IN THE SUPREME COURT FOR THE STATE OF ALASKA

OFFICE OF PUBLIC ADVOCACY, Appellant, v. ALASKA COURT SYSTEM, RANDALL GUY GORDANIER, JR. SIV BETTI JOHNSON Appellees.	)	Supreme Court Case No. S-1299

Trial Court No. 3AN-06-8887 Civil

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

AMICUS BRIEF OF ALASKA LEGAL SERVICES CORPORATION, ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, DISABILITY LAW CENTER OF ALASKA, ALASKA PRO BONO PROGRAM, ALASKA IMMIGRATION JUSTICE PROJECT AND THE ALASKA NATIVE JUSTICE CENTER

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Filed in the Supreme Court of
The State of Alaska this 19th
Day of November 2008.

MARILYN MAY, CLERK OF THE APPELLATE COURTS

By: _____
Deputy Clerk

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Alaska Const. art. I, § 1 (2008)

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.

Alaska Const. art. I, § 7 (2008)

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 Stat. § 44.21.410 (2008)

Sec. 44.21.410. Powers and duties

(a) The office of public advocacy shall ---

(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;

Introduction

The issue presented in this case which concerns the Amici is whether the superior court has the authority to appoint an attorney for a low-income parent involved in a custody dispute, wherein he or she risks significant infringement of parental rights. Amici believe that answering this question in the affirmative best protects the interests of low-income parents and their children, as well as the State, and is mandated by the due process and equal protection clauses of the Alaska Constitution.[1]

Interest of Amici

Amici in this case are six private non-profits with varying missions to provide legal representation to low-income Alaskans.

- Alaska Legal Services Corporation, established to provide legal representation to low-income Alaskans in civil cases generally;
- The Alaska Pro Bono Program, a pro bono program dedicated to assisting otherwise unrepresented low-income Alaskans;
- The Disability Law Center of Alaska, established to provide legal services to clients with disabilities;
- The Alaska Immigration Justice Project, established to provide legal services to Alaska's immigrant population;
- The Alaska Network on Domestic Violence and Sexual Assault, providing civil legal assistance to victims directly and through pro bono attorneys; and

[1] Alaska State Constitution, Article I, section 1 and section 7.

- The Alaska Native Justice Center, an advocacy group for Alaska Natives in their contacts with the justice system.

Their eligibility and case acceptance policies differ, but all provide some level of no-cost or low-cost legal assistance to their clientele. All also have shared the frustration of having to deny services to applicants who are forced to represent themselves in family law cases in Alaska's courts.

Amicus Alaska Legal Services Corporation ("ALSC") was formed in 1966 as a private, non-profit corporation to provide legal services to the poor. It currently is only about half the size it was approximately 30 years ago. However, ALSC still maintains roughly 20 attorneys in nine offices throughout the state. ALSC's mission is "to provide meaningful access to justice in resolving civil legal problems for low-income clients, thus promoting family stability and reducing the legal consequences of poverty."[2]

Amicus the Alaska Pro Bono Program Inc., ("APBP") is a statewide program that was formed in 2000 as a private, non-profit corporation to provide low-income Alaskans access to civil justice. APBP's case intake gives priority to the categories of cases ALSC cannot accept, which include immigrants, prisoners, and non-profits that are not being served by other pro bono programs. APBP's intake comes primarily from referrals from other agencies, including referrals from ALSC, Catholic Social Services, the Alaska Native Justice Center, the Disability Law Center of Alaska, attorneys, shelters, community groups, and state and federal judges. The demand for services exceeds the

[2] More information about ALSC is available at its websites, www.alsc-law.org and www.alaskalawhelp.org.

program's capacity given the Alaska Pro Bono Program's annual budget of less than $80,000; however, the program currently is providing services to over 60 clients.[3]

Amicus the Disability Law Center of Alaska ("DLC") advises and represents people with developmental disabilities, mental health issues, and physical disabilities in civil court cases and administrative proceedings anywhere in Alaska. Designated under federal law as the State of Alaska's "Protection and Advocacy" (P & A) agency, and thus part of a nationwide network of congressionally mandated, legally based disability rights agencies, its mission is to promote and protect the legal and human rights of individuals with physical and/or mental disabilities. Many individuals are indigent and unable to hire private counsel to represent them. Legal help for parents with disabilities in custody cases is particularly important because of prejudice against individuals and mistaken factual assumptions about their ability to meet a child's needs.[4]

Amicus the Alaska Immigration Justice Project ("AIJP") provides low-cost immigration legal assistance to immigrants and refugees in all immigration applications including citizenship, permanent resident status, work permits, asylum, family-based petitions and immigration petitions for immigrant victims of domestic violence, sexual assault and human trafficking. AIJP's mission is to promote and protect the human rights of immigrants and refugees throughout Alaska by providing critical services to this

[3] More information about APBP is available at www.alaskaprobono.org.

[4] More information about the DLC is available at its website, www.dlcak.org.

underserved population. Its services include immigration legal services, language interpretative services, training and educational programs.[5]

Amicus the Alaska Network on Domestic Violence and Sexual Assault ("ANDVSA") is the statewide non-profit coalition of nineteen domestic violence and sexual assault programs. ANDVSA's Legal Advocacy Project ("LAP") was started in 1996 to help victims of domestic violence and sexual assault to meaningfully access the civil and criminal justice systems. In 1999, the LAP started a Pro Bono Program to assist domestic violence and sexual assault victims who needed help in family law proceedings. Since its inception, the LAP has, either directly or indirectly, counseled hundreds of victims of domestic violence and sexual assault going through protective order and family law cases. The LAP's Pro Bono Program currently has over two hundred open family law cases involving domestic violence, many of which involve custody.[6]

Amicus Alaska Native Justice Center ("ANJC") was created in 1993 to address Alaska Natives' unmet needs regarding the Alaskan civil and criminal justice system. Its mission is to promote justice through culturally-based advocacy, prevention, and intervention initiatives to restore dignity, respect, and humanity to all Alaska Natives." Knowing that the navigation of Alaska's justice system can be confusing and challenging, its goal is to act as a guide between individual Alaska Natives and the justice system. Its programs and services include a broad range of informational resources, technical

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[5] More information on AIJP is available at its website, www.akjip.org.

[6] More information on ANDVSA is available at its website, www.andvsa.org.

assistance and training, attorney referral, advocacy, support and civil pro se services and clinics.

Statement of the Case

Amici adopt the Statement of the Case of the Appellee, Ms. Jonsson.

Argument

I. The Need for Assistance with Representation in Family Law Matters is Greater than Current Service Providers are Able to Meet.

As attorneys, we place the concept of equal justice on our court houses, and pledge allegiance to it as a fundamental value of our society and our profession. It is the foundation of our system of adjudication. It is a value reflected in our ethical rules.[7] As new admittees to this Bar Association, we pledge to "uphold the honor and to maintain the dignity of our profession and to improve not only the law but the administration of justice."[8]

Despite this rhetoric, many low-income Alaskans are denied effective access to justice because of its cost. As officers of the court we are responsible for the system of justice that we create. The Alaska Supreme Court's Civil Access to Justice Task Force Report concluded that approximately 50% of Alaska's poor citizens were likely to face a legal need in any given year.[9] As of its date of publication, the Report used a poverty population of 66,000 because the 2000 census figures had not come out. But the number

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[7] Alaska Rule of Professional Conduct 6.1.

[8] Alaska Bar Rule, Section 3.

[9] Alaska Civil Access to Justice Report at 11 (2000).

of Alaskans living below Alaska's poverty level[10] as released by the Census Bureau in 2002, was actually 80,405. Today it is likely over 90,000.[11]

Nationally, the extent of the unmet need for legal services is staggering. In a recent report, the Legal Services Corporation found "a very serious shortage of civil legal assistance - an urgent justice gap - in the United States." The report concludes that at least 80% of those who require legal assistance do not receive the help they need.[12] The Legal Services Corporation has made it clear that states cannot wait for a national solution to relieve this problem.

The current providers have not been able to come close to meeting the need in the family law area. ALSC has tracked the numbers of those "unserved" or "underserved" in custody cases[13] due to ALSC's under-staffing during 2006:

Out of 100 applicants coming to ALSC for assistance with custody issues, 44 are turned down. Of these 44 applicants, 16 are turned down for reasons unrelated to

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[10] Alaska's poverty ceiling is set at 125% of the federal poverty ceiling due to cost of living factors.

[11] The "Income, Earnings and Poverty Data from the 2007 American Community Survey," issued August 2008, available at www.census.gov/prod/2008pubx/acs-09.pdf, estimates that, of 667,000 Alaskans for whom poverty status was determined, 8.9% had incomes under 100% of poverty level, and 13.3% had incomes under 125% of poverty level (which is 100% of the Alaska poverty ceiling). The annual estimate of the total population for Alaska as of July 1, 2007, was 683,478. *See* http://quickfacts.census.gov/qfd/states/02000lk.html, link for "Estimates for Alaska counties." Assuming 13.3% of those Alaskans are under Alaska's poverty ceiling, the figure would be 90,900.

[12] *See* Legal Services Corporation, Documenting the Justice Gap in America, at 18-19 (Sept. 2005) (http://www.lsc.gov/justicegap.pdf).

[13] The type of case that is most in demand for representation in ALSC offices.

ALSC's funding (*e.g.*, the applicant is financially ineligible, or ALSC has a conflict). However, 28 applicants are turned down to whom ALSC could provide some level of assistance if it had sufficient resources to do so.

Of the 56 whose applications for assistance with custody issues are accepted, 34 are seeking legal advice or some other form of service short of full representation and are able to get what they need from ALSC. Of the remaining 22 applicants who would benefit from long-term representation, ALSC is able to provide it to 13. The remaining 9 applicants would prefer long-term representation, but find that ALSC can only provide legal advice, assistance with pro se paperwork, completion of a brief "unbundled" task, or some other form of service short of full representation.

Thus, out of the initial 100 applicants, there are 28 who cannot get any service from ALSC due to ALSC's understaffing, and another 9 who are "underserved" and could benefit from additional assistance. This figure does not include, of course, the unknown number of people who don't apply to ALSC in the first place, either because they are unaware of the program or because they are discouraged by the unlikelihood of successfully obtaining representation.

ANDVSA's Pro Bono Program numbers are similar. In its last reporting period, from January 2008 – July 2008, ANDVSA served 108 clients and was not able to serve 72. Since ANDVSA only serves clients who have domestic violence or sexual assault problems, there is a large population of family law clients who never even apply to ANDVSA because they would not meet the eligibility criteria.

Obtaining representation today is more difficult than a generation ago. The following chart compares ALSC today to the ALSC in 1979, when *Flores* was decided:

Item	1979	2008
Number of offices	13 (including Galena, then unstaffed)	9 (including Ketchikan and Kotzebue, currently staffed only by non-attorneys)
Number of attorneys	44	23
Number of paralegals	24	2
Other staff	25	14
Alaskans living under Alaska poverty limit	55,909	90,922 (est.)[14]
Poverty-level Alaskans per ALSC Attorney	1270	3953

In addition, ALSC has become increasingly dependent on specialized, as distinguished from general, funding sources. Historically, the majority of ALSC's funding came from the Legal Services Corporation. As of 1979, for example, approximately 80% of ALSC's funding was from the LSC, and was generally available for any type of civil legal assistance. Currently, LSC funding makes up about 40% of ALSC's funding.[15]

During the early 1980's, the State of Alaska was a major supporter of ALSC, and a general funding appropriation from the State to ALSC stood at $1.2 million in FY 1984. This funding too was available for general representation, and could have been used for

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[14] Source: CPS Annual Demographic Survey, http://pubdb3.census.gov/macro/032006/pov/new46_100125_01.htm, and http://www.census.gov/popest/states/tables/NST-EST2005-01.xls.

[15] Funding from LSC to ALSC underwent a sudden steep reduction approximately ten years ago, from $1.7 million in 1995 to $0.9 million in 1996. This was due to the elimination of an Alaska cost-of-doing-business adjustment ALSC had enjoyed up until then, and a drastic decrease in funding to LSC itself from Congress. LSC funding to ALSC has since crept back upwards to about $1.2 million currently, recovering less than halfway the cut taken from 1995 to 1996.

representation in cases like Ms. Jonsson's. However, the legislature literally decimated the appropriation from $1.2 million as of FY 1984 to $125,000 as of FY 2004. For FY 2005, the legislature appropriated only half that amount, and that meager $62,500 was vetoed by former Gov. Murkowski. Ironically, the small size of the amount was one of the two reasons he gave for the veto.[16] The other reason was that state government had no responsibility to provide civil legal assistance.[17] More recently, ALSC has recovered some of this lost ground, and for FY 2009 the legislature gave ALSC an appropriation of $200,000. This has enabled ALSC to avoid even further reductions, but still leaves ALSC a far cry from the $5,000,000 agency that the Alaska Access to Justice Task Force urged.[18]

Diversified funding is generally healthy for a non-profit, but ALSC's operations have become more reliant on specialized funding sources with their own priorities for client categories and case acceptance criteria. Currently, much of ALSC's funding for domestic relations representation comes from the Office of Violence Against Women, which limits representation to victims of domestic violence, stalking, or sexual assault. This is a logical policy and one to which ALSC has no objection, but replacing general work funding with funding for more specialized work forces ALSC to abandon clients like Ms. Jonsson when they fall outside the parameters of the specialized funding source.

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[16] " 'The state's support to this non-profit organization has declined over the years,' Murkowski said in his veto message." Anchorage Daily News, July 20, 2004.

[17] " 'Providing a grant to an organization that provides legal assistance to individuals is not a basic responsibility of state government.'" *Id.*

[18] Alaska Civil Access to Justice Report at 3.

Research has shown that the needs of family law clients in Alaska cannot be handled adequately by the number of available volunteer attorneys. Family law cases are the most common legal problem confronted by low-income Alaskans but fewer and fewer practitioners in Alaska are willing to handle family law cases, either pro bono or for fee-paying clients. Anecdotally, the pro bono program Amici have noted that, even if more attorneys are willing to take pro bono cases, fewer of them are willing to take family law cases. This also appears borne out by analysis of Anchorage Directory figures. Between 1996 and 2006, the population of attorneys overall in Anchorage increased and the number of attorneys per 1000 general population in Anchorage stayed generally level. However, the number of attorneys listing themselves in the yellow pages as handling domestic relations cases fell from between 1996 and 2006. Thus, the percentage of practicing attorneys advertising for family law cases declined, as well as the number of advertising family law attorneys per 1000 population in Anchorage, as shown in the following table:

Year	Attorneys in Anchorage	Attorneys in Anchorage per 1000 population	Anchorage Yellow Page attorney listings for domestic relations	Percent of Anch. practicing attorneys advertising in family law	Advertising family law attorneys in Anch. per 1000 population
1996	1472	5.71	72	4.9%	0.3
2005	1585	5.7	60	3.8%	0.2
Change	+113 or +7.6%	~0	-12 or -16.6%		-0.1 or -33%

Since there are fewer attorneys doing family law, it is unrealistic to rely on pro bono resources to fill the gap.

Attorney fees awards in custody cases are also inadequate to meet the needs of indigent parents in family law cases.[19] As in the present case, often the opposing party's income is not large enough to meet the legal needs of two individuals and the court cannot award fees.[20] Even when the opposing party's income is sufficient, the providers' anecdotal experience with clients who attempt to get attorney fees is that it is hard to retain an attorney with fees and that fee awards are often inadequate.[21] While the court has the authority to award attorney fees in the interim of a divorce or custody case,[22] many judges prefer to wait until the end of a case to award fees. This makes retention of

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[19] Attorneys fees in a divorce cases involving custody are governed by the "divorce exception" to Civil Rule 82 fee awards and are based on the relative economic situations and earning powers of the parties. *Burrell v. Burrell,* 537 P.2d 1, 7 (Alaska 1975). For non-married custody cases, the same standard often applies. *Sanders v. Barth,* 12 P.3d 766, 768 (Alaska 2000); *Koller v. Reft,* 71 P.3d 800, 809 (Alaska 2003) quoting *Bishop v. Clark,* 54 P.3d 804, 813-14 (Alaska 2002). In a modification of custody case, the standard is "the relative financial resources of the parties and whether the parties have acted in good faith." AS 24.20.115.

[20] Amici believe that the trial court followed the proper process in assessing whether the opposing party could afford to pay for Ms. Jonsson's attorney, and then appointing an attorney after concluding that Mr. Gordanier lacked the resources. Amici believes that the attorney fees options should be exhausted before appointment is made.

[21] Amici send clients who might qualify for attorney fees awards through this process before they will represent them. ALSC has a pro se packet for clients to ask the court for attorney fees, which ANDVSA also utilizes. Clients are asked to attempt to find an attorney who will represent the client under the assumption they will receive fees. Amici's experiences are that unless the opposing party's income is significant (over $100,000), finding an attorney willing to take this risk is very difficult. ANDVSA also did some recent research attempting to find a pool of attorneys who might be willing to take on fee cases. Discussions with a handful of Anchorage family attorneys confirmed our experiences – fee awards often are inadequate, come at the end of the case if awarded, and often even when awarded, are not paid.

[22] AS 25.24.140(a)(1).

an attorney in the beginning of the case difficult, since the attorney is unsure he or she will be paid. Furthermore, family law attorneys often ask for a $10,000-20,000 retainer in a contested custody case and awards, when made, tend to be lower than $10,000. Courts may have good reasons for keeping fees low – avoiding parties' amassing "war chests" to litigate or creating an undue burden on the resourced parent – however the low fees make it impossible to retain or keep the indigent party's attorney.[23]

Alaska family courts resolve the most important and difficult issues confronting our society – the issue of how we raise our children. There should be no more important priority for the State of Alaska. And yet despite the work of many, indigent Alaskans do not have meaningful access to the courts.

II. Having Representation in a Contested Child Custody Case Makes a Difference.

In *Flores v. Flores,* this Court articulated the importance of counsel in a custody case:

> A parent who is without the aid of counsel in marshalling and presenting the arguments in his favor will be at a decided and frequently decisive disadvantage which becomes even more apparent when one considers the

[23] Nor has administrative rule 12(e) been utilized to help indigent parents in custody cases. OPA argues in its brief that since 12(e) awards are a possibility in custody cases, there is not disparate treatment for equal protection purposes. Appellant's Brief at 17, 22-23. Ms. Jonsson's brief argues that there is disparate treatment since AS 44.21.410 requires the appointment of counsel and Administrative Rule 12(e) is discretionary. Appellee's Brief at Argument Section V(A). In Amici's experience, Administrative Rule 12(e) appointments are rarely, if at all, made in custody cases. If they are, it is likely the Court would argue that there is not a legal basis for the appointment, as they have in this case.

> emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.[24]

The Court's concerns echoed those of Justice Black in *Gideon v. Wainwright*, that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[25]

A recent case handled through the ANDVSA Pro Bono Program well-illustrates the importance of representation. The applicant sought help on a case in which the custody trial had occurred approximately nine months earlier, with the mother unrepresented and the father represented. The court had orally awarded the father four nights every other week with the children. However, the written order contained a clerical error, omitting the word "other," in effect giving primary physical custody to the father four nights out of seven; in effect, the father had been erroneously exercising primary physical custody for over nine months when he was supposed to only have four nights visitation out of fourteen. This clerical omission had a dramatic effect on the client's access to her children over those nine months, and her ability to affect their care. Even more disturbingly, the mother had repeatedly tried to alert the court to the problem after the written findings were approved. But because she did not know the proper language and form to bring the issue to the court, the court misconstrued her requests and denied them. Only when the mother finally found counsel was she able to bring this omission to the court's attention.

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[24] 598 P.2d 893, 896 (Alaska 1979).

[25] 372 U.S. 335, 345 (1963), quoting *Powell v. Alabama,* 287 U.S. 45, 68-69 (1932).

Studies in Alaska reinforced these concerns over twenty years after *Flores*. In 2000, the Access to Justice Report Subcommittee on Pro Se Representation found that:

- Pro se litigants face a number of hurdles when they try to represent themselves in court including: a lack of knowledge and education about the legal issues involved, an inability to draft motions and follow court procedures as set forth in the Rules of Court, and failure to serve papers on the opposing party. Furthermore, pro se litigants make inappropriate telephone calls and have inappropriate telephone contact with the court and judges' chambers, and take up an extensive use of court time due to their lack of knowledge and their non-compliance with basic court rules;

- There is a lack of effective access to the court for unrepresented litigants in family law matters.

- Many victims of domestic violence remain in the home where the violence is occurring due to lack of resources, representation and an understanding of family law.[26]

Task force reports in other states concerning unrepresented litigants have agreed that there is an especially compelling need to provide representation when only one side is represented, as in Ms. Jonsson's case. The Boston Bar Association Task Force on Expanding the Civil Right to Counsel found that, "there is a compelling need for a lawyer in contested child custody cases when one side has an attorney and the other party is unrepresented due to indigency."

The importance of representation in child custody cases involving domestic violence is well-documented. A recently convened conference of national domestic violence experts in a variety of cross-disciplines found that "families without private

[26] Access to Justice Report at 38.

resources are disadvantaged in their access to the courts and related services."[27] A highly-publicized study on the efficacy of legal services in combating domestic violence reached the conclusion that "while shelters, hotlines, and counseling programs targeted at battered women are found to have no significant impact on the likelihood of domestic abuse, *the availability of legal services in the county of residence has a significant, negative effect on the likelihood that an individual woman is battered.*"[28] This study underscores what domestic violence advocates have known for years. Victims stay in dangerous situations because of financial concerns, concerns about losing their children, and safety concerns. Providing an attorney who can help them obtain custody of their children, safe and enforceable visitation orders, protection orders, child support and alimony provides the support that victims need to leave the relationship.

Cases involving domestic violence are especially ill-suited for pro se litigants and may even be dangerous. The dynamic of power and control that is found in a relationship with domestic violence makes litigating on an even plain impossible. Abusers who have lost control of their partner in the relationship often use the court process as the next means of maintaining control and may engage in extended, vexatious litigation.[29]

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[27] Van Steergh, Nancy, *Report from the Wingspread Conference on Domestic Violence and Family Courts,* Family Court Review, Vo. 46, No. 3 July 2008, at p. 468.

[28] Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline in Domestic Violence, 21 Contemp. Econ. Pol'y 158, 158-172 (2003) (emphasis added).

[29] Abusive parents may use an extended court process to emotionally and financially drain the other party to achieve their goal of controlling the family. When court cases are lengthy, it is the parent who is less financially capable (typically women) who is less likely to gain custody due to her inability to retain an attorney. Lundy Bancroft & Jay

Unfortunately, too, these cases are among the more complex in family court, often involving expert witnesses, medical and police reports and psychological evaluations. Furthermore, since separation is the most dangerous time in a domestic violence relationship,[30] forcing an unrepresented litigant to negotiate and litigate against her abuser in a highly emotional custody case is dangerous. For all these reasons, legal advocates at ANDVSA member programs have continually indicated that obtaining civil legal representation in family law proceedings is the greatest unmet need of their clients.

Parents with disabilities are similarly harmed by self-representation. A parent's need for legal representation in a custody case may be most acute when the parent has, or is alleged to have, mental health problems.[31] The other parent may try to use motion practice to force the parent with the alleged disability into a Rule 35 psychiatric evaluation.[32] A victim of domestic violence who also has a disability may not get custody of his or her children, despite the statutory domestic violence custody presumption, if he or she suffers from a "diagnosed mental illness that affects parenting abilities."[33] If witnesses are available to testify that a parent's psychiatric problems do not have any significant effect on his or her parenting ability, an attorney's assistance

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Silverman, The Batterer As Parent: Addressing the Impact of Domestic Violence on Family Dynamics at 117, 125 (2002).

[30] Bancroft & Silverman, *supra* at12.

[31] "The mental health of a parent is a proper topic of inquiry at a custody hearing; however, the basis of the custody determination is the best interests of the child and a parent's conduct is relevant only insofar as it has or can be expected to negatively affect the child." *Morel v. Morel*, 647 P.2d 605, 608 (Alaska 1982) (citations omitted).

[32] *See Dingeman v. Dingeman*, 865 P.2d 94, 98-99 (Alaska 1993).

[33] *See A*S 25.24.150(h).

may be vital not just in marshalling these witnesses at trial, but also in demonstrating to the trier of fact and a reviewing court that their testimony is valid.[34]

Mental illness carries a stigma, and it has been necessary for the Alaska Supreme Court to warn trial courts that "[e]ven the mental health of the custodial parent is 'relevant only insofar as it has or can be expected to negatively affect the child.'"[35] Yet it may be all too possible for courts to view mental illness as a static, untreatable condition. This Court recently affirmed a trial court's finding that a father's serious mental illness required treatment occupying the majority of his emotional resources and that this and other problems imposed "structural limits" which would be permanent obstacles on his ability to parent.[36] And, stigma aside, a parent with mental illness who must appear pro se runs the substantial risk of not being able to make arguments with sufficient detail and coherence to allow an appellate court to consider them.[37]

As attorneys we know that providing representation in court makes an enormous difference in the outcome of a case. It is likely that this principle is one with which most Alaskans would agree.

> 'The question is very simple. I requested the court to appoint me an attorney and the court refused.' So Gideon had written to the Supreme Court in support of his claim that the Constitution entitled

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[34] *Morel*, 647 P.2d at 608 (successful argument on appeal that testimony overrode trial court's conclusion about mother's parenting ability).

[35] *S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985), quoting *Morel,* 647 P.2d at 608; *see also A.H. v. W.P.*, 896 P.2d 240, 244-45 (Alaska 1995) (trial court did not mention stigma and properly based custody decision only on mentally ill parent's conduct).

[36] *Elton R. v. Naomi H.*, 119 P.3d 969, 972 (Alaska 2005).

[37] A.H. v. W.P., 896 P.2d 240, 243-44 (Alaska 1995).

> the poor man charged with a crime to have a lawyer at his side. Most Americans probably would have agreed with him. To even the best informed person unfamiliar with the law it seemed inconceivable, in the year 1962, that the Constitution would allow a man to be tried without a lawyer because he could not afford one.[38]

In 1962 it seemed inconceivable that an indigent party would be unrepresented in a criminal case. It is similarly inconceivable to many Alaskans today that indigent citizens are not represented when defending their rights to their children.[39]

III. There is Sufficient State Action in This Case to Trigger a Constitutional Claim.

The Alaska Court System's brief argues that there is insufficient state action in a private custody case to trigger a due process claim.[40] It argues that there is insufficient state action because there is not a public agency on one side of the case and because custody cases do not have to be resolved through the court. This argument is contrary to Alaska law and the practical legal posture of this case and of most custody disputes.

This Court has already found that a right to counsel exists in a case in which there was no public agency involved on either side. In *Matter of K.L.J.*, [41] the superior court had denied the father's request for appointed counsel because "it reasoned that state involvement was essential to invoking due process," and the mother and stepfather

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[38] Anthony Lewis, *Gideon's Trumpet*, 82 (1964).

[39] In a recent national poll, 79 percent of the respondents answered "yes" when asked if a poor person has a right to free counsel if sued in civil court, despite the fact that no such general right has been recognized in the United States. Jonathon Baird, "Deck Stacked Against Poor in Court," *Concord Monitor,* June 27, 2008.

[40] Alaska Court System Brief at 19.

[41] 813 P.2d 276, 282 (Alaska 1991).

(adoptive parents) were represented by private counsel. This Court reversed, stating, "[a]s loss of custody is often recognized as 'punishment more severe than many criminal sanctions,' ... *and as it is accomplished through a state mechanism*, we think the imprimatur of state involvement here sufficient to necessitate appointed counsel."[42] The Court noted that, although the State was not a party to the case, it had, "first and foremost," an interest in the children.[43] It also had an interest in an accurate and just decision, best served when all parties were represented by counsel,[44] and an interest in the rights of the indigent parent.[45] All those factors are equally present in the case before the Court.[46]

It is true that a custody decision does not have to be court-authorized, but once it is in court, the state action requirement is fulfilled. Where one private party invokes the civil judicial process against another private party, due process protects the defendant party.[47] In this case, Ms. Jonsson did not have a choice whether to go to court since she

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[42] Id. at 283 (emphasis added).

[43] Id. at 279.

[44] Id. at 280.

[45] Id. at 280.

[46] The Court System also draws a distinction between a custody case and an adoption case (at issue in *K.L.J.*), the latter of which it argues must go through court. However, adoptions do not have to be court-authorized. Parents can agree with adoptive parents to a child-rearing arrangement that suits everyone, and which in fact can be recognized as having constituted an adoption, even years after the "adoptive" parents have died. *Calista Corp. v. Mann,* 564 P.2d 53 (Alaska 1977).

[47] In *Aguchak v. Montgomery Ward*, 520 P.2d 1352 (Alaska 1972), Montgomery Ward filed a small claims suit against Mr. and Mrs. Aguchak, obtaining a default judgment. The Aguchaks appealed, and this Court held that the particular summons used in the small claims case had violated the Aguchaks' due process rights. Id. at 1358. *See also*

was not the petitioning parent. Since the State is providing the judicial mechanism invoked by Mr. Gordanier, there is sufficient state involvement to implicate Ms. Jonsson's due process rights.

Furthermore, as this Court recognized in *Flores*, child custody disputes that are born out of divorce cases, involve the requisite state action:

> [T]here is a strong state interest in divorce-child custody proceedings. Unlike commercial contracts, legally binding marriages and divorces are wholly creations of the state. Any provision for child custody in a divorce order is fully enforceable by the state.[48]

And while custody orders unrelated to divorce do not *require* court-authorization, court authorization is essential to preserving children's best interests, an interest that this court found important to the state action analysis in *K.L.J.*[49] Once a custody issue becomes disputed, the parties can only rely upon the enforcement power of Alaskan courts to resolve their disputes. Parties in contested custody cases often have little trust and little goodwill to work together. If domestic violence is present, agreement between the parties may not be feasible, and added manipulation of existing court orders may be a problem. Children's best interests can be lost in power struggles between the parties. State action is essential to protecting Alaskan children.

Fuentes v. Shevin, 407 U.S. 67 (1972) (due process was violated by state law allowing a private party, upon filing a court complaint and posting a bond, to summarily seize the defendant's goods or chattels).

[48] *Flores,* 598 P.2d at 895-896, citing *Boddie v. Connecticut*, 401 U.S. 371, 376-377 (1971).

[49] 813 P.2d at 279.

IV. Ms. Jonsson Has a Due Process Right to An Attorney Under the Mathews v. Eldridge Test

A. Ms. Jonsson Faced a Potentially Significant and Severe Loss of her Fundamental Right to Her Child If She Were Forced to Proceed Without Representation.

The Court System argues that a custody decision does not have strong enough implications for the parent/child relationship to require appointing an attorney to protect this right. It argues that custody cases do not implicate the severe repercussions a parent might face in a CINA or adoption case, where a right to counsel has been found to exist.[50] Amici believe that these arguments unfairly dismiss the importance of a custody determination, especially an initial custody determination.

The potential loss of rights in a custody case is significant and severe. The Alaska Supreme Court has already held that private custody disputes have a significant enough effect on parental rights to implicate due process concerns.[51] Private custody decisions will affect both the legal decision-making rights of parents regarding their children and the physical custody rights of parents. A private custody proceeding, even one in which parental rights are not terminated, can entail the placement of conditions on visitation which have the effect of severing contact between parent and child for periods of ten

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[50] Alaska Court System Brief at 17.

[51] *Flores,* 598 P.2d at 895 ("Although the divorce proceeding will not sever all parental rights of the petitioner, an award of custody to the respondent will have the same consequences , due to the distance between California and Alaska and the petitioner's indigency.") *In the Matter of K.L.J.,* 813 P.2d at 283 (Alaska 1991) ("[L]oss of custody is often recognized as 'punishment more severe than many criminal sanctions'") quoting, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights,* 80 A.L.R. 3d 1141, 1145.

years or more.[52] In a private custody dispute it is quite possible for one parent to go from seeing their child every day to seeing them on holiday and school vacations or for limited hours and days. In Ms. Jonsson's case, Mr. Gordanier wanted only supervised visitation for Ms. Jonsson, necessitating third-party presence at all times that she saw her child. Such restricted time with one's child is certainly a significant infringement on the fundamental relationship between parent and child.

In many respects, CINA cases, adoptions, and child custody cases are similar. Not every CINA case ends in termination of parental rights; indeed, the State is under various obligations to try to avoid that outcome.[53] Nor does every adoption case severe the parent-child relationship. The adoption may of course end up being denied, and even if it is granted, Alaska law allows continuation of visitation rights and inheritance rights post-adoption,[54] and an effective advocate for the parent may succeed in having such provisions inserted.

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[52] *Nelson v. Jones*, 944 P.2d 476 (Alaska 1997).

[53] *See* A.S. 47.10.086(a) ("Except as provided in (b) and (c) of this section, the department shall make timely, reasonable efforts to provide family support services to the child and to the parents or guardian of the child that are designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate ...").

[54] AS 25.23.130(a)(1) (" [U]nless the decree of adoption specifically provides for continuation of inheritance rights ..."); AS 25.23.130(c) ("Nothing in this chapter prohibits an adoption that allows visitation between the adopted person and that person's natural parents or other relatives").

Furthermore, adoption decrees do not have the finality that the Court System posits. Under Alaska law, an adoption decree may be re-opened within a year,[55] and federal law requires in certain ICWA cases that this period of repose be extended to two years.[56] State law includes another exception to the one-year repose period, where the adoptive petitioner has not had custody of the minor.[57] Although the issue of modifications of "open adoptions" has not been addressed in a published decision, it seems inescapable that an adoption decree that includes visitation rights would necessarily entail ongoing judicial jurisdiction to modify those visitation rights if appropriate. And ICWA provides even further post-adoption residual rights – if the adoptive parents later voluntarily consent to the termination of their own parental rights, a biological parent or prior Indian custodian may petition for return of the child, to be granted in the absence of a showing that such return of custody is not in the child's best interests.[58]

The distinction proffered by the Alaska Court System's brief is thus more tenuous than substantive. A trial court judge is unable to tell at the outset of an adoption proceeding whether the eventual decree will entail visitation or not, just as a judge cannot tell at the outset of a private custody case whether the eventual decree will have the effect of severing visitation or not.

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[55] AS 25.23.140(b).

[56] 25 U.S.C. §1913(d) (where consent was obtained through fraud or duress).

[57] AS 25.24.140(b) ("[U]nless, in the case of the adoption of a minor the petitioner has not taken custody of the minor ...").

[58] 25 U.S.C. §1916(a).

The Court system also argues that because custody decisions may be modified, the importance of protecting a parent's due process rights at the initial custody determination is diminished. However, this argument misconstrues important distinctions between initial custody cases and modifications. An initial custody determination involves protections for both parents' rights that do not apply in a modification, making representation at that initial proceeding critical. For example, AS 25.20.070 creates a "temporary equal physical custody" presumption. This provides a one-time-only opportunity for a parent, even a parent who has not been the primary custodian, to avail himself or herself of this presumption and prove him or herself an equal contender for custody. Even though that decree may be modifiable in the future, the statutory presumption favoring that equal-access opportunity will be forfeited.

Procedurally, a modification motion places the burden of proof[59] on the movant, which, as the Alaska Court System emphasizes, does not occur in an initial custody determination.[60] Modification of custody is contingent on a "substantial change of circumstances."[61] The requirement limits the focus to those events that have transpired

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[59] *S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985).

[60] ACS Brief at 26.

[61] A.S. 25.20.110. "An award of custody of a child or visitation with the child may be modified if the court determines that a change in circumstances requires the modification of the award and modification is in the best interests of the child." Some earlier decisions had characterized the "changed circumstances" requirement as not an ironclad barrier to judicial reconsideration, but only one factor to be considered by the trial court. This was initially prompted by enactment of a 1968 child custody statute which, by not mentioning the "change in circumstances" requirement, arguably eliminated the necessity of such a showing. *See King v. King*, 477 P.2d 356 (Alaska 1970). *See also Deivert v. Oseira*, 628 P.2d 575 (Alaska 1981); *Starkweather v. Curritt*, 636 P.2d 1181 (Alaska 1981). These

since the time of the prior custody order.[62] Thus, a self –represented parent in an initial custody proceeding who has inadvertently omitted or minimized the significance of a material piece of evidence that occurred prior to the decree has permanently lost the ability to bring that evidence to the court's attention.

An initial custody determination puts a greater emphasis on a parent's improvement in parenting skills, whereas modification motions do not value those efforts as highly. In an initial custody determination, the efforts and characteristics of both parents are equally relevant. That is not true in a modification action. This Court has emphasized that, in general, an improvement in the position of one party to the decree is not sufficient to justify a change in child custody.[63] Thus, attempts by a parent to improve his/her parental skills or child-rearing environment are generally taken into account if they occur prior to an initial determination, but less so if they occur prior to a request to modify.

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cases preceded the 1982 enactment of AS 25.20.110, which made the "change in circumstances" language statutory, and further used the language "if the court determines that a change in circumstances *requires* the modification of the award," SLA 1982, ch. 88, §6 (emphasis added).

[62] *Nichols v. Mandelin*, 790 P.2d 1367, 1372 (Alaska 1990); *S.N.E. v. R.L.B.*, 699 P.2d 875, 878 (Alaska 1985).

[63] *Gratrix v. Gratrix*, 652 P.2d 76 (Alaska 1982); *Garding v. Garding*, 767 P.2d 183, 186 (Alaska 1988); *See also Jenkins v. Handel*, 10 P.3d 586, 591 (Alaska 2000) (improvement in moving party's housing situation and employment situation not sufficient); *Long v. Long*, 816 P.2d 145 (Alaska 1991) (recent remarriage improving noncustodial parent's position is not sufficient); *Nichols v. Nichols*, 516 P.2d 732 (Alaska 1973) (passage of time combined with mother's improved circumstances following remarriage not sufficient).

For all these reasons, the prospect of a future motion to modify custody does not present as pronounced a distinction under Alaska law as the Alaska Court System brief posits between the two categories of cases. There are prerogatives that a parent forfeits once the initial custody determination is concluded, regardless of the possibility of future modification, and prerogatives that a parent may retain when an adoption is concluded regardless of its supposed non-modifiability. The two contexts have more in common than they do in distinction.

B. Substantive and Procedural Safeguards in Custody Law and the Family Law System Do Not Lessen the Risk of Erroneous Deprivation to Ms. Jonsson.

The Court System argues that even if Ms. Jonsson has a private interest in the care, custody and control of her children, that there are many procedural and substantive safeguards that will lessen the risk of erroneous deprivation to Ms. Jonsson. However, Amici believe that this argument oversimplifies the landscape of Alaska domestic relations law and that none of these safeguards adequately protects a parent's fundamental right to the care, custody, and control of their child.

The laws applicable to parents who are litigating custody have become increasingly complex, especially since *Flores* was decided. This complexity greatly increases the risk that a self-represented parent will misapply, overlook, or misconstrue a law, thus hindering their case. A brief recitation of the evolution of custody from the 1960s through the present demonstrates this point:

- Initially, the Alaska Statutes laid out no particular criteria or standards for the court to apply, only giving it jurisdiction to provide for the care and custody of minor children as it may deem just and proper.[64]
- In 1968, the legislature enacted a statute requiring the court to consider two factors: (1) "the best interests of the child and if the child is of a sufficient age and intelligence to form a preference, the court may consider that preference in determining the question"; and (2) as between parents adversely claiming the custody, neither parent is entitled to it as of right.[65]
- In 1977,[66] the legislature enacted a separate provision at AS 25.20.060, in the "Parent and Child" Chapter (20) of Title 25, and added to the list of factors in AS 09.55.150, so that it read:

> The court shall determine custody in accordance with the best interests of the child. Neither parent is entitled to preference as a matter of right in awarding custody of the child. In determining the best interests of the child, the court shall consider all relevant factors including: (1) the physical, emotional, mental, religious and social needs of the child; (2) the capability and desire of each parent to meet these needs; (3) the child's preference; (4) the love and affection existing between the child and each parent; (5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; and (6) the desire and ability of

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[64] *See Harding v. Harding*, 377 P.2d 378, 379 (Alaska 1962) (citing to ACLA 1949, sec. 56-5-13: "[F]or the future care and custody of the minor children of the marriage as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper giving the preference to the party not in fault."). This later became the text of AS 09.55.210; *see Ransier v. Ransier*, 414 P.2d 956 (Alaska 1965).

[65] SLA 1968, ch. 160, §1, as quoted in *Sheridan v. Sheridan*, 466 P.2d 821, 824 (Alaska 1970).

[66] SLA 1977, ch. 63.

each parent to allow an open and loving frequent relationship between the child and his other parent.[67]

- In 1982, with the legislative introduction of the concept of "shared custody," a separate list of "best interest" factors was introduced in a new section 25.20.090, to some extent overlapping the AS 09.55.205 factors and to some extent different:

> *Factors for consideration in awarding shared child custody.* In determining whether to award shared custody of a child the court shall consider
> (1) the child's preference if the child is of sufficient age and capacity to form a preference;
> (2) the needs of the child;
> (3) the stability of the home environment likely to be offered by each parent;
> (4) the education of the child;
> (5) the advantages of keeping the child in the community where the child presently resides:
> (6) the optimal time for the child to spend with each parent considering
> (A) the actual time spent with each parent;
> (B) the proximity of each parent to the other and to the school in which the child is enrolled;
> (C) the feasibility of travel between the parents;
> (D) special needs unique to the child that may be better met by one parent than the other;
> (E) which parent is more likely to encourage frequent and continuing contact with the other parent;
> (7) any findings and recommendations of a neutral mediator;
> (8) whether there is a history of violence between the parents;
> (9) other factors the court considers pertinent.

A new AS 25.20.060(c) stated that the court could award shared custody to both parents "if shared custody is determined by the court to be in the best interests of the child," while a new AS 25.20.100 provided that a court had to state on the record its reasons for denying a request for shared custody from a parent or GAL.

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[67] Former AS 09.55.205, quoted in *Bonjour v. Bonjour*, 592 P.2d 1233, 1236 (Alaska 1979).

A new AS 25.20.070 created a presumption favoring shared physical custody during the temporary custody stage of the proceedings.[68]

- A 1989 legislative enactment added three more factors to the AS 25.24.150[69] list:

> (7) any evidence of domestic violence, child abuse, or child neglect in the proposed custodial household or a history of violence between the parents:
> (8) evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child;
> (9) other factors that the court considers pertinent.[70]

The same session law added a tenth "substance abuse" factor to the parallel list in AS 25.20.090, bringing that list to a total of ten factors (with the sixth factor containing five additional subfactors).[71]

- A 1991 enactment, while it did not change the substantive factors, did limit the court's discretion to reserve child custody issues for determination after the final divorce judgment.[72]

- In 2004, several changes were made specific to domestic violence issues. The presumption favoring shared physical custody during the interim custody stage under AS 25.20.070 was made subject to an exception for domestic violence. The "willingness and ability to facilitate and encourage a close and continuing relationship" factor, in both the 25.20.090 list and the 25.24.250(c) list, had an

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[68] A separate 1982 enactment added a provision for grandparent visitation. SLA 1982, ch. 15, §1.

[69] In 1983, the divorce statutes were moved from AS 09.55 to AS 25.24.

[70] SLA 1989, ch. 52, §2.

[71] SLA 1989, ch. 51, §1.

[72] SLA 1991, ch. 76.

exception added for situations of sexual assault or domestic violence. And new presumptions were created in subsections added to AS 25.24.150(c): a rebuttable presumption that a parent with a history of perpetrating domestic violence should not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody; and a parallel presumption that a parent with a history of perpetrating domestic violence be allowed only supervised visitation. Also added was a provision that an abused parent suffering from effects of abuse could not be denied custody on that basis unless the court found the effects to be so severe that they rendered the parent unable to safely parent the child.

The statutory structure the legislature has established is thus a relatively complex one, with two sets of partially overlapping and not entirely consistent factors, one to be considered for custody issues and the other for "shared" custody issues.[73] Adding to the complexity, other factors appear only in the case law, not the statute, e.g., the desirability of keeping siblings together.[74]

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[73] Whether there is a distinction between "joint" and "shared" custody is also not clear. The statutes use both terms in separate statutes, and define neither. This Court looked to §1(a) of SLA 1982 ch. 88 in divining the legislature's intent with respect to joint legal custody – but that portion of the session laws is uncodified, so unavailable to a pro se litigant trying to understand the Alaska Statutes. Civil Rule 90.3 contains a definition of "shared physical custody," meaning that each parent has physical custody of the children at least 30% of the year (110 overnights), but parents are free to label their own arrangement as "shared physical custody" for other purposes even if it does not meet that 30% threshold. The Rule also introduces the further complicating concepts of "divided custody" and "hybrid custody" for child support calculation purposes.

[74] See *Horton v. Horton*, 519 P.2d 1131, 1134 (Alaska 1974). Furthermore, the above recitation only includes the changes to custody law and does not include the complicated nature of child support law which is inextricably linked to child custody cases.

There is further confusion underlying this complexity: the term "custody" itself is not defined in the statutes, and as this Court has observed:

> "Custody" has no fixed legal signification. It involves a variety of parental rights and duties which vary according to the circumstances of the relationship of the child to the parent. "Custody" pertains not only to the parental control of the child, but is inseparably linked to the parent's rights of access and companionship with his offspring. There are, of course, no precise contours to the complex of rights denoted by "custody," and similarly there can be no fixed catalogue of the parental rights and responsibilities to which "part-time custody" relates.

This Court's decisions have attempted to explain the differences between the concepts of "legal custody" and "physical custody," and have interpreted that the legislature's 1982 amendment to AS 25.20.060 as favoring the award of joint *legal* custody, regardless of the *physical* custody arrangement.[75]

Thus, although the Court system posits that "the case begins with the presumption that both parents will share custody,"[76] there is actually a tangled web of intricate and somewhat contradictory statutes that a parent litigating his or her custody case has to master to effectively protect their interest in their child. When that is combined with the emotional nature of these disputes, it is unrealistic to expect parents to articulate their concerns and represent themselves in a way that will enable a conscientious judge to discern what the actual issues are.

Several of the "substantive and procedural safeguards" the ACS brief describes only underscore the hazards facing a parent trying to navigate these shoals alone. For

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[75] *Bell v. Bell*, 794 P.2d 97, 99 (Alaska 1990).

[76] Alaska Court System Brief at 24.

example, it is true that "the court may order a mental examination pursuant to Civil Rule 35,"[77] but that is hardly reassuring to an unrepresented indigent parent. Psychological examinations are an increasingly common tool that judges and child custody investigators use when there are conflicting party stories and concerns about credibility. Once ordered,[78] these examinations greatly increase the complexity and expense of a case. Pro se parents must now educate themselves in the complex world of psychologists – including DSM diagnosis and psychological testing.

Similarly, the guardian ad litem (GAL) and the child custody investigator (CCI) add an additional layer of complexity. Both the GAL, as a representative for the child, and the CCI, an expert appointed by the Court, owe no duty of loyalty to the unrepresented parent and cannot redress the imbalance between the represented and the unrepresented parent.[79] GAL's and CCI's jobs become more problematic when one parent's voice is muted by lack of representation, since they often won't receive adequate information from the parents to evaluate a child's best interests.[80] If the GAL's and the

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[77] Alaska Court System Brief at 25.

[78] Amici assume that the psychological testing would be ordered since it is doubtful that a pro se litigant would be able to research and articulate the parameters that this Court has placed on the availability of Rule 35 orders in *Dingeman v. Dingemen*, 865 P.2d 94 (Alaska 1993).

[79] *See*, Civil Rule 90.6 and 90.7.

[80] "If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal context of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may be unwholesomely unequal." *Matter of K.L.J.*, 813 P.2d 276, 280 (Alaska 1991) (quoting from *Lassiter v. Dept of Social Services*, 452 U.S. 18, 28 (1981)).

CCI's position on custody doesn't align with one parent's position, that parent's job at trial has now become more challenging.[81] When a CCI sides with one parent, the other parent may have to hire their own expert to perform another evaluation. If there are legal problems with the report, an unrepresented party may not know to move to strike certain parts or the whole of the report. Furthermore, sometimes even indigent parents have to pay a portion of the cost of a CCI or GAL, taking away precious funds that could have been used to hire an attorney.[82]

Adequate training for GALS and CCIs is also an issue. Many family law cases involve complicating issues of substance abuse, mental health issues and domestic violence, however, there is no requirement that GALs or CCIs have training in this area of the law. An unrepresented parent would not know to highlight a professional's lack of training in theses areas to lessen the weight that a court might give to a recommendation.

The GAL and CCI also have access to a whole array of evidence that would otherwise be inadmissible if introduced into trial. Often at trial the GAL or the CCI relies on this hearsay evidence as the basis for their report or recommendation. Yet an

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[81] In fact, many family law attorneys believe that these added parties have no place in the family court system because they subvert the court's role as factfinder and infringe on a parent's constitutional rights. *See, e.g.,* Richard DuCote, *Guardians Ad Litem in Private Custody Litigation: The Case for Abolition,* 3 Loy. J. Publ. Int. L. 106 (2002).

[82] For all these reasons, Amici urge this Court to affirm the trial court's ruling that the appointment of a GAL in this case triggered a right to appointed counsel under AS 44.21.210(a)(4) and *Flores* as outlined in Argument section III(C) of Ms. Jonsson's brief.

unrepresented parent would not know to object.[83] For all these reasons, GALs and CCIs do not simplify custody cases.

C. The Government's Financial Interest is Not Strong

The State's primary interest in minimizing the expense of a right to counsel is weak given the countervailing arguments. In *Flores,* Justice Connor worried about the financial implications of creating a right to counsel in the custody realm.[84] To date, the costs of meeting that need have been relatively minimal. Similarly, the cost of providing counsel to indigent criminal defendants was offered as an excuse to avoid a right to counsel in *Gideon v. Wainwright*, but the government has found a way to fund this right.

Nor is it clear that the cost will be extraordinary. Former Public Advocate Josh Fink sought a preliminary estimate from the Alaska Court System on how many cases were similarly situated to Ms. Jonsson's during the briefing stage of this issue before the trial court. The Court System, through an email from Doug Wooliver to Josh Fink, estimated that statewide there were approximately 700 custody cases (including modification of custody cases) where one party was represented by counsel. Thus, if the Office of Public Advocacy were to take over this role, one could imagine that it might

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[83] Appointment of a GAL or CCI also implicates a parent's privacy concerns. These individuals will be conducting extremely intrusive inquiries. They are given access to a whole host of private information including CINA files, juvenile files, medical and psychological records and criminal records. As such, a parent might inadvertently waive a privilege against self-incrimination.

[84] *Flores,* 598 P.2d at 900 (Connor, J., dissenting in part, concurring in part)("Finally, there is another aspect of the court's decision which requires comment, and that is the cost to the public....so far as I know, we lack reliable data on the needs of the poor in Alaska and the expense of meeting those needs.")

have to hire approximately 15 staff attorneys and support personnel to undertake this function. Roughly, one might estimate that this would cost the agency approximately 2 million dollars or approximately 12% of its FY 2007 budget.

Finally, there will be savings to the state if custody cases are handled efficiently and appropriately by attorneys. Here, settlement was possible through the assistance of Ms. Jonsson's court-appointed attorney. Clerks save time on cases that are efficiently managed by attorneys. Judicial resources are conserved. And, most importantly, public resources are saved when children are in well thought-out placements, lessening society's future costs for mental health care, police protection, and child welfare protection.

V. The Court's Role is to Delineate Rights, Especially Rights Involving the Administration of Justice.

This Court has previously resolved that, "lack of representation impedes access to justice, a subject in which the judiciary has a special responsibility."[85] In *Flores* this Court eloquently stated the need for counsel in child custody cases when one party is represented. This Court has found a constitutional right to counsel in many civil contexts, including a right to counsel for indigent persons in civil contempt proceedings for nonsupport,[86] adoption proceedings,[87] termination of parental rights proceedings[88]

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[85] Alaska Supreme Court Resolution, "The Creation of a Civil Access to Justice Task Force", November 25, 1997.

[86] *Otten v. Zaborac*, 525 P.2d 537 (Alaska 1974).

[87] *In the Matter of K.L.J.*, 813 P.2d 276.

[88] *V.F. v. State*, 666 P.2d 42 (Alaska 1983).

(including private termination proceedings),[89] and paternity proceedings.[90] Affirming the trial court's appointment of counsel in Ms. Jonsson's case simply follows the principles of the Court's previous important decisions.

There is not a separation of powers problem with the Court exercising its role to delineate rights that may require legislative funding.[91] This Court has the unique role of articulating constitutional rights. Once the Court finds such a right, the Legislature allocates funding to effectuate this right. By way of example, through most of the 1960s, Alaska had no public defender agency.[92] The United States Supreme Court decided *Gideon v. Wainwright* in 1963.[93] This Court found that indigent probationers were entitled to appointed counsel in probation revocation proceedings in 1965[94] and that indigent convicts were entitled to appointed counsel to represent them in presenting petitions to vacate the sentence in 1967.[95] Once the constitutionally-protected right was established, the legislative funding followed.

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[89] *In the Matter of K.L.J.*, 813 P.2d 276.

[90] *Reynolds v. Kimmons*, 569 P.2d 799 (Alaska 1977).

[91] *Department of Heath and Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913-914 (Alaska 2001).

[92] The Public Defender Agency was established by SLA 1969, ch. 169. Prior to that, representation was effected by court appointment of private attorneys for a nominal fee; see *Jackson v. State*, 413 P.2d 488 (Alaska 1966), overruled, *DeLisio v. Alaska Superior Court*, 740 P.2d 437 (Alaska 1987).

[93] *Gideon*, 372 U.S. 335.

[94] *Hoffman v. State*, 404 P.2d 644 (Alaska 1965).

[95] *Nichols v. State*, 425 P.2d 247 (Alaska 1967).

Similarly, the right to appointed counsel which this Court found in *Flores*[97] in 1979 was implemented legislatively in 1984 when the Office of Public Advocacy was established, with its statutory duties encompassing that right.[98] And, as the following table comparing OPA and ALSC funding demonstrates, Court articulation of a right greatly affects the legislative funding allocated:

Fiscal Year	Alaska Legislative appropriation to OPA (right to counsel)	Alaska Legislative appropriation to ALSC (no right to counsel)
1985	$ 2,323,000	$ 1,000,000
1986	$ 3,659,000	$ 525,000
1987	$ 3,517,900	$ 475,000
1988	$ 3,751,500	$ 475,000
1989	$ 3,785,900	$ 498,800
1990	$ 4,995,900	$ 619,750
1991	$ 6,394,300	$ 475,000
1992	$ 6,228,500	$ 575,000
1993	$ 6,468,100	$ 475,000
1994	$ 6,339,500	$ 361,000
1995	$ 7,239,600	$ 311,000
1996	$ 6,810,500	$ 150,000
1997	$ 6,953,700	$ 140,600
1998	$ 7,461,400	$ 175,000
1999	$ 7,469,200	$ 175,000
2000	$ 8,301,600	$ 175,000
2001	$ 8,532,600	$ 175,000
2002	$ 8,541,100	$ 253,857
2003	$ 11,877,500	$ 125,000
2004	$ 11,601,400	$ 0
2005	$ 12,499,000	$ 0
2006	$ 14,673,800	$ 0
2007	$ 16,055,700	$ 0 [96]

[96] ALSC did get an appropriation of $200,000 for FY 2008.

[97] 598 P.2d 893 (Alaska 1979).

[98] The Office of Public Advocacy was established by SLA 1984, ch. 55. Its duties are listed in AS 44.21.410.

Thus, the Legislature has been responsive to providing the funding for those services which have been found to be constitutionally required, and there is no reason to doubt that it will continue to do so.

Conclusion

When Ms. Jonsson asked the trial court to appoint an attorney for her, she was invoking her constitutionally-protected right to the care, custody, and control of her child. There should be nothing more important that government does than provide for the safety and well-being of families. For all the above stated reasons, Amici urge this Court to affirm the trial court's decision that Ms. Jonsson was entitled to an attorney.

DATED and respectfully submitted this ____ day of November, 2008.

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