal pursuant to AS 22.05.010 and Appellate Rule 202(a).

PARTIES

The Office of Public Advocacy (OPA) is the appellant.

The Alaska Court System, Randall Guy Gordanier, Jr., and Siv Betti Jonsson are the appellees.

ISSUES PRESENTED

1. In a civil custody case, legal representation may be acquired through various means: by obtaining counsel on one's own behalf, obtaining counsel paid for by the opposing party, obtaining counsel paid for by the Alaska Court System, or obtaining counsel paid for by OPA. Because the central issue here is not whether representation is available but who will pay for such representation (more specifically, which state agency, the Court System or OPA), did the trial court err in concluding that similarly situated people were treated differently for purposes of equal protection analysis or that equal protection analysis was appropriate at all?

2. OPA may provide counsel to an individual only when clearly authorized by its enabling act, AS 44.21.410. This act does not cover the situation presented here, namely where an indigent parent in a child custody case is unrepresented and a public agency has provided a guardian ad litem to represent the child's best

interests. Did the trial court err in concluding that OPA was required to provide counsel under the circumstances presented?

STATEMENT OF THE CASE

I. INTRODUCTION

This case arose out of a child custody case in which the parents disagreed about who should have legal and physical custody of their daughter and what the visitation plan should be. [R. 1109-13] Although both parents initially appeared pro se, the father later retained private counsel. [R. 193, 930, 1112] The mother, who had limited financial resources, attempted to obtain representation through Alaska Legal Services Corporation. [R. 5] After Legal Services declined to represent her, the mother asked the trial court to appoint counsel for her under the Alaska Constitution's due process clause. [R. 3-6] After considering the arguments of the parties, as well as an amicus brief, the trial court concluded that the mother had a due process right to counsel and ordered the Alaska Court System to provide her with counsel. [R. 929-44] The court also concluded that OPA's enabling act, AS 44.21.410, violates Alaska's equal protection clause. [R. 940-43]

After receiving the order to provide counsel, the Court System intervened and asked the trial court to reconsider its order or, in the alternative, to shift the obligation of providing counsel to OPA. [R. 916-23] OPA then intervened, and the trial court considered the arguments of the parties, the interveners, and an amicus brief before granting the Court System's request to shift the financial responsibility of providing counsel for the mother to OPA. [R. 1177-90] The court also reaffirmed that the mother

had a due process right to counsel and that OPA's enabling act, under which it was requiring OPA to provide counsel, was unconstitutional. [R. 1177-90]

OPA does not take a position on the original determination that the mother was entitled to court-appointed counsel under the due process clause; OPA does challenge the trial court's conclusion that its enabling act is unconstitutional, as well as the trial court's determination that OPA is statutorily obligated to provide counsel under the circumstances of this case.

II. FACTS AND PROCEEDINGS

A. Brief Background on the Family.

Randall Gordanier and Siv Jonsson met in Colorado. [R. 40] The couple never married, and it is unclear how long they remained together. [R. 40] They had a daughter in 1996. [R. 21, 40] The family briefly moved to Alaska, before returning to Colorado. [R. 40] After six or seven months in Colorado, Ms. Jonsson and her daughter returned to Alaska; Mr. Gordanier did not return with them. [R. 40] By this time, Mr. Gordanier and Ms. Jonsson had ended their relationship. [R. 40]

Mr. Gordanier became involved in his daughter's life again when she was a toddler. [R. 40] After a year, because of conflicts with Ms. Jonsson, he discontinued contact with both his daughter and with Ms. Jonsson. [R. 40] For the next four years, Mr. Gordanier had no contact with his child. [R. 40] In 2003, by which time the child was seven, Mr. Gordanier entered his daughter's life once again. [R. 40] The child continued living primarily with her mother but visited Mr. Gordanier and his wife on the weekends. [R. 213-14]

B. The Father Initiates a Civil Custody Case, Seeking Sole Legal Custody, Primary Physical Custody, a Modified Visitation Plan, and a Modified Child Support Order.

In June 2006, Mr. Gordanier, who was pro se, initiated a child custody action, seeking sole legal custody and primary physical custody of the child and a modification of the visitation schedule. [R. 1109-13] Mr. Gordanier sought an interim custody order, under which primary custody would shift from Ms. Jonsson to him. [R. 205-19] Ms. Jonsson would have physical custody only on alternating weekends, and Mr. Gordanier's child support obligations would be waived. [R. 205-19] Ms. Jonsson, who was also pro se, opposed this proposal. [R. 184-90]

The trial court granted Mr. Gordanier interim custody, giving him physical custody on weekdays and Ms. Jonsson physical custody on weekends. [R. 62] The court subsequently amended the child support order to reflect that the parents shared legal custody, that Mr. Gordanier had primary physical custody, and that Ms. Jonsson was now required to pay child support rather than Mr. Gordanier. [R. 52-59]

Ms. Jonsson then asked the trial court to appoint a custody investigator who could make recommendations regarding custody and visitation; Mr. Gordanier supported this request. [R. 139, 161] The trial court granted it, appointing an investigator. [R. 61]

In August 2006, Mr. Gordanier obtained legal counsel. [R. 930] He then sought a suspension of Ms. Jonsson's unsupervised weekend visits. [R. 26] Rather than grant Mr. Gordanier's request, the trial court appointed a guardian ad litem to represent the child's best interest since the "record suggests that the parties both appear to be acting

contrary to the best interests of the child." [R. 21-23; Ex. 1-2] Having appointed a guardian ad litem, the trial court vacated its order appointing an investigator. [R. 23]

The guardian ad litem asked the trial court to reconsider its decision to vacate the order appointing an investigator. [R. 12-14] She noted that although the roles of a custody investigator and the guardian ad litem overlap somewhat, they are not duplicative and a custody investigator was important to this case. [R. 13] Based on this request, the trial court re-appointed a custody investigator. [R. 15-16] The court then had both a guardian ad litem and a custody investigator to assist it in making custody and visitation decisions. [R. 15-16]

C. As an Indigent Party in a Civil Custody Case Who is Facing a Represented Opposing Party, the Mother Requests Court-Appointed Counsel.

In October 2006, Ms. Jonsson requested court-appointed counsel. [Exc. 3-6] She asserted that she was indigent, had been deprived of her parental rights, stood to lose custody of her child, and was "unable to litigate [the couple's] differences in judicial forum because of [her] emotional involvement in the case." [Exc. 3] Ms. Jonsson explained that she had attempted unsuccessfully to obtain representation through several sources, including Legal Services, and did not have sufficient funds to hire a private attorney. [Exc. 3] Under the circumstances, she believed that she had a due process right to counsel. [Exc. 3-4] Mr. Gordanier opposed the motion, asserting that "[a]s a matter of public policy it is a poor idea to provide counsel at public expense in civil litigation" because the "possibilities of public funding for private custody litigation boggle the mind." [Exc. 7] Noting that the "question of whether there is a right to counsel under the

Alaska Constitution in cases where custody is at issue is an important one," the trial court requested amicus briefs from a number of entities. [Exc. 9]

Alaska Legal Services Corporation, the Alaska Network on Domestic Violence and Sexual Assault, and the Alaska Pro Bono Program, Inc. (amici) filed a joint amicus brief, in which they asserted that Ms. Jonsson had a due process right to court-appointed counsel under the state and federal constitutions. [Exc. 12, 24-30] Amici also argued that because AS 44.21.410 – OPA's enabling act – violated the equal protection clause of the Alaska Constitution, Ms. Jonsson was entitled to counsel under this statutory provision as well. [Exc. 30-32]

OPA filed a position paper in which it explained that it did not take a position on whether "the Alaska Constitution requires appointment of court-appointed counsel for an indigent parent in a civil custody matter where the opposing party is represented by a private attorney." [Exc. 41] It noted that it was statutorily authorized, under AS 44.21.410, to represent an indigent party in a child custody case *only* if the "opposing party is represented by counsel provided by a public agency," which was not the case here. [Exc. 41] OPA further noted that if a state agency was charged with providing representation in cases such as this, it would require a "significant appropriation" of funds from the legislature. [Exc. 43]

After considering all of the briefing, the trial court noted that before resolving the constitutional issue, it was "prudent to determine whether [Mr. Gordanier] should provide funds to [Ms. Jonsson] to enable her to retain counsel." [Exc. 46] As such, the court asked Mr. Gordanier to explain "why, in light of the relative financial

resources of the parties" (records previously submitted suggested Mr. Gordanier earned ten times what Ms. Jonsson did) and relevant case law, it should not order Mr. Gordanier to pay for private counsel for Ms. Jonsson. [Exc. 46-47]

In response, Mr. Gordanier argued that he was not in a financial position to pay for Ms. Jonsson's counsel based on his limited financial resources, his current level of debt, and his inability to obtain money from any other sources. [Exc. 48-49] He also asserted that, under relevant case law, he was not required to pay for Ms. Jonsson's counsel because they were never married, distinguishing this from a divorce case, and there was no allegation that he had acted in bad faith in the proceedings. [Exc. 48-49]

Because Mr. Gordanier also noted that Ms. Jonsson had not provided any documentation regarding her own financial situation, the trial court ordered Ms. Jonsson to provide relevant information to determine whether she could afford her own attorney. [Exc. 58-59] The trial court noted that if Ms. Jonsson failed to comply, it would assume she could afford to hire an attorney and would deny her motion. [Exc. 59]

Ms. Jonsson apparently complied with this order because on August 14, 2007, the trial court granted her request for counsel. [Exc. 60-75] The court concluded that Ms. Jonsson did not have sufficient funds to pay for counsel and that Mr. Gordanier did not have sufficient funds to pay for counsel for her. [Exc. 63] As such, it could not resolve the request under an applicable statute and must consider the constitutional arguments. [Exc. 63-64] The trial court then adopted the amici's legal arguments (almost word for word) in concluding that Ms. Jonsson was entitled to court-appointed counsel under both the Alaska due process and equal protection clauses. [Exc. 64-74]

Having found a constitutional right to counsel, the trial court noted that counsel "will be appointed by separate order pursuant to Administrative Rule 12(e)." [Exc. 74] It continued:

> The Court wishes to emphasize the narrowness of this ruling. Here, one party has the resources to afford to retain private counsel while the other does not. Whether counsel must be appointed when neither party can afford to retain counsel is not before the Court. Moreover, in this case there are allegations that any visitation awarded to [Ms. Jonsson] should be supervised. This makes this case more clearly analogous to a [child-in-need-of-aid] proceeding. Whether counsel would be required in a custody or divorce case where such relief is less likely is also not decided.

[Exc. 74-75 (footnote omitted)]

D. The Alaska Court System and OPA Intervene in Order to Address Which Agency Would Be Required to Provide Counsel for the Mother.

Under the trial court's order, the Court System was responsible for providing Ms. Jonsson with counsel. [Exc. 74] Because it was directly affected by this order but had not been given an opportunity to litigate the question of representation, the Court System filed a motion to intervene and seek reconsideration of the appointment order. [Exc. 76-83] The trial court granted the request for the limited purpose of permitting the Court System to brief the issue of whether the court should reconsider its August 14, 2007 order appointing counsel to Ms. Jonsson. [Exc. 84-85]

In its motion for reconsideration, the Court System explained that "the number of unrepresented parties in custody proceedings is among the highest in all categories of civil cases" and "because of the number involved, an order requiring the appointment of counsel for indigent parties in civil custody cases under Administrative

Rule 12(e) will have dramatic and unanticipated effects on the Court System's budget." [Exc. 87] To avoid incurring this cost, the Court System asked the trial court to shift this significant financial burden to OPA (by severing language from AS 44.21.410(a)(4)) or to conclude that Ms. Jonsson was not entitled to counsel. [Exc. 86-127]

On September 19, 2007, the trial court invited those entities originally asked to file amicus briefs to respond to the Court System's motion. [Exc. 128] Amici and OPA filed responses, as requested. [Exc. 131-50, 158-76] OPA also filed a motion to intervene, which the trial court granted. [Exc. 151-57, 197]

In their response, contrary to their original position, amici urged the trial court to refrain from ruling on the constitutionality of OPA's enabling act; they explained that the equal protection analysis was unnecessary because payment of court-appointed counsel could occur pursuant to Administrative Rule 12. [Exc. 133-37] Amici also asked the court to refrain from reconsidering its decision that Ms. Jonsson was entitled to counsel under the due process clause. [Exc. 137-49]

In its response, OPA argued that the trial court should reconsider its equal protection analysis. [Exc. 158] Rather than severing part of AS 44.21.410(a)(4) as requested by the Court System, OPA contended that the trial court should strike the portion of its order discussing equal protection. [Exc. 159-65] OPA argued that if the trial court severed the portion of AS 44.21.410 as requested by the Court System, it would violate the separation of powers doctrine. [Exc. 166-70]

On December 10, 2007, after considering the interveners' and amici's responses, the trial court issued an order requesting briefing on a new issue: "whether the

appointment of a guardian ad litem is sufficient to bring this case within the holding of *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) and if so whether appointment of counsel is required on that basis." [Exc. 195-96] As a follow-up question, the court asked "whether the appointment of counsel in this case should be sustained under the existing *Flores* doctrine, rather than under the Court's August 14, 2007 Order." [Exc. 195-96] In a footnote, the trial court also asked everyone to address whether, under this new theory, appointment should be provided by OPA pursuant to AS 44.21.410. [Exc. 196 n.1]

In response, OPA asserted that *Flores*, which must be narrowly interpreted, did not apply to a custody case in which a guardian ad litem was appointed at public expense because the guardian ad litem does not act as the child's attorney but participates as a party in lieu of the child. [Exc. 198-201] OPA then noted that even if *Flores* were interpreted broadly enough to require court-appointed counsel for one or both indigent parents based on appointment of a guardian ad litem, OPA should not be required to pay for such counsel because appointment would fall outside the scope of AS 44.21.410. [Exc. 204-05]

Amici argued that OPA's enabling act should be interpreted as requiring the agency to provide counsel to an indigent parent if a guardian ad litem has been provided for the child because the word "counsel" could be interpreted as including "guardian ad litem." [Exc. 207-16] Then, contrary to their response to the Court System's motion for reconsideration, amici asked the trial court to also incorporate its prior equal protection analysis, which found OPA's enabling act unconstitutional, into its final order. [Exc. 207, 220]

The Court System suggested that *Flores* should not be read broadly enough to require appointment of counsel for a parent where a guardian ad litem has been appointed for a child. [Exc. 222-25] In the alternative, it argued that if the trial court interpreted *Flores* as requiring appointment under these circumstances, then OPA's enabling act should also be read broadly enough to require it to pay for such appointment, rather than the Court System. [Exc. 225-27]

E. After the Substantive Issues in the Child Custody Case Are Resolved, the Trial Court Issues an Order Shifting the Responsibility of Paying for Counsel from the Alaska Court System to OPA.

While the interveners and amici were litigating about which state agency should pay for Ms. Jonsson's counsel, Mr. Gordanier and Ms. Jonsson were litigating the underlying issues – legal and physical custody of the child and a visitation schedule. [R. 1305] The custody investigator completed his investigation and submitted a report to the trial court; the guardian ad litem also submitted her recommendations. [R. 947, 1305] On January 15, 2008, the trial court issued an order resolving the custody case, granting Mr. Gordanier sole legal custody and primary physical custody and setting forth a very specific visitation plan. [R. 1103-06] Because custody had been altered, the trial court indicated that it would modify the child support order after it received a child support guidelines affidavit from Ms. Jonsson. [R. 1105-06]

Shortly after issuing this order, the trial court issued a final order regarding appointment of counsel for Ms. Jonsson. [Exc. 229-42] The court reaffirmed its prior conclusion that Ms. Jonsson was entitled to court-appointed counsel, rejecting the Court

System's argument that due process did not require appointment of counsel in this civil custody case.[1] [Exc. 233] In doing so, the court reiterated the narrowness of its order:

> This Court again wishes to stress the specific facts of this case that led the Court to issue its August 14, 2007 decision, i.e. suggestions that defendant had various mental health problems and visitation needed to be supervised, and a child with a mental health history making the case far more complex than the usual custody case. The Court also notes that in this case, while plaintiff had funds to retain his own attorney his assets were insufficient to require him to pay for defendant's lawyer. Finally, the Court notes that Ms. Jonsson had applied for legal services by those organizations who provide free legal services and had been turned down. Obviously not all of these factors will be present in the "run-of-the-mill" custody case.

[Exc. 234 n.2] The court then turned to which government entity should pay for counsel – the Court System or OPA. [Exc. 235]

In relation to this issue, the trial court concluded that OPA was required to pay for counsel because "the role of a GAL is sufficiently analogous to that of an attorney to trigger the right to counsel" under both *Flores* and OPA's enabling act. [Exc. 236-41]

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[1] In its order, the trial court noted: "The parties were able to resolve the case with the help of counsel such that Mr. Gordanier has primary custody and Ms. Jonsson has unsupervised visitation. This is a far different outcome than initially proposed by plaintiff before counsel for Ms. Jonsson was appointed. While the outcome of the case does not answer the question of whether the appointment of counsel is constitutionally required, it certainly points out the need for a litigant in Ms. Jonsson's position to have counsel when custody is at issue." [Exc. 231-32] But this was not an accurate reflection of the case. As discussed above, Mr. Gordanier initially sought precisely this relief – sole legal custody and primary physical custody and a modification of the visitation schedule under which Ms. Jonsson would have unsupervised visits. [R. 1109-13] After Mr. Gordanier obtained counsel, he sought a suspension of Ms. Jonsson's unsupervised visits, a request that was ultimately denied. [R. 26-49] So the end result was not all that different from Mr. Gordanier's original requests, despite the trial court's characterization to the contrary.

It also held that a guardian ad litem is an "opposing party" in a civil custody case because the guardian ad litem "will always disagree with at least one of the disputing parents, and frequently will oppose at least certain aspects of both parents' positions."[2] [Exc. 240, 242] In its conclusion, the trial court reiterated that Ms. Jonsson was entitled to court-appointed counsel under the due process clause (because she was indigent and faced an opponent represented by counsel) and, alternatively, under OPA's enabling act (because she was indigent and a guardian ad litem had been provided by a public agency). [Exc. 241] As such, the trial court ordered OPA to pay for Ms. Jonsson's counsel. [Exc. 242]

The trial court did not expressly address its prior equal protection analysis but did note that "[o]ther than requiring OPA, rather than the Court System, to pay for such counsel this Court reaffirms its August 14, 2007 Order in all other respects." [Exc. 242] Thus, the equal protection analysis appears to have remained intact. [Exc. 242]

OPA appeals.

ARGUMENT

I. INTRODUCTION

The trial court initially concluded that, under the due process clause of the Alaska Constitution, an indigent party in a civil custody case is entitled to court-appointed counsel if the opposing party is represented by private counsel but cannot afford to pay for counsel for the indigent party. [Exc. 64-69] And it correctly found that

[2] Much of the trial court's analysis is taken almost word for word from amici's brief, including the court's mis-citation and analysis of an Alaska Court of Appeals opinion, which broadly construes *Flores*, as an Alaska Supreme Court opinion. [Exc. 210-16, 235-41]

such counsel should be provided by the Court System pursuant to Administrative Rule 12(e). [Exc. 74] The trial court then erroneously concluded that AS 44.21.410(a)(4) violates the equal protection clause of the Alaska Constitution because it arbitrarily distinguishes between "a poor vs. a resourced opposing litigant" in determining whether an individual is entitled to OPA counsel in a civil custody case. [Exc. 72] In doing so, the trial court not only overlooked the fundamental principle that equal protection is an individual right meant to protect a person from unequal treatment by the government, it ignored the fact that the question before it was simply who should pay for counsel for Ms. Jonsson – a question it had already resolved by ordering the Court System to pay pursuant to Administrative Rule 12(e). [Exc. 74]

In its order on reconsideration, the trial court took the clause it previously concluded was unconstitutional (AS 44.21.410(a)(4)) and interpreted it in such a way that a court-appointed guardian ad litem in a civil custody case becomes not only an opposing party to the parents in that case but legal counsel for the child. [Exc. 235-42] In other words, in order to shift the financial burden of paying for Ms. Jonsson's counsel from the Court System, where it properly belonged, to OPA, the trial court impermissibly rewrote OPA's enabling act so that the statute went from requiring OPA to provide "legal representation . . . to indigent parties in cases involving child custody in which the *opposing party is represented by counsel* provided by a public agency"[3] to requiring OPA to provide "legal representation . . . to indigent parties in cases involving child custody in

[3] AS 44.21.410(a)(4) (emphasis added).

which the [*guardian ad litem is*] provided by a public agency." Such an interpretation is not only illogical, it violates the maxims of statutory construction.

While OPA does not take a position on the trial court's determination that Ms. Jonsson was entitled to counsel pursuant to the due process clause, it does ask this Court to vacate the trial court's clearly erroneous and legally unnecessary conclusion that AS 44.21.410(a)(4) violates the equal protection clause of the Alaska Constitution. OPA also asks this Court to vacate the trial court's conclusions that OPA is required to provide counsel for an indigent party (or parties) in a civil custody case in which a guardian ad litem has been appointed and to re-instate the trial court's order requiring the Court System to pay for Ms. Jonsson's counsel as required by relevant case law and Administrative Rule 12.

II. HAVING ALREADY JUSTIFIED APPOINTMENT OF COUNSEL UNDER THE DUE PROCESS CLAUSE AND ORDERED THE COURT SYSTEM TO PAY FOR COUNSEL, THE TRIAL COURT ERRONEOUSLY HELD THAT AS 44.21.410 VIOLATED THE EQUAL PROTECTION CLAUSE.

A. Standard of Review.

Because an equal protection challenge involves a question of law, the Court will apply its independent judgment, bearing in mind that a "constitutional challenge to a statute must overcome a presumption of constitutionality."[4]

[4] *Pub. Employees' Ret. Sys. v. Gallant*, 153 P.3d 346, 349 (Alaska 2007).

B. The Trial Court Not Only Gratuitously But Erroneously Concluded that AS 44.21.410(a)(4) Treats Similarly Situated People Differently for Purposes of Equal Protection Analysis.

Under article I, section 1 of the Alaska Constitution, all persons are "entitled to equal rights, opportunities, and protection under the law." The Court has interpreted this clause as a "command to state and local governments to treat those who are similarly situated alike."[5] Thus, the initial inquiry in an equal protection case is "whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment."[6] Because the purpose of equal protection is to ensure that an individual does not face unequal treatment by the government, where there is no different, disparate, or unequal treatment, there is no basis for an equal protection claim.[7]

Here, there was no "unequal" treatment – only a question of which government entity would pay for court-appointed counsel, the Court System or OPA. Ignoring this reality along with the fact that it had already ordered the Court System to provide counsel, the trial court treated OPA's enabling act as the only source through which an indigent party could obtain representation in a civil custody case when the opposing party is represented by counsel and concluded that the enabling act treated similarly situated people differently. [Exc. 72, 74] But OPA's enabling act is not the only source for obtaining counsel in civil custody cases; and the existence of these

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[5] *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994).

[6] *Id.*

[7] *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 397 (Alaska 1997).

alternative sources (including the Court System) removes any perceived different or disparate treatment. As such, the trial court erred in concluding that OPA's enabling act violated the equal protection clause,[8] and this Court should reverse the trial court's order.

1. Treating AS 44.21.410 as the only source for an indigent party to obtain representation in a custody case when the opposing party is represented by counsel, the trial court erred when it concluded that the act treats similarly situated people differently.

The statute at issue, AS 44.21.410, is intended to create and define the functions of OPA. In establishing the powers and duties of the agency, AS 44.21.410 grants OPA authority to investigate complaints, establish a guardian ad litem program, and adopt regulations. In addition, it authorizes OPA to provide legal representation in circumstances expressly specified by the legislature. For example, the enabling act provides, in relevant part:

> AS 44.21.410. Powers and duties. (a) The office of public advocacy shall . . .

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[8] Having already concluded that Ms. Jonsson was entitled to court-appointed counsel under the due process clause, the trial court did not need to reach the issue of whether AS 44.21.410(a)(4) violated the equal protection clause. [Exc. 64-69] There is both a presumption that a statute is constitutional and a "duty to construe a statute, if it is reasonable to do so, to avoid dangers of unconstitutionality." *Gallant*, 153 P.3d at 349; *Bonjour v. Bonjour*, 592 P.2d 1233, 1237 (Alaska 1979). Because the right to counsel may be protected solely under the due process clause, the court should have avoided needlessly construing AS 44.21.410(a)(4) as unconstitutional. Moreover, even if the trial court were correct that AS 44.21.410(a)(4) violates the equal protection clause, the remedy would be to sever the offending portion of the statute (*i.e.*, the entire clause "to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency"), not to provide counsel pursuant to the unconstitutional provision. *See State v. Kenaitze Indian Tribe*, 894 P.2d 632, 639 (Alaska 1995). Thus, the trial court's equal protection analysis was not only erroneous, it was gratuitous and should not, under the court's analysis, provide the remedy requested by Ms. Jonsson.

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

(Emphasis added.) The trial court considered only the italicized portion of this statute, erroneously concluding that it violated the equal protection clause. [Exc. 72-74]

In its analysis, the trial court stated that "Alaska statutes differentiate between an indigent parent litigating custody against an indigent parent with a public attorney, on the one hand, and an indigent parent litigating custody against a parent with resources, on the other." [Exc. 72] It continued: "In effect, parents who have spouses who are poor enough to get the assistance of a legal services attorney are afforded the opportunity to meaningfully access the courts to fight for custody, while those who have resourced opposing parties are not." [Exc. 72] Believing that the "distinction between a poor vs. a resourced opposing litigant should not be the deciding factor as to whether someone can adequately protect their rights to their child," the trial court went on to summarily conclude that AS 44.21.410(a)(4) violated equal protection under Alaska's sliding-scale equal protection test.[9] [Exc. 73-74]

In concluding that "Alaska statutes differentiate" between indigent litigants in civil custody cases based on the financial resources of their opposing party, the trial

[9] *See Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 269-70 (Alaska 1984) (discussing the sliding-scale test).

court referenced only OPA's enabling act. [Exc. 72] But OPA is only one of several sources through which counsel in a civil custody case may be obtained. Thus, as explained below, the "distinction between a poor vs. a resourced opposing litigant" is *not* the "deciding factor as to whether someone can adequately protect their right to their child" by obtaining representation but *is* a material factor in determining who (or which state agency) will pay for that representation. *See* section II.B.2.

By failing to take into account these other sources, the trial court ignored the reality of civil custody cases, which is that litigants entitled to counsel in civil custody cases are not actually treated differently – because the law ensures counsel through a variety of sources. Given this reality, there is no different or disparate treatment of indigent litigants who are entitled to counsel in civil custody cases. Therefore, there is no equal protection violation.

2. Contrary to the trial court's analysis, the state has provided several sources through which an indigent litigant may obtain counsel in a civil custody case.

A litigant in a civil custody case is not generally guaranteed the assistance of counsel, but counsel may be made available either through fee-shifting or by court appointment.[10] For example, in a divorce or custody action, a trial court may award one party attorney's fees and costs based, not on prevailing party status, but "on the relative economic situations and earning powers of the parties."[11] Such an award is intended to

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[10] *Midgett v. Cook Inlet Pre-Trial Facility*, 53 P.3d 1105, 1111 (Alaska 2002).

[11] *Lone Wolf v. Lone Wolf*, 741 P.2d 1187, 1192 (Alaska 1987); AS 25.24.140(a)(1).

"assure that both spouses have the proper means to litigate the divorce action on a fairly equal plane."[12]

A slightly different standard is applied to a custody case in which a party seeks modification of a prior custody or support order. In that case, the trial court may still award one party attorney's fees and costs, taking into account "the parties' relative economic situations, as well as whether they have acted in good faith."[13] However, the parties' financial situations will not "necessarily take primacy over the presence or absence of good faith."[14] Thus, in either the original custody case or where modification is sought, if one party has the financial resources to obtain counsel on his or her own behalf, that person may be required to pay for the other party's counsel as well.

This fee-shifting will occur only if one or both parties have sufficient financial resources to obtain counsel (or are "resourced"); it does not apply if both parties are indigent and cannot afford to obtain counsel. Under the latter circumstance, counsel may be provided to: (1) an indigent party who faces an opposing party represented by counsel provided by a public agency, or (2) an indigent party who faces an opposing party represented by private counsel but who lacks the financial resources to pay for the indigent party's counsel. Each of these alternatives is discussed below.

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[12] *Lone Wolf*, 741 P.2d at 1192; *see also Bergstrom v. Lindback*, 779 P.2d 1235, 1238 (Alaska 1989) (applying standard in divorce cases to case between unmarried individuals where issues were limited to child custody and support).

[13] *B.J. v. J.D.*, 950 P.2d 113, 119 (Alaska 1997); AS 25.20.115.

[14] *B.J.*, 950 P.2d at 119.

In *Flores v. Flores*, this Court held that an indigent party in a civil custody case is entitled to court-appointed counsel, under the due process clause, if his or her opponent is represented by counsel provided by a public agency.[15] It then concluded that counsel should be appointed from the private bar, who would be compensated by the Court System pursuant to the administrative rules.[16] In 1984, the legislature enacted AS 44.21.410(a), shifting that responsibility from the Court System to OPA.[17] Under this statutory scheme, OPA is required to provide legal representation "to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency[.]"[18] Thus, if both parties are indigent and one obtains counsel through a public agency (such as Alaska Legal Services), the other is entitled to court-appointed counsel through OPA.[19]

The second scenario occurred in the underlying case – namely, appointment of counsel for an indigent parent in a civil custody case who faces an opposing party who has just enough financial resources to obtain counsel for him- or herself but lacks

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[15] *Flores v. Flores*, 598 P.2d 893, 894-96 (Alaska 1979).

[16] *Id.* at 896-97.

[17] Sec. 1, ch. 55, SLA 1984.

[18] AS 44.21.410(a)(4).

[19] In *Flores*, the Court emphasized that its holding was limited to "cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency," effectively characterizing Alaska Legal Services as a "public agency." *Flores*, 598 P.2d at 896 n.12; *cf. Flores*, 598 P.2d at 900 n.8 (J. Burke, dissenting in part, concurring in part) (asserting that Alaska Legal Services is not a "public agency").

sufficient resources to pay for the indigent party's counsel. Relying on the Court's due process analysis in *Flores* and its progeny, the trial court concluded that the indigent parent under this scenario was entitled to court-appointed counsel. [Exc. 64-69] Because such appointment falls outside the scope of AS 44.21.410(a)(4) (and the Public Defender Agency's statutory obligation to provide counsel under AS 18.85.100(a)) but is required by the Alaska Constitution, the trial court initially held that counsel should be provided by the Court System.[20]

In summary, as the right to counsel in civil custody cases has evolved over the years through case law, statutes, and court rules, a number of different sources for providing such counsel have been relied upon, including: (1) requiring a resourced parent, who is represented by private counsel, to pay for counsel for a parent with limited or no financial resources pursuant to AS 25.24.140(a)(1) or AS 25.20.115; (2) requiring the Court System to pay, pursuant to Administrative Rule 12(e), for counsel for an

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[20] Administrative Rule 12(e)(1). Under Administrative Rule 12(e)(1), if "the court determines that counsel . . . should be appointed for an indigent person, and further determines that the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, but in the opinion of the court is required by law or rule," then "the court shall appoint an attorney." *See also In re K.L.J.*, 813 P.2d 276, 286 & n.14 (Alaska 1991) (remanding for appointment of counsel for father pursuant to former Admin. R. 12(d)(2)(A), where father was constitutionally entitled to representation); *State v. Superior Ct., Fourth Judicial Dist.*, 718 P.2d 466, 467 (Alaska 1986) ("Currently Administrative Rule 12(d)(2) mandates that indigent persons requiring counsel but not provided for under AS 44.21.410 or AS 18.85.100, the public defender statute, shall be provided with counsel at the expense of the Alaska Court System."); *Flores*, 598 P.2d at 897 & n.16 (concluding that counsel should be provided under the administrative rules because appointment was required under the constitution but fell outside the scope of the Public Defender Agency's statutory obligation to provide counsel); 1998 Alaska Op. Atty. Gen. (Inf.) 339, 1988 WL 249464 (discussing responsibility for payment of fees of court-appointed attorneys).

unrepresented indigent parent if the other parent is represented by counsel but has insufficient funds to pay for the indigent parent's counsel; or (3) requiring OPA to pay, pursuant to AS 44.21.410(a)(4), for counsel for an unrepresented indigent parent if the other parent is represented by counsel provided by a public agency. The only other situation occurs when neither party is represented, either by choice or because both litigants are indigent. There are no statutes or court rules that would provide for counsel under this circumstance, and this Court has not concluded that due process protections require appointment of counsel in a civil custody case where both parties are unrepresented.[21] Thus, counsel need not be appointed where both litigants in a civil custody case are unrepresented.[22]

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[21] *Cf. Flores*, 598 P.2d at 895-96 (explaining that "[f]airness alone dictates that the petitioner should be entitled to a similar advantage," namely representation by counsel provided by a public agency where a fundamental right was at stake); *Lone Wolf*, 741 P.2d at 1192 (explaining that "the purpose of awarding attorney's fees [under AS 25.24.140(a)(1)] is to assure that both spouses have the proper means to litigate the divorce action on a fairly equal plane").

[22] Despite this, the trial court found that AS 44.21.410(a)(4) was "especially arbitrary" given "how few indigent parents actually get an attorney appointed through OPA, given Alaska Legal Services' systematic inability to represent large numbers of indigent parents in the first place." [Exc. 72-73] This is illogical. If the opposing party in a civil custody case is not represented by a public agency, such as Alaska Legal Services, the due process right to counsel recognized in *Flores* is not triggered and counsel need not be provided. Instead, both indigent parties would remain unrepresented; a result that is constitutionally and statutorily permissible. Contrary to the trial court's statement, this does not demonstrate the arbitrariness of OPA's enabling act; instead, it demonstrates the close means-end nexus of the statutory provision (*i.e.*, requiring a triggering event or condition before counsel will be provided).

3. Because the government is not treating a protected person disparately by providing counsel through a variety of sources, AS 44.21.410(a)(4) does not violate the equal protection clause.

Given the multiple sources available to provide counsel to an indigent party in a civil custody case who faces an opposing party represented by counsel, there is no different, disparate, or unequal treatment. The portion of OPA's enabling act at issue simply does not result in disparate treatment that deprives an individual, such as Ms. Jonsson, of a fundamental right enjoyed by similarly situated individuals. Ms. Jonsson was treated identically to any other indigent parent in a child custody case who faces an opposing party who is represented by counsel – the trial court determined whether she was entitled to counsel and, once that was answered in the affirmative, who would pay for such counsel. The fact that the source of payment would be one state fund versus another – namely the Court System (pursuant to Administrative Rule 12) rather than OPA (pursuant to AS 44.21.410) – does not demonstrate different treatment that resulted in the infringement of a fundamental right enjoyed by similarly situated person. The right at issue here is the right to counsel, not the right to have a particular entity or person pay for that counsel.[23] Since there is no disparate treatment of similarly situated persons, AS 44.21.410(a)(4) does not violate the equal protection clause.[24] As such, the Court

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[23] *Accord Coleman v. State*, 621 P.2d 869, 878 (Alaska 1980) ("indigent defendants are not constitutionally entitled to counsel of their choice").

[24] *See Matanuska-Susitna Borough Sch. Dist.*, 931 P.2d at 397 ("Where there is no unequal treatment, there can be no violation of the right to equal protection of law."). The lack of an infringement on the right to counsel is demonstrated in the case below; after the trial court appointed counsel for Ms. Jonsson, the child custody issues were resolved and the only remaining question was which state agency would pay for that

should reverse and vacate the portion of the trial court's order in which it concludes that AS 44.21.410(a)(4) is unconstitutional.

III. HAVING ERRONEOUSLY CONCLUDED THAT A GUARDIAN AD LITEM, WHO REPRESENTS THE BEST INTERESTS OF A CHILD, IS ANALOGOUS TO LEGAL COUNSEL FOR AN OPPOSING PARTY, THE TRIAL COURT SHIFTS THE BURDEN OF PAYING FOR COUNSEL FROM THE COURT SYSTEM TO OPA.

A. Standard of Review.

This Court will review *de novo* questions of law and will interpret the Alaska Statutes and Alaska Constitution "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters."[25]

B. Only by Impermissibly Legislating from the Bench and Considerably Re-drafting AS 44.21.410 Was the Trial Court Able to Conclude that Appointment of a Guardian ad Litem in a Civil Custody Case Triggers OPA's Obligation to Provide Counsel for an Indigent Party.

1. Contrary to the trial court's conclusion, appointment of counsel through OPA was not authorized by the plain language of AS 44.21.410(a)(4), precluding it from providing counsel.

In its August 14, 2007 order, the trial court concluded that Ms. Jonsson was entitled to court-appointed counsel based on her right to due process. [Exc. 64-69] As discussed above (section II.B.2), if a court appoints non-OPA (or non-PDA) counsel

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counsel. Thus, the right to counsel was protected. Even if the right were characterized as the right to care, custody, and control of a child or the right to meaningful access to the courts (the rights identified by the trial court), there is still no infringement because Ms. Jonsson obtained counsel to protect these rights. [Exc. 72, 74]

[25] *State v. Jeffery*, 170 P.3d 226, 230 (Alaska 2007); *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

when legal representation is constitutionally required, the Court System must pay for such counsel.[26] In order to shift this expense from the Court System to OPA, appointment of counsel must be authorized by OPA's enabling statute, AS 44.21.410. But OPA may only accept appointment "in those cases for which the basis for the appointment is *clearly authorized*."[27] Thus, unless proceedings are "specifically among the classes of cases mentioned in the statute detailing the 'powers and duties' of the Office of Public Advocacy," OPA's obligation to provide counsel is not triggered.[28]

The only provision of AS 44.21.410 that comes close to applying states: "The office of public advocacy shall provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency[.]"[29] While Ms. Jonsson was indigent, Mr. Gordanier was not "represented by counsel provided by a public agency"; instead, he was represented by private counsel. Thus, appointment of counsel through OPA was not "clearly authorized," requiring the Court System to provide counsel for Ms. Jonsson.

Despite the dictates of case law and court rules directing the trial court to appoint counsel for Ms. Jonsson through the Court System, the trial court interpreted

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[26] Admin. R. 12(e)(1) (if "the court determines that counsel . . . should be appointed for an indigent person, and further determines that the appointment is not authorized by AS 18.85.100(a) or AS 44.21.410, but in the opinion of the court is required by law or rule," then "the court shall appoint an attorney"); *State v. Superior Court*, 718 P.2d at 467.

[27] Admin. R. 12(d) (emphasis added).

[28] *State v. Superior Court*, 718 P.2d at 467.

[29] AS 44.21.410(a)(4).

AS 44.21.410(a)(4) as authorizing OPA to pay for counsel. In order to accomplish this, the trial court looked not at what was "clearly authorized" by the statutory provision but at what situations might be analogous to its plain language. Such interpretation and application of OPA's enabling act was erroneous and should be reversed.

2. In order to shift the expense of providing counsel to OPA, the trial court essentially rewrote AS 44.21.410, substituting the phrase "guardian ad litem" for both the phrase "opposing party" and "counsel."

In interpreting the provision "shall provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency," the trial court explained that the "child is in a very real sense the party whose interests are most at stake, and the GAL represents those interests." [Exc. 238] According to the court, because the guardian ad litem frequently takes a position contrary to one or both parents and "may well be a bigger 'opponent' of one parent than the other parent is," the guardian ad litem is an "opposing party" for purposes of AS 44.21.410(a)(4).[30] [Exc. 238-42] The trial court

[30] In this case, the guardian ad litem was provided by OPA, a public agency. [Exc. 2] If the trial court's conclusion is correct – namely that OPA must provide counsel to Ms. Jonsson because the guardian ad litem is an "opposing party" – this will create a conflict of interest because OPA will have provided both the guardian ad litem, who represents the best interests of the child, and counsel for a parent. It is reasonable to presume that this would be a reoccurring (and potentially significant) problem given that OPA is the state agency responsible for providing guardians ad litem in civil custody cases pursuant to AS 25.24.310(c) and AS 44.21.410(a)(5). The issue could become more complicated still if both parents are indigent and entitled to counsel under the trial court's interpretation. In that circumstance, OPA would be required to provide the guardian ad litem (and potentially an attorney) for the child (or children), as well as attorneys for both parents.

needlessly conflated the adversarial role of guardians ad litem with adversity to parental interests to reach this conclusion given that, under Civil Rule 90.7(e), the guardian ad litem "shall be treated as a party to the proceeding for all purposes, except as otherwise provided in this rule." But even if the guardian ad litem is a "party" to a civil custody case, that still does not mean that OPA must provide counsel to an indigent party under AS 44.21.410(a)(4).

If the phrase "opposing party" is replaced with "guardian ad litem," the statutory provision would mandate that OPA "provide legal representation . . . to indigent parties in cases involving child custody in which [the guardian ad litem] is represented by counsel provided by a public agency." Under certain circumstances, a guardian ad litem may be represented by counsel provided by a public agency.[31] There is no evidence that counsel was provided to the guardian ad litem in this case, so the modified version of the statute was not satisfied.

But the trial court's interpretation of AS 44.21.410(a)(4) was not limited to this single revision. The court also concluded that "under Alaska law, a Guardian Ad Litem is as much as advocate as is an attorney for either parent." [Exc. 241] Based on this conclusion, it explained that if the guardian ad litem were provided by a public agency, "the language of AS 44.21.410(a)(4) . . . encompasses an indigent parent's right to court-appointed counsel." [Exc. 241] If this analysis were correct, the guardian ad

[31] *See* Alaska Civil Rule 90.7(e) ("The court may appoint an attorney to advise or represent a non-attorney guardian ad litem if the court finds that legal advice or legal representation of the guardian ad litem is necessary to represent the child's best interests.").

litem would become not only the "opposing party" but also the requisite "counsel" for that opposing party. In other words, the statute would now require OPA to "provide legal representation . . . to indigent parties in cases involving child custody in which the [guardian ad litem is] provided by a public agency." Such a substantive revision of AS 44.21.410(a)(4) has no basis in law.

3. Ignoring the maxims of statutory construction, the trial court construed the phrase "represented by counsel" as meaning "represented by a guardian ad litem."

Unless statutory words have "acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage."[32] The common definition of "counsel" is "[a]ttorney or counselor," and "counselor" is defined as an "attorney; lawyer."[33] These definitions are not broad enough to include a guardian ad litem, indicating that "counsel" and "guardian ad litem" are two distinct categorizations. Thus, absent development of a peculiar meaning through statutory definitions or judicial construction, "counsel" should be interpreted for purposes of AS 44.21.410 as referring to an attorney or lawyer.

That guardians ad litem and legal counsel are not equivalent or analogous terms is apparent from the variety of Alaska statutes and rules that treat "counsel," "attorney," and "legal representative" interchangeably, while treating "guardian ad litem" as a distinct and separate position. For example, AS 44.21.410(a)(5), under which OPA

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[32] *Jeffery*, 170 P.3d at 232.

[33] BLACK'S LAW DICTIONARY at 347, 348 (6th ed. 1990).

would have appointed a guardian ad litem in this case, requires OPA to "provide legal representation and guardian ad litem services under AS 25.24.310[.]" The referenced statute, AS 25.24.310, addresses representation of a minor in a divorce action and sets forth the conditions for appointing an attorney and/or a guardian ad litem for the minor, clearly distinguishing between these two roles and what services should be provided.[34]

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[34] Alaska Statute 25.24.310 provides, in relevant part:

> (a) In an action involving a question of the custody, support, or visitation of a child, the court may, upon the motion of a party to the action or upon its own motion, appoint an attorney or the office of public advocacy to *represent a minor* with respect to the custody, support, and visitation of the minor . . . . Upon notification, the court shall determine whether the minor or other child should have legal representation or other services and shall make a finding on the record before trial. If the parties are indigent or temporarily without funds, the court shall appoint the office of public advocacy. The court shall notify the office of public advocacy if the office is required to provide legal representation or other services. . . .
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> . . .
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> (c) Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, upon the motion of either party or upon its own motion, appoint an attorney or other person or the office of public advocacy to *provide guardian ad litem services to a child* in any legal proceedings involving the child's welfare. The court shall require a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from preferences, would serve the welfare of the child. The court in its order appointing a guardian ad litem shall limit the duration of the appointment of the guardian ad litem to the pendency of the legal proceedings affecting the child's interests, and shall outline the guardian ad litem's responsibilities and limit the authority to those matters related

The court rules addressing divorce, child-in-need-of-aid, delinquency, and adoption proceedings also treat the right to counsel (or attorney or legal representative) and the appointment of a guardian ad litem as being distinct and separate, supporting the contention that "counsel" does not incorporate "guardian ad litem."[35]

This distinction between "counsel" and "guardian ad litem" also occurs in several provisions contained in Administrative Rule 12: under subsection (a), the court "shall appoint *counsel or a guardian ad litem* only when the court specifically determines

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> to the guardian's effective representation of the child's best interests in the pending legal proceeding. . . . [T]he court shall determine if a child's best interests need representation or if a minor or other child needs other services and shall make a finding on the record before trial. If one or both of the parties is indigent or temporarily without funds the court shall appoint the office of public advocacy. The court shall notify the office of public advocacy if the office is required to provide guardian ad litem services. The court shall enter an order for costs, fees, and disbursements in favor of the state and may further order that other services be provided for the protection of a minor or other child.

See also AS 47.10.050 and AS 47.12.090, which address appointment of an attorney or a guardian ad litem for a minor in child-in-need-of-aid cases and delinquency cases, respectively, and which reference AS 25.24.310.

[35] *See*, *e.g.*, Alaska Civil Rule 90.7; Alaska Delinquency Rules 2(i) (defining guardian ad litem), 4(d)(2) (master's authority to appoint counsel or a guardian ad litem for the juvenile), 15 (appointment of guardian ad litem), and 16 (right to counsel); Alaska CINA Rules 2(e) (defining guardian ad litem), 4(d)(2) (master's authority to appoint counsel and guardians ad litem), 11 (appointment of guardian ad litem), and 12(b)(3) (right to counsel for minor); Alaska Adoption Rules 2(e) (defining guardian ad litem), 3(d) (master's authority to appoint counsel or a guardian ad litem), 7 (appointment of guardian ad litem), and 8 (right to counsel). *See also* CINA Rule 11, commentary ("If the GAL is an attorney, he or she acts in a capacity as a GAL rather than as an attorney, and information received from the child is not subject to the attorney-client privilege. CF. Ethics Opinion 85-4, Alaska Bar Association.").

that the appointment is clearly authorized by law or rule, and that the person for whom the appointment is made is financially eligible for an appointment at public expense;" subsection (c)(1) addresses the procedure for appointing counsel or a guardian ad litem through OPA; subsection (c)(3) addresses the assessment of costs for "the minor's legal representative or guardian services;" and subsection (e)(1) discusses the Court System's responsibilities if "the court determines that counsel, or a guardian ad litem, or other representative should be appointed for an indigent person[.]" If "guardian ad litem" and "counsel" were interchangeable, these provisions would be marked by their redundancy.

Finally, the distinction between "counsel" and "guardian ad litem" is expressly clarified in the commentary to Alaska Civil Rule 90.7, the rule under which a guardian ad litem in a civil custody case is appointed:

> Commentary. When custody is contested, the court has discretion to appoint a custody investigator, a guardian ad litem, and/or an attorney for the child. *See* AS 25.24.310(a), (c). *The roles of* a custody investigator, *a guardian ad litem, and an attorney for the child are different and must be clearly distinguished*:
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> . . .
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> • guardian ad litem: A guardian ad litem has the duty to conduct a thorough factual investigation. Based on this investigation, the guardian ad litem must decide what course of action is in the child's best interests. The guardian ad litem must then advocate this course of action, regardless of whether the child agrees with the guardian ad litem's position. The guardian ad litem participates as a party in court proceedings that affect the child, but only testifies in exceptional circumstances and then only as to factual matters. The guardian ad litem never testifies as an expert witness.

> The guardian ad litem must be served with copies of all pleadings and papers relating to the child, *see* Civil Rule 4(i), and must be given notice of all court appearances and conferences involving issues that affect the child. The guardian ad litem's rights include the right to appear and participate at hearings, engage in motion practice, conduct discovery, introduce evidence, examine and cross-examine witnesses, make objections, and make opening statements and closing arguments.
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> The guardian ad litem's advocacy need not be confined to custody and visitation issues. If included within the scope of the appointment, the guardian ad litem should be prepared to participate in decisions about any special education or psychological needs of the child (such as counseling) and child support and other financial issues related to the child.
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> • attorney for child: A child's attorney represents the child, and it is the child who ultimately decides what position will be advocated in court. The attorney's duty is to conduct a thorough investigation, advise and consult the client, and zealously advocate the client's position in court. *See Wagstaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975) (concerning child's right to select attorney when child's interests are hostile to parents' interests).
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> The court may appoint an attorney to advise or represent a non-attorney guardian ad litem. If the court takes this action, the court should take care to specify the scope and duration of the appointment and the attorney's compensation.[36]

Further identifying the distinction between counsel for the minor and a guardian ad litem, the commentary states:

> If there is a conflict between the guardian ad litem's position and the child's preference, the court may appoint a separate attorney to represent the child. The court should take this action only if the child's preference cannot be presented adequately by one of the parties. If the court appoints a separate attorney for the child, the court may either discharge

[36] Commentary, Alaska Civil Rule 90.7(e) (emphasis added).

> the guardian ad litem or continue the guardian ad litem appointment to represent what the guardian ad litem believes to be in the child's best interests.[37]

And the rule and its commentary clarify that even if the person serving as guardian ad litem is an attorney, he or she does not fulfill the role of legal counsel for the minor:

> (l) Privileges.
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> (1) The guardian ad litem has a privilege to refuse to disclose and to prevent anyone other than the child from disclosing confidential communications made by the child. This privilege does not apply if disclosure of the communication is required by law or if the court finds there are compelling reasons to reveal the communication.
>
> (2) The attorney-client privilege does not apply to confidential communications between the child and an attorney guardian ad litem.
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> Commentary. *An attorney serving as a guardian ad litem does not act as legal counsel for the child but rather as a party to the proceeding.* Therefore, the attorney-client privilege does not apply. But the policy behind the attorney-client privilege is equally compelling in the guardian ad litem-child relationship: to encourage the child to talk openly and candidly to the guardian ad litem so that the guardian ad litem can make the best possible determination about what is in the child's best interests. Therefore, this rule adopts a limited privilege for confidential communications between an attorney or non-attorney guardian ad litem and the child. It also allows the guardian ad litem to protect confidential communications made by the child to other persons.[38]

Each of these statutory provisions and court rules demonstrates that "counsel" and "guardian ad litem" are two distinct categories, not one. If "counsel" were

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[37] Commentary, Alaska Civil Rule 90.7(h).

[38] Alaska Civil Rule 90.7(l) & commentary (emphasis added).

interpreted broadly enough to include "guardian ad litem," rather than as being limited to "attorney or lawyer," the language contained in these statutes and rules distinguishing between the two would become superfluous. Under the canons of statutory construction, which require that "effect must be given, if possible, to every word, clause and sentence," this is a result that is to be scrupulously avoided.[39] Thus, "counsel" cannot be interpreted as including "guardian ad litem" under the statutory scheme.

Under the canons of statutory construction, there is the final question of whether judicial construction has interpreted the word "counsel" as encompassing "guardian ad litem."[40] Although this Court has compared the role of a guardian ad litem to that of counsel for a child, it has never reached the conclusion that the term "counsel" encompasses a guardian ad litem.[41] Instead, a contrary result has been reached, namely that counsel for a child and a guardian ad litem for a child are two separate roles. For example, in *In re P.N.*, the Court noted that "an attorney may be appointed to act in the *dual role* of guardian ad litem and counsel for the children" in a child-in-need-of-aid case.[42] The Court further recognized that, under the Children's Rules in effect at that time, the trial court had discretion in appointing both (or either) counsel and a guardian

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[39] *McGee v. State*, 162 P.3d 1251, 1257 (Alaska 2007) (citing 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 181 (6th ed. 2000); *Mechanical Contractors of Alaska, Inc. v. State, Dep't of Pub. Safety*, 91 P.3d 240 (Alaska 2004)).

[40] *Jeffery*, 170 P.3d at 232.

[41] *Veazey v. Veazey*, 560 P.2d 382, 385-91 (Alaska 1977) (overruled by statute on other grounds) (discussing the role of a guardian ad litem).

[42] 533 P.2d 13, 17-18 (Alaska 1975) (emphasis added).

ad litem.[43] And in a footnote, the Court acknowledged that "[i]n those areas of the state where attorneys are not readily available and appointment of counsel is not essential or in those circumstances where a guardian ad litem is available to protect the interests of the children[,] there is no requirement that an attorney at law be appointed."[44]

As recognized in *P.N.*, appointment of both counsel and a guardian ad litem may be accomplished through appointment of a single person, where that person participates in the proceeding in two different roles, or through appointment of two people, each fulfilling a separate role. However, in either case, the roles of guardian ad litem and counsel for the minor are distinct.[45] Thus, the Court has not interpreted "counsel" as incorporating "guardian ad litem."

Because "counsel" has not "acquired a peculiar meaning, by virtue of statutory definition or judicial construction," such that it may be read broadly enough to include a guardian ad litem, it should have been "construed in accordance with [its] common usage."[46] The trial court's conclusion to the contrary runs afoul of the canons of statutory construction and resulted in an erroneous legal conclusion. Under the

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[43] *Id.* at 18 (citing Children's Rules 11(a) and 14(a)).

[44] *Id.* at 18 n.6A.

[45] *See also State v. F.L.A.*, 608 P.2d 12, 18 (Alaska 1980) (discussing potential need for guardian ad litem, who could "protect a minor from making a decision adverse to his own interests" in delinquency case where minor was already represented by counsel); *RLR v. State*, 487 P.2d 27, 34-35 (Alaska 1971) (noting potential danger of appointing child's attorney to dual role of guardian ad litem in delinquency case because the attorney "may be unsure where his advocate's role ends and his role of judging his ward's best interests begins").

[46] *Jeffery*, 170 P.3d at 232.

circumstances, this Court should vacate the trial court's order on reconsideration and order the trial court to reinstate its August 14, 2007 order, under which Ms. Jonsson was appointed counsel pursuant to Administrative Rule 12(e)(1).

C. Appointment of a Guardian ad Litem in a Civil Custody Case Does Not Trigger a Right to Counsel Under *Flores*.

In addition to concluding that "counsel" encompassed "guardian ad litem" for purposes of appointing counsel for an indigent parent in a civil custody case under AS 44.21.410(a)(4), the trial court reached the same conclusion for purposes of appointing counsel under the due process analysis in *Flores*. [Exc. 235] This conclusion is equally flawed. *Flores* is grounded on the idea that due process requires that one parent should not have an unfair advantage over the other by being provided counsel at public expense. The Court noted in *Flores*, "[a]lthough a private individual initiated the proceeding below, he was represented by counsel provided by a public agency," and concluded that, for this reason, "[f]airness alone dictates that the petitioner should be entitled to a similar advantage."[47]

There is no similar "unfair" advantage gained by a child with a guardian ad litem appointed at public expense. The purpose of appointing a guardian ad litem is to cure the disadvantage of a child who lacks the capacity to protect his or her own best interests or whose best interests are not adequately protected by the parties to the case or

[47] *Flores*, 598 P.2d at 895.

by a child custody investigator.[48] While the attorney of one parent seeking custody necessarily advocates at the expense of the other parent, that is not true of a guardian ad litem. The guardian ad litem represents the best interests of the child, which are paramount to, and stand above, the interests of either parent.[49]

1. *Flores*, which is to be construed narrowly, does not envision the appointment of a guardian ad litem as triggering a right to counsel.

In *Flores*, this Court stated that it did not intend its decision to be broadly interpreted. The Court "emphasize[d] that [the] holding in this opinion is limited to cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency."[50] Despite the fact that it is a tremendous expansion of *Flores* to interpret it as requiring the appointment of an attorney whenever a child in a custody case has a guardian ad litem at public expense, the trial court erroneously concluded that "the presence of a GAL in this case[] brings this case within the rationale of *Flores*[.]" [Exc. 235] This interpretation should not be permitted to stand.

The trial court based its expansion of *Flores* on a misapplication of *Office of Public Advocacy v. Superior Court, Second Judicial Dist.*,[51] citing it for the

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[48] *See* Alaska Civil Rule 90.7(a), commentary ("Courts should not routinely appoint guardians ad litem in custody, support, and visitation proceedings. In most instances, the child's best interests are adequately protected and presented by the parties. In most contested proceedings in which professional input is warranted, a child custody investigator . . . should be appointed instead of a guardian ad litem.").

[49] *See* Alaska Civil Rule 90.7(e); AS 25.24.150.

[50] *Flores*, 598 P.2d at 896 n.12.

[51] 779 P.2d 809 (Alaska App. 1989).

proposition that this Court has "noted the difference between the narrower language of some portions of *Flores* and the broader language of other portions, and held that interpretation of AS 44.21.410(a)(4) should look to the latter rather than the former[.]" [Exc. 235] *Office of Public Advocacy* was actually decided by the Alaska Court of Appeals so was not an expansion of *Flores* by this Court. Moreover, the case did not actually expand *Flores*.

The question involved in *Office of Public Advocacy* was one of statutory interpretation, with the Court of Appeals concluding that, under the plain language of AS 44.21.410(a)(4) ("provide legal representation . . . to indigent parties in cases involving child custody in which the opposing party is represented by counsel provided by a public agency"), the phrase "child custody" included the disposition phase of a delinquency proceeding where the state actively sought custody of the delinquent minor.[52] The court considered the fundamental right to parent discussed in *Flores*, explaining that, just as in a civil custody dispute, this interest was "at stake in a delinquency proceeding where the state actively seeks to take custody from a child's parents."[53] But it did not conclude that the parents had a due process right to counsel. Instead, it held that counsel should be provided under the plain language of AS 44.21.410(a)(4) because the phrase "child custody" was broad enough to include the

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[52] *Office of Public Advocacy*, 779 P.2d at 809-10.

[53] *Id.* at 810.

custody proceeding in question.[54] Thus, *Office of Public Advocacy* does not stand for the proposition that the due process right in *Flores* may be interpreted broadly enough to incorporate situations analogous to that case.[55]

Although the Court of Appeals simply interpreted the plain language of AS 44.21.410(a)(4) such that "child custody" included not only a divorce proceeding but a delinquency case in which the trial court must conclude who would have custody of a child (the state or the child's parents), the trial court treated *Office of Public Advocacy* as permission to extend the express limitations of *Flores* for purposes of due process analysis. [Exc. 236-37] However, as discussed above, the Court of Appeals' opinion does not encourage that broad an application of *Flores*, and this Court has not indicated that *Flores* should be so broadly construed as to require appointment of counsel under the

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[54] *Id.* at 810-11 (explicitly limiting its holding to the particular circumstances of the case).

[55] In dictum, the Court of Appeals suggested that, contrary to the clear language of *Flores*, this Court had not "intended its decision to be narrowly limited to the facts of that case." In reaching this conclusion, it noted that although the Court "characterized the narrow issue presented as 'whether an indigent party has the right to court-appointed counsel in a private child custody proceeding in which her spouse is represented by Alaska Legal Services,'" it actually resolved "the issue in somewhat broader terms, concluding, as does AS 44.21.410(a)(4), that the right to representation extends 'to cases involving child custody where an indigent party's opponent is represented by counsel provided by a public agency.'" *Id.* It would appear that this "broader" interpretation applied to the phrase "child custody" as compared to the narrower "private child custody proceedings." Even if this were evidence that this Court intended a broad interpretation of *Flores*, it would not be relevant here since both *Flores* and this matter arose out of private child custody proceedings.

due process clause, under the circumstances of this case.[56] And even if it did, that would still not mean that OPA must provide such counsel since AS 44.21.410(a)(4) does not authorize it.

Moreover, as discussed below, although the guardian ad litem is an advocate for the child's best interests, this should not be sufficient to trigger a due process right to counsel for the indigent parent(s) given that the presence of the guardian ad litem does not give a child an advantage over an unrepresented parent and does not impair the interests of the parents. *See infra*, sections III.C.2-3. In addition, the practical implications of the trial court's interpretation are expansive. Under this decision, the state (whether through the Court System or OPA) would be required to pay for both indigent parents to have attorneys when a guardian ad litem is appointed for the child. This would likely cause an explosive increase in attorneys appointed at public expense in custody cases.

[56] *Cf. Hamilton v. Hamilton*, 1994 WL 16459407 (Alaska 1994) (declining to extend *Flores* in child custody case in which indigent father was unrepresented, the mother was represented by private counsel, there was no state involvement in mother's representation, and issue involved was solely extent of the father's visitation with the child, not potential termination of parental rights). Although *Hamilton* is an unpublished decision, it may still have persuasive value. *See Hallam v. Holland America Line, Inc.*, 180 P.3d 955, 959 n.20 (Alaska 2008) (citing Alaska Supreme Court Order No. 1654 (April 15, 2008) (amending Alaska Rule of Appellate Procedure 214(d) and providing that "[i]f a party believes . . . that an unpublished decision has persuasive value in relation to an issue in the case, and that there is no published opinion that would serve as well, the party may cite the unpublished opinion")).

2. The appointment of a guardian ad litem does not give a child an advantage over an unrepresented parent, but rather cures the disadvantage of limited capacity.

In *Flores*, this Court found that it would be unfair for only one parent to be provided counsel at public expense when the other parent cannot afford to hire an attorney.[57] The role of an attorney in litigation is to advocate the desires of the client by gathering and presenting evidence and legal arguments. A pro se litigant generally is at a disadvantage against an attorney because the pro se litigant is not trained to represent him- or herself in legal proceedings. This disadvantage becomes particularly significant in a civil custody proceeding, where the pro se litigant "faces a substantial possibility of the loss of custody or a prolonged separation from a child."[58]

This disadvantage for the pro se litigant does not arise through the appointment of a guardian ad litem because the guardian ad litem does not act as the child's attorney and because the child's interests are not adverse to the parents'.[59] The purpose of a guardian ad litem is not to advocate the desires of a child in a custody dispute or to best present the child's case; it is to put the child on equal footing with the adults, regardless of whether those adults are represented by counsel. While adults determine their legal positions by assessing their own best interests, a child is deemed not to have the ability to make a judgment as to his or her best interests. The legal system recognizes the limited capacity of a child and provides that a child, in this circumstance,

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[57] *Flores*, 598 P.2d at 895.

[58] *Reynolds v. Kimmons*, 569 P.2d 799, 802 (Alaska 1977) (citations omitted).

[59] *See* Alaska Civil Rule 90.7(l), commentary.

should have an adult to offer that judgment. Thus, the duty of a guardian ad litem is to look after the child's best interests and to act for him or her in matters relating to the custody issues as the child might act for him- or herself if the child had the ability to do so.[60]

The analysis may be different if the child were given an attorney at public expense since this person, unlike the guardian ad litem, is tasked with representing the child.[61] Because the guardian ad litem does not advocate the child's position or express the child's desire, the position of the guardian ad litem may be adverse to the wishes of the child. In these situations, the trial court may appoint a separate attorney to represent the child.[62]

Thus, the appointment of a guardian ad litem is intended in part to cure the disadvantage of the child's legal incapacity, not to serve in a position analogous to a

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[60] *See* Alaska Civil Rule 90.7(e) & commentary.

[61] *Cf.* AS 25.24.310(c) ("The court shall require a guardian ad litem when, in the opinion of the court, representation of the child's best interests, to be distinguished from preferences, would serve the welfare of the child."); Alaska Civil Rule 90.7(e), commentary ("A child's attorney represents the child, and it is the child who ultimately decides what position will be advocated in court.").

[62] *See* Alaska Civil Rule 90.7(h), commentary ("If there is a conflict between the guardian ad litem's position and the child's preference, the court may appoint a separate attorney to represent the child. . . . If the court appoints a separate attorney for the child, the court may either discharge the guardian ad litem or continue the guardian ad litem appointment to represent what the guardian ad litem believes to be in the child's best interests."); *see also* AS 25.24.310(a).

parent's counsel.[63] Because a guardian ad litem's purpose is to provide the capacity a child lacks, and not to participate as counsel for the child, the concept of unfairness inherent in *Flores* does not arise.

3. A guardian ad litem's representation of the child's best interests does not impair the interests of either parent.

Providing a publicly-appointed attorney to one party and not to another can be considered unfair only if their interests are adverse. When two parents have a custody dispute, by definition it is a battle between the interests of one parent and the interests of the other. Because the parents live apart, one parent's time with the child will necessarily be limited by the time the other parent has with the child. If one parent has counsel and the other does not, the unrepresented parent is generally less able to make the legal arguments and present the evidence that will best advocate his or her position, which puts the unrepresented parent at a disadvantage vis-à-vis the other parent.

In contrast, the child's interests in a custody dispute are paramount and cannot be limited by the interests or desires of either parent. This Court has "often said that the paramount concern in child custody decisions is the child's welfare and not the

[63] *See Veazey*, 560 P.2d at 389-90 (recognizing that "the advocate for the child in a custody dispute occupies a position unlike that of the advocates for either parent").

parent's wishes."[64] A trial court must determine custody in accordance with the best interests of the child regardless of the positions of the parents.[65]

In an ideal world, parents would seek whatever custody arrangements are in the best interests of the child, and "[i]n most instances, the child's best interests are adequately protected and presented by the parties."[66] Unfortunately, this is not always true. As this Court has stated, divorcing parents seek, or decide not to seek, custody of their children for a variety of reasons – including as a bargaining point between them – and the reasons may have little correlation with the best interests of the child.[67]

But these instances generally involve one parent who stands in opposition to the other. As a matter of public policy, the custody of a child should not be a matter that pits a child against a parent. Alaska law prevents this situation by elevating the interests of the child. An unrepresented parent therefore is not disadvantaged vis-à-vis the child by the existence of a guardian ad litem; the parent's personal interests are less important as a matter of law.[68] The trial court does not ever have to resolve a conflict between the best interests of the child and the wishes of a parent. For this reason, the

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[64] *Lee v. Cox*, 790 P.2d 1359, 1364 (Alaska 1990) (Compton, J., concurring) (citing *S.N.E. v. R.L.B.*, 699 P.2d 875, 877 (Alaska 1985)).

[65] *See* AS 25.24.150(c) (listing the factors the trial court considers in determining custody, none of which involve the interests of the parents).

[66] Alaska Civil Rule 90.7(a), commentary.

[67] *Veazey*, 560 P.2d at 389.

[68] AS 25.24.150(c) ("The court shall determine custody in accordance with the best interests of the child . . . .").

participation of a publicly-appointed advocate who tries to determine the best interests of the child, to help the trial court achieve the same goal, cannot be considered unfair or disadvantageous to either parent.

Under the circumstances, appointment of a guardian ad litem for a child in a civil custody case is not sufficiently analogous to representation of a parent by counsel to justify the trial court's extensive expansion of *Flores*, and this Court should vacate the trial court's order of January 23, 2008.

CONCLUSION

Based on the foregoing arguments, this Court should reverse the trial court's order to the extent that it concluded that OPA was required to provide counsel for Ms. Jonsson, rather than the Alaska Court System, and to the extent that it concluded OPA's enabling act, AS 44.21.410(a)(4), violates the equal protection clause of the Alaska Constitution.

DATED at Anchorage, Alaska this 27th day of June, 2008.

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