IN THE SUPREME COURT FOR THE STATE OF ALASKA

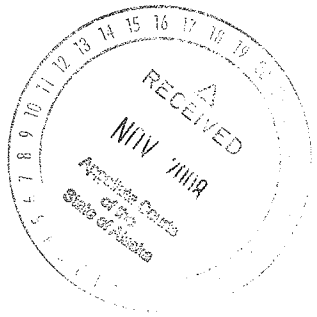
OFFICE OF PUBLIC ADVOCACY,

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 RETIRED ALASKA JUDGES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE JONSSON

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I. Introduction

The question of the scope of the right to counsel in private custody disputes under the Alaska Constitution is one of basic fairness and equal access to justice. The Court's answer will derive in part from assessing how proceedings involving pro se litigants actually transpire, considered in light of the applicable constitutional standards. In this brief, Amici Retired Judges provide first-hand observations as well as draw support from research and other commentary that corroborates their experience. These perspectives are relevant to the nature and magnitude of the private and state interests, and the substantial risks of erroneous outcomes, that the Court must consider when determining whether due process or equal protection requires appointment of counsel in this and similar cases. Further, Amici suggest that the Court's analysis of these claims should be resolved in the context of its obligation and authority under the Alaska Constitution, consistent with the separation of powers, to ensure the fair administration of justice.

II. Interests of Amici

The Amici are ten retired Alaska judges with more than 190 collective years of distinguished service on the bench. They are:

Justice Alexander O. Bryner, Alaska Supreme Court, 1997 – 2007 (Chief Justice 2003 – 2006); Chief Judge, Alaska Court of Appeals, 1980 – 1997; District Court, 3rd District at Anchorage, 1975 – 1978.

Judge Victor D. Carlson, Superior Court, 3rd District at Anchorage, 1976 - 1991; District and Superior Court, 1st Judicial District at Sitka and Juneau, 1970 – 1976.

Judge Christopher R. Cooke, Superior Court, Fourth District at Bethel, 1976 – 1986.

Judge Jay Hodges, Superior Court, 4th District at Fairbanks, 1976 – 1997.

Judge John Reese, Superior Court, 3rd District at Anchorage, 1989 – 2004.

Judge Eric T. Sanders, Superior Court, 3rd District at Anchorage, 1996 – 2003.

Judge Richard D. Savell, Superior Court, 4th District at Fairbanks, 1987 – 2005.

Judge Thomas Schulz, Superior Court, 1st District at Ketchikan, 1973 – 1993.

Judge Brian Shortell, Superior Court, 3rd District at Anchorage, 1981 - 2000.

Judge Larry Zervos, Superior Court, 1st District at Sitka, 1990 – 2007; District Court, 4th District at Fairbanks, 1988 – 1990.

Based on their experiences in court, Amici are well situated to illuminate the high costs, both financial and non-monetary, to the parties, the judicial system, and fairness itself when there is a failure to appoint counsel for indigent litigants involved in cases affecting basic human needs, including contested custody matters. Amici Retired Judges urge the Court to determine that principles of due process and equal protection mandate the provision of counsel to an indigent parent contesting custody against a represented party.

III. Preliminary Statements

Amici adopt Appellee Siv Betti Jonsson's jurisdictional statement, pertinent provisions of law, statements of the issues presented and of the case, and discussion of the applicable standard of review.

IV. Argument

A. Due Process and Equal Protection Require Consideration and Weighing of Private and State Interests.

As the parties' briefs make clear and the Court well knows, child custody disputes implicate fundamental rights. The right to direct the upbringing of one's child "is one of

the most basic of all civil liberties." *Flores v. Flores*, 598 P.2d 893, 895 (Alaska 1979). The United States Supreme Court has called the right to have children "a basic civil right of man," *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942), and noted that custody is a right "far more precious ... than property rights." *May v. Anderson,* 345 U.S. 528, 533 (1953). The opportunity to parent one's child is a matter of liberty under both the Alaska and U.S. constitutions, and such a fundamental interest may not be abridged without due process of law. Alaska Const. art. I, § 7; U.S. Const. amend. XIV; *Troxel v. Granville*, 530 U.S. 57, 65 (2000). What process is due depends on an evaluation that takes into account the nature of the interests affected, the complexity of the proceeding, and, at base, what is necessary to provide a fair opportunity to be heard. The test is set forth in *Matthews v. Eldridge,* 424 U.S. 319, 321 (1976):

> Identification of the specific dictates of due process generally involves consideration of three distinct factors: the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.

Amici's experience indicates that forcing unrepresented parents to litigate contested child custody cases against opposing parties who are represented by a lawyer fails to meet due process requirements. In particular, pitting unrepresented parents against represented parents in the context of such fundamental and basic human interests creates an unacceptably high risk of erroneous determinations, coupled with excessive administrative and judicial burdens which cannot be sufficiently mitigated by available aids to pro se litigants.

In the equal protection realm, once a fundamental interest is at stake, the standard is that similarly situated persons cannot be treated differently absent a compelling state interest in doing so. Not only do similarly situated persons deserve equal protection from the imposition of burdens; they also deserve equal access to rights and benefits. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 785 (Alaska 2005). In *Flores v. Flores*, this Court decided that when an indigent parent faces a parent represented by publicly funded counsel in a child custody dispute, the indigent parent is entitled to a court-appointed attorney. 598 P.2d at 895. Such representation is now provided pursuant to statute. Alaska Stat. § 44.21.410(a)(4).

The court below decided that there is no meaningful difference in the postures of a parent facing opposition from a party represented by publicly funded counsel and one facing privately retained counsel. Therefore, an indigent parent in a contested custody case against a represented opponent is entitled to a leveled playing field, and thus the assistance of a court-appointed attorney. Amici urge affirmance.

B. Failure to Provide Counsel to Indigent Litigants in Contested Custody Cases Creates Substantial Risks of Erroneous Determinations and Erodes Confidence in and the Effectiveness of the Judicial System

In September 2008, the Alaska Bar Association's Board of Governors relied on both Alaskan and national experience when it endorsed extension of the civil right to counsel. The Board resolved "That the Alaska Bar Association urges the State of Alaska to provide legal counsel as a matter of right to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody." Alaska Bar Association Pro Bono

Committee, Resolution in Support of Recognizing a Right to Counsel for Indigent Individuals in Certain Civil Cases (2008), Brief of Appellee Siv Betti Jonsson, Exh. 1 at 2 [hereinafter "Alaska Bar Resolution"]. There is a wealth of anecdotal and social science evidence to bolster their conclusion. Both Alaska judges who were recently surveyed and Amici Retired Judges, from their direct experience on the bench, relate many negative consequences to individual litigants and to the judicial system overall when parties are forced to appear pro se in complex matters. These observations are supported by studies from around the United States. In an adversarial adjudicatory system, with its associated benefits and pitfalls, pursuing a cause without a lawyer dramatically affects the process and its results.

1. Unrepresented Parties Suffer, with Case Outcomes and Fairness Compromised.

When the U.S. Supreme Court established the right to an attorney for indigent criminal defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963), it observed: "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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

In criminal matters, where the right to counsel is well established, the right is deemed so critical that Alaska requires a searching inquiry before a criminal defendant entitled to the appointment of an attorney is permitted to waive the right to counsel and

proceed pro se. *McCracken v. State*, 518 P.2d 85, 91-92 (Alaska 1974); *Gladden v. State*, 110 P.3d 1006, 1010 - 1011 (Alaska Ct. App. 2005); *McIntire v. State*, 42 P.3d 558, 561 (Alaska Ct. App. 2002). A judge must advise a defendant, in detail, regarding the risks of proceeding without representation. A court form, CR 204, *available at* http://www.state.ak.us/courts/forms/cr-204.pdf, outlines the substantial benefits that attorneys confer, including preparing and filing legal papers, making sure no improper evidence is brought in, and making sure that all of the defendant's rights are protected in court.

The 1980 Alaska Magistrate's checklist for misdemeanor arraignment, quoted in *Swensen v. Anchorage*, 616 P.2d 874 (Alaska 1980), sets forth a recommended script for magistrates to assure that the accused knows the advantages conferred by an attorney:

> I am going to explain to you what a lawyer is and what a lawyer does.
>
> A lawyer is a person who has studied the laws of Alaska and has passed a test to show that he understands these laws.
>
> If you have a lawyer to represent you, he will talk with you about the facts of this case, in private. Your lawyer is not allowed to tell anyone else about what you tell him about this case unless you want him to do so.
>
> Your lawyer will come to court with you each time you come to court, and he will speak for you in court. He will talk to the lawyer for the state for you.
>
> Your lawyer will examine the charges which have been brought against you to see if they are in proper form. Because your lawyer has been trained in the law, he might see some mistakes in the legal papers which have been filed against you which you might not see. Your lawyer will prepare and file legal papers for you.
>
> Your lawyer will make sure that no improper evidence would be brought against you in court.

> Your lawyer will make sure that all your rights are protected in this court.
>
> Your lawyer can advise you about whether or not you should have a trial.
>
> Your lawyer will show your case to this court in the way most favorable to you. He will question any witnesses who speak out against you. He will present evidence in court for you.
>
> Even if you think you want to admit that the charges against you are true, a lawyer can held you by giving favorable information to this court and making an argument for you at sentencing.
>
> Because your right to a lawyer is so important, if you want a lawyer but cannot pay for one, I will appoint a lawyer for you ; that is, you can have a lawyer that you won't have to pay for.

Id. at 878 n.5.

The A.B.A. Standards for Criminal Justice are also instructive regarding the rationale for insisting on a knowing waiver of this important right. The commentary states: "Except in the most unusual circumstances, a trial in which one side is unrepresented by counsel is a farcical effort to ascertain guilt." A.B.A. Standard for Criminal Justice, § 6-3.6, commentary at 6.39 (2d ed. 1982 supp.)

In Amici's experience, access to counsel is no less important in civil matters where fundamental interests are at risk, and every element of the description set forth above is directly transferable to such civil cases. Litigants in these high-stakes civil cases face similarly great challenges when they are without "the guiding hand of counsel." The obstacles include not only difficulties fathoming law and procedure, but also advocating for oneself in the midst of what is often intense emotional turmoil. The problems start at

the inception of a dispute. Pro se litigants may turn to court personnel for help, only to be frustrated:

> [P]ro se litigants often ask statute of limitations questions, questions about the proper person to serve..., or about the manner of enforcing a judgment...These are basic questions the public expects court staff to answer. Answering them does not necessarily involve unauthorized practice of law...But court staff generally will not answer a limitations question, much less direct the litigant to the appropriate part of a state code.

Jona Goldschmidt, *The Pro Se Litigants Struggle for Access to Justice*, 40 FAM. CT. REV. 36, 47 (2002).

In the domestic violence context, the lack of a lawyer can have dangerous consequences. A law professor in Baltimore compared success in obtaining protective orders between represented and unrepresented women. Those with lawyers were much more likely to succeed, with 83% getting an order of protection, whereas fewer than 32% of pro se women received a protective order. Jane C. Murphy, *Engaging the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511-12 (2003). Another study found that legal representation was the preeminent factor (as compared to shelters, hotlines, and counseling) associated with a decrease in domestic violence against women. Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence,* 21 CONTEMP. ECON. POL'Y 158, 169 (2003).

Defaults and dismissals plague self-represented litigants disproportionately. For family law cases in Delaware, when both parties were represented, only 16%

were dismissed. However, with only one party represented, the number climbed to 30%, close to doubling. Paula Hannaford Agar & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 171 (2003). Similarly, in New York City, a study quantified the default discrepancy between represented and unrepresented tenants in housing court. The randomized sample showed that, with an attorney, the rate of default for tenants was six percent, compared to 28% for those unrepresented. Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 427 (2001).

The statistics for final judgments in this study are especially notable. Final judgments were entered more than twice as often against unrepresented as against represented tenants, in 50.6% versus 21.5% of the cases. "The results demonstrate that the provision of legal counsel produces large differences in outcomes, independent of the merits of the case." Yet researchers noted that "almost all landlords in Housing Court have the benefit of legal representation," while "the vast majority of tenants do not." Seron et al., *supra* at 420.

Studies in the child custody domain show a similarly profound effect from the presence of counsel. Of particular relevance to the question before this Court in this case, the problem of differential results is especially severe when one party is represented and the other is not. When only the father had a lawyer, a mother's chance of gaining physical custody of her child dropped by about half. Robert Mnookin et al., *Private Ordering*

Revisted: What Custodial Arrangements are Parents Negotiating?, *in* DIVORCE REFORM AT THE CROSSROADS 37, 64 (Steven D. Sugarman and Herman Hill Kay, eds., 1990.). A study of 300 divorce cases in Washington found that "[p]lans written in cases with two attorneys...[had] significantly more 'shared parenting' in all its forms: mediation for dispute resolution, 'shared' decision making, and larger amounts of shared residential time." Jane Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 132, 170 (1990).

During contested proceedings, parties with lawyers use procedural mechanisms that are key to success in civil litigation much more than unrepresented parties do. *See* Anthony J. Fusco, Jr. et al., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93, 115 (1979); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L & POL'Y REV. 385, 411-12 (1995); *see also* Russell Engler & Craig S. Bloomgarden, Summary Process Actions in the Boston Housing Court: An Empirical Study and Recommendations for Reform 7 (May 20, 1983) (unpublished manuscript) (on file with the Public Justice Center). Those with lawyers are more likely than those without to file motions (73% compared to 8%), request discovery (62% compared to 0%), and receive continuances (35% compared to 3%). Fusco, Jr. et al., *supra* at 115 (continuances); Gunn, *supra* at 412, Tab. 16 (motions); Engler & Bloomgarden, *supra* at 17, Tab. 10 (discovery).

Perhaps obviously, lawyers' knowledge of and ability to raise substantive claims and defenses has also been found substantially to improve outcomes for their clients. *See*

Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 9, 35, 44-45 (1973). First, represented litigants far more frequently raise such issues. *Id.* at 44, Fig. 17 (83% of represented litigants raised available defenses compared to 30% of unrepresented); Engler & Bloomgarden, *supra* at 19, Tab. 11 (80% versus 2%). Second, raising substantive claims and defenses, as would be expected, greatly increases represented litigants' chances of achieving outcomes that reflect the underlying merits of their cases. Gunn, *supra* at 413-14, Tab. 18.

If the pro se litigant survives the pre-trial gauntlet by meeting all discovery and pleading deadlines and appropriately presenting arguments that can withstand motions to dismiss or for summary judgment, and does not achieve settlement, trial awaits. While serving on the bench, Amici frequently faced parties flummoxed by the rules of evidence. Lacking understanding, pro se parties would often try to introduce inadmissible material, and be disappointed or even angry when the judge ruled pursuant to objection that the witnesses or documents could not come in. The problem is a common one. "It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence," says one commentator. Goldschmidt, *supra* at 52. To cite just one such frequently encountered obstacle, Alaska's rule against hearsay defines hearsay, carves out three enumerated exclusions and goes on to list more than a score of exceptions to the exclusionary rule, divided into two categories. Alaska Evidence Rules 803, 804. Because the rule is beyond the ken of most pro se litigants, Amici Judges note that parties routinely bring in letters with out-of-court statements and are perplexed when these

testimonials are excluded, sometimes ending the case. These same parties will not have known of the need to bring these hearsay declarants to testify in person and will have had no idea how to secure their presence.

However, the adversarial system's complexities are not without justification; such rules are the basic template for trials. "Procedural and evidentiary rules developed over time to prohibit misleading and untrustworthy evidence." Drew Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*," 54 AM. U.L. REV. 1537, 1590 (2005). Alaska has confronted the implications of pro se representation, and recognized the hazards:

> [E]veryone desires a legal system that reaches the correct result most of the time, and where the result is not dependent on money. Pro se litigants, however, are severely disadvantaged by their inability to afford counsel because they are unable to assert their rights effectively due to their lack of knowledge about pertinent defenses and rights. One judge noted that this could have tragic results not just for the particular individuals involved, but also for all of us.

Alaska Legal Services Subcommittee, Equal Access to Civil Justice Task Force, Report and Recommendations 12 (May 2000), *available at* http://www.state.ak.us/courts/civjust.pdf [hereinafter Access to Justice Report]. In complex cases, poor litigants should not be forced to bear the burden of this tension without representation.

Amici's experience demonstrates that child custody matters present particular roadblocks to the pro se litigant, because they may involve especially difficult litigation, including the use of expert testimony and reports to assess psychological and financial matters. Handling evidence and trial strategy presents profound challenges. And if a

parent has failed to request preliminary orders that might change custody arrangements, by the time that parent gets into court, facts on the ground may weigh dispositively against the party's claim. As this Court wrote in *Flores*:

> We have noted on previous occasions that 'child custody determinations are among the most difficult in the law.' Although the legal issues in a given case may not be complex, the crucial determination of what will be best for the child can be an exceedingly difficult one as it requires a delicate process of balancing many complex and competing considerations that are unique to every 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 emotional nature of child custody disputes, and the fact that all of the principals are likely to be distraught.

598 P.2d at 896 (quoting *Horton v. Horton*, 519 P.2d 1131, 1132 (Alaska 1974)).

Even systems established to assist pro se litigants recognize their own limitations and urge reliance on attorneys in serious legal matters. For example, the Family Law Self Help Center in Anchorage recognizes the perils of proceeding without an attorney and cautions against it. On its web site's home page, the following warning appears: "There is no attorney-client relationship between you and the staff. The Center does not take the place of an attorney, and cannot advise you on strategy or tell you what to say in court. You are strongly encouraged to seek the services of a private attorney for legal advice and strategy." Alaska Court System, Self-Help Center: Family Law, http://www.state.ak.us/courts/selfhelp.htm (last visited November 10, 2008). In cases where there have been allegations of domestic violence, the warning is even stronger, and points out another issue plaguing pro se litigants, that of the ever-changing nature of the law.

> The custody and visitation law has changed in family cases with any domestic violence between the parents. Under the new law, the parent who committed the domestic violence may not get custody or visitation. However, the parent may get some custody or visitation if he or she meets specific legal requirements.
>
> If there is any history of domestic violence in your relationship, you should talk with a lawyer about how this law will impact your case.

Id.

Reduced to its most basic, the impact of a lawyer is an impact on winning. Those with counsel win more. Rebecca Sandefur, a Stanford University scholar, has quantified the impact of having a lawyer in a meta-analysis of other studies. She wrote that a litigant with a lawyer is five times more likely to succeed than someone who is self-represented. Rebecca Sandefur, Element of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes 3 (March 26, 2008) (unpublished manuscript) (on file with the Public Justice Center). Lawyers matter in two main ways: "by increasing the accuracy of legal decision-making and by conferring advantage on represented parties." *Id.* at 4. She also noted that the case need not be particularly complex for the effect of having representation to be substantial. Where the litigant is among the most vulnerable in society (what she characterized as "of lower status"), the presence of a lawyer even more favorably affects the outcome than in more complex matters with less vulnerable litigants. *Id.*

As the American Bar Association has stated:

> Underlying all the constitutional theories are several undeniable truths. The American system of justice is inherently and perhaps inevitably adversarial and complex. It assigns to the parties the primary and costly responsibilities of finding the controlling legal principles and uncovering the relevant facts,

> following complex rules of evidence and procedure and presenting the case in a cogent fashion to the judge or jury. Discharging these responsibilities ordinarily requires the expertise lawyers spend three years of graduate education and more years of training and practice acquiring. With rare exceptions, non-lawyers lack the knowledge, specialized expertise and skills to perform these tasks and are destined to have limited success no matter how valid their position may be, especially if opposed by a lawyer. Not surprisingly, studies consistently show that legal representation makes a major difference in whether a party wins in cases decided in the courts.

A.B.A. Presidential Task Force on Access to Civil Justice, Report with Recommendation on Civil Right to Counsel 9-10 (August 7, 2006), *available at* http://www.abanet.org/legalservices/sclaid (follow "Civil Right to Counsel Resolution" hyperlink) [hereinafter "ABA Task Force Report"].

2. Parties Have More Confidence in the Judicial System When They Have Had the Assistance of a Lawyer.

Regardless of the type of case, lawyers make their clients' journeys through litigation less traumatic, easier to understand, and fairer, both apparently and actually. In a survey conducted in Washington, having representation not only increased satisfaction with the outcomes of legal problems, but also greatly increased respect for the justice system overall. Among low-income people who sought and got an attorney's help, 27% were "very positive" and 27% were "somewhat positive" in their attitudes toward the justice system. The corresponding figures for those who had tried but failed to get a lawyer were 3% and 18%, respectively. *See* Task Force on Civil Equal Justice Funding, Washington State Supreme Court, The Washington State Civil Legal Needs Study 56 (2003) *available at* http://www.courts.wa.gov (follow "News & Info" hyperlink; then follow "Washington State Civil Legal Needs Study" hyperlink).

Having to go without a lawyer can make going on seem altogether futile. One scholar did in-depth interviews with fifty-one applicants for civil legal assistance, asking them about their legal matters, their previous experiences with the justice system, their feelings toward government, and their thoughts about the need for legal representation. In general, respondents characterized "legal jargon, uninterested judges and court staff, complex paperwork, and the skilled representation of opponents as barriers to justice that mandate the retention of counsel." Rosalie Young, *The Search for Counsel: Perceptions of Applicants for Subsidized Legal Assistance*, 36 BRANDEIS J. FAM. L 551, 560 (1997). She quoted a woman who explained her sense of being adrift without a lawyer in family and county court:

> I get in there (court), when I don't know what the laws are and I don't know what my rights are and stuff. I just don't know. And there's nobody there to help you by saying, 'Susan, this is what you need to do. This is the approach we're taking. This is the evidence we've compiled, whatever the case may be, and I'm going to help you through this.' That's what my idea of an attorney is: someone who knows more about the law than you do and is there to help you talk your way through it. If you can't get subsidized help and you can't afford an attorney, what good is the system going to do you?

Id. at 562.

In Amici's experience, the child custody realm has distinct challenges that can exacerbate the feeling of isolation, because of the highly charged emotional context in which cases are brought and the great import of the outcome, making the role of a lawyer all the more important to trust in the process. Furthermore, unrepresented parties often fail to understand and accept the statutory factors judges must apply in making determinations, and what they must discount as irrelevant. The skills of a lawyer can be

especially necessary to a litigant's ultimate satisfaction with the course and outcome of a custody case, win or lose. Lawyers are also a buffer between parties at emotional war who are in court precisely because they have not been able to get along with each other. Lawyers can moderate the expressions of hostility that Amici have witnessed when unrepresented litigants are forced to negotiate with their former spouses or partners over custody and other crucial matters.

Far beyond satisfaction with the conduct of a judicial proceeding, it is of critical significance to parties, and to their children, that the travails of a custody proceeding be minimized. The state itself, interested in the well-being of its families and children, also gains. Inappropriately or unnecessarily broken bonds between parents and their children can lead to prolonged unhappiness and maladjustment, harming individuals and society as a whole. *See* Robert E. Emery et al, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System,* 6 PSYCHOL. SCI. PUB. INT. 1, 14 (American Psychological Society 2005); *see also* Judith Wallerstein and Julia Lewis, *The Unexpected Legacy of Divorce: Report of a 25-Year Study*, 21 PSYCHOANALYTIC PSYCH. 353, 359 (Sum. 2004). Custody decisions have far-reaching effects on such measures of well-being as school achievement, early pregnancy, and incidence of unemployment. Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 91 (2002). A recently conducted study of over 1600 children between the ages of four and six showed that those who had been separated from a parent for a month or more did significantly less well on learning tasks than their peers who had not suffered such separation. Salyn

Boyles, *Parental Absence Stifles Kids' Learning: Children Separated from a Parent Face a Higher Risk of Early Learning Issues and Struggles at School*, WebMd Health News, May 16, 2008, http://children.webmd.com/news/20080516/parental-absence-stifles-kids-learning.

3. Judges Face an Inexorable Dilemma in Cases With Pro Se Litigants.

Judges are forced to walk a fine line when presiding over a case in which an unrepresented party is pitted against a lawyer. Amici are well acquainted with the conflict: on one hand, the judge must strive to achieve justice; on the other, the judge must remain impartial. Even if fairness is maintained, the appearance of fairness and neutrality may fall. Judges polled in Alaska explained the conflict: "...a judge frequently must assume either the role of mediator, or at other times attorney, for each of the unrepresented individuals, thereby putting the judge in an inappropriate position." Access to Justice Report, *supra* at 11. As one scholar wrote in a critique of the hurdles facing pro se parties:

> [Judges] do not know how to reconcile their constitutional duty to provide a meaningful hearing ([or] access to justice) with their ethical duty to remain impartial. Currently, they tip the balance of these obligations in favor of their ethical duty to remain impartial – both in fact and in appearance – and they do so within our traditional adversarial system, in which the judge's role is the passive umpire of the fight between what the justice system (and adversary theory) assumes are two represented parties. The result is not unexpected: The represented party usually wins.

Goldschmidt, *supra* at 37.

Some authorities suggest that judges should come to grips with their dilemma by embracing a pragmatically activist role. *See* Russell Engler, *Ethics in Transition:*

Unrepresented Litigant and the Changing Judicial Role, 22 ND J. L. ETHICS & PUB POL'Y 367; Goldschmidt, *supra* at 51. That solution has been criticized. "Ultimately, either our justice system will have rules that apply to all, or no rules at all. Any belief that there could be one set of rules for one group of people, and another set of rules for another group, and both systems would be equally fair and just – is doomed to failure." Swank, *supra* at 1591-2.

Amici are not prepared to recommend a shift to an inquisitorial judicial system, and the wisdom, or lack thereof, of such a far-reaching policy prescription is simply not before the Court. Given the parameters of our existing adversarial system, the problem presented by pro se litigants is well-recognized, *see* ABA Task Force Report at 10, and neither the Canons of Judicial Ethics nor case law offers particularly helpful guideposts to the inherent conflict judges regularly confront. As one commentator points out:

> The text of the Canons and Commentary provides little direct guidance as to how active or passive a judge should be in handling cases involving unrepresented litigants. In the words of one set of authors trying to provide guidance as to appropriate judicial techniques: 'In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court.'

Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role,* 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 370 (2008), quoting Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J. 16, 19 (2003).

Recent Alaska authority on a judge's obligations vis à vis pro se litigants underscores the difficulty of drawing such lines. On the one hand, the pleadings of pro se litigants are entitled to a liberal interpretation and if a pro se party submits a defective response to a motion, the court must instruct the party on how to remedy the deficiency. *Breck v. Ulmer*, 745 P. 2d 66 (Alaska 1987). On the other hand, if no response is filed at all, then the court is under no obligation to alert the self-represented party to the impending consequences of the failure to respond. *Capolicchio v. Levy*, 194 P.3d 373, 379 (Alaska 2008). In *Capolicchio*, the Court quotes from *Bauman v. State Div. of Family & Youth Servs.*, 768 P. 2d 1097, 1097-98 (Alaska 1989), that to "require a judge to instruct a pro se litigant as to each step in litigating a claim would compromise the court's impartiality in deciding the case by forcing the judge to act as an advocate for one side." *Id.*

Unrepresented litigants and judges are not the only ones who are burdened by the judge's dilemma. During their years on the bench, Amici sometimes felt compelled to make evidentiary rulings sua sponte, or otherwise make sure that rules were honored despite the ignorance of the pro se party. Amici are well aware that their actions were perceived as unfair by the opponent and counsel in such circumstances. Appointed counsel resolves these problems for all involved.

4. Pro Se Litigants Absorb Excess Judicial Time and Impair the Efficiency of Court Proceedings and Case Management.

With court time at a premium, any inordinate attention that must be paid to pro se cases has a ripple effect. Judges may be forced to postpone attention to other complex

civil cases, for example. Access to Justice Report, *supra* at 11. In cases involving pro se litigants, Amici have at times taken pains to explain how a trial works, offering details about deadlines, trial schedules, rules, burdens of proof, and motions practice. But even with such efforts to help clarify requirements, unnecessarily protracted litigation may result. Further, "...attorneys representing a client against a pro se litigant find themselves returning over and over to court due to the pro se litigant's lack of understanding of the legal process...[T]he community as a whole is impacted by the backlog created by the spillover from pro se cases, particularly in the area of domestic relations." *Id.*

In addition, because pre-trial settlements are impeded by the absence of counsel, and post-judgment enforcement of orders is more difficult for pro se parties, courts have a further interest in seeing parties represented by counsel. This interest goes beyond achieving a positive result for parties, and involves lessening judicial burden. In New York City's Housing Court, the presence of an attorney increased the likelihood of a settlement and decreased post-judgment motions, therefore dramatically enhancing efficiency of the courts. Parties with attorneys settled more than 31% of the time, whereas the unrepresented settled in less than 2% of their cases. Post-judgment motions were made by 13% of represented parties, but by 29% of unrepresented parties. Carroll Seron, et al., *supra* at 427. Another study showed a rate of settlement below 7% when both sides were unrepresented, but when an attorney appeared for either party, the settlement rate jumped to 26% if the defendant was represented, and 38% if the plaintiff had a lawyer. Hannaford-Agar & Mott, *supra* at 171. Obtaining compliance with orders is more difficult for pro se litigants, thus creating otherwise unnecessary post-judgment

motions. *See* Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. REV. 8, 13 (2003).

5. Public Confidence in the Integrity of the Judicial System is Compromised by the Absence of Counsel.

In Amici's experience, the combination of widespread financial inability to afford representation, as detailed in other amicus briefs in this matter, and the resulting disadvantages in court described herein, foster an unfortunate perception that money drives the American system of justice. In a custody battle, this means that the better-off or better-connected parent gains a substantial advantage. Observers of this phenomenon far beyond the litigants themselves lose faith in our courts. In an adversarial system with "rules of the game" difficult to navigate for any but the initiated (meaning lawyers), an unequal contest can be viewed as an assault on justice that threatens the social contract. When fundamental rights are at stake, such stacked odds offend universal notions of dignity and fairness. *See* David Luban, *Lawyers and Justice: An Ethical Study* 251 (1988).

Federal District Court Judge Robert Sweet has reflected on lawyers' crucial role in preserving the legitimacy of court proceedings. "What then needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society under a rule of law? . . . To shorthand it, we need a civil *Gideon,* that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system." Robert Sweet, *Civil*

"Gideon" and Justice in the Trial Court (The Rabbi's Beard), 42 THE RECORD 915, 924 (Dec. 1997).

The Alaska Bar Association's resolution urging civil representation at public expense specifically mentions perceptions of justice. The Bar Association notes the "urgent justice gap" for the economically disadvantaged, and also refers to the particularly high numbers turned away from help in family law cases. Finally, "[t]he Alaska Bar Association recognizes that the overwhelming unmet needs of low income persons and the lack of resources to meet those needs ultimately leads to a loss of confidence by the public in the legal system which the Alaska Bar Association's members are bound to uphold..." Alaska Bar Resolution, *supra* at 2.

C. The Court has the Authority and Responsibility to Determine Whether the Proper Administration of Justice Requires Appointment of Counsel in Certain Cases.

The Alaska Court System claims that, although providing an attorney in a case such as this might be good policy, it is within the province of the legislature to determine whether public funds should be expended to serve this public purpose. Brief of Appellee Alaska Court System at 3. However, the legislature's authority to appropriate public funds cannot hamstring the Court from assuring that litigants receive a fair trial, or have access to the assistance of counsel, if, as urged, constitutional rights are at stake. Rather, the Court must be able to act to safeguard these deeper principles. *See Dept. of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *State Dept. of Military and Veterans Affairs v. Bowen*, 953 P.2d 888 (Alaska1988); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 2d 60 (1803).

In *Planned Parenthood of Alaska, Inc.*, this Court acknowledged the judiciary's power and duty "to ensure compliance with the provisions of the Alaska Constitution," 28 P.3d at 914, and therefore held unconstitutional on equal protection grounds funding restrictions imposed by the legislature. The Court rejected the state's separation of powers argument that the trial court had effected an appropriation of funds, explaining:

> The separation of powers doctrine and its complementary doctrine of checks and balances are implicit in the Alaska Constitution. In light of the separation of powers doctrine, we have declined to intervene in political questions, which are uniquely within the province of the legislature. But under the same doctrine, we 'cannot defer to the legislature when infringement of a constitutional right results from legislative action;' legislative intent is not paramount when that intent conflicts with the constitution.

Id. at 913-14 (quoting *Valley Hospital Ass'n. v. Mat Su Coalition for Choice*, 948 P.2d 963, 972 (Alaska 1997)). The Court went on to recount numerous instances where a court decision preserving a constitutional right had resulted in a significant fiscal impact.

> Legislative exercise of the appropriations power has not in the past, and may not now, bar courts from upholding citizens' constitutional rights. Indeed, constitutional legal rulings commonly affect state programs and funding. Many of the most heralded constitutional decisions of the past century have, as a practical matter, effectively required state expenditures. In *Green v. County School Board,* the United States Supreme Court ordered effective desegregation of public schools; in *Gideon v. Wainwright,* it required funding of counsel for indigent criminal defendants; and in *Shapiro v. Thompson,* it required states to give newcomers to the jurisdiction equal welfare benefits. In each of these cases, a judicial decision upholding constitutional rights required state expenditures to support those rights. ...Like the Supreme Court decisions listed above, today's holding is squarely within the authority of the court, not in spite of, but *because* of, the judiciary's role within our divided system of government.

Planned Parenthood of Alaska, Inc.,28 P.3d at 914-15 (citations omitted).

It may be true that the legislature could, on public policy grounds, mandate appointment of counsel is an array of civil matters. That authority does not alter the separate and distinct authority of this Court to determine the constitutional dimension of the matter. Where a fundamental liberty interest is involved, and a fatally flawed contest between a represented and an unrepresented parent is taking place, the Court must have the authority to speak.

Further, Alaska's judiciary has the power, pursuant to Article IV, section 1 of the Alaska Constitution, to promulgate interpretive rules concerning "constitutional, statutory, or common law requirements." *Lawson v. Lawson*, 108 P.3d 883, 888 (Alaska 2005). In *Lawson*, the Court upheld its rule which sets standards for determining child support awards, rejecting claims that the separation of powers had been violated. In doing so, the Court reaffirmed *Coghill v. Coghill*, 836 P.2d 921 (Alaska 1992). The *Coghill* court squarely considered whether the promulgation of Alaska Civil Rule 90.3 unconstitutionally intruded upon the legislature's prerogative. The Court explained the appropriateness of its action: "Article IV, section 1...vests the judicial power in a supreme court, a superior court, and other courts established by the legislature. 'The court's rulemaking authority under this section is inherent in the judicial power vested in it, as the supreme court of the state.' (citing Alaska Const., art. IV, § 1)." 836 P.2d at 927 (quoting *Citizens Coalition v. McAlpine*, 810 P.2d 162 (Alaska 1991)). The Court also relied upon its particular power "to regulate with greater substantive effect inside the limited ambit of the judicial system, than we could under our article IV, section 15 powers." *Id.* (quoting *McAlpine*, 810 P.2d at 167).

In *Wood v. Superior Court*, 690 P.2d 1225 (Alaska 1984), the Court upheld Alaska Administrative Rule 12, which allows for appointment of attorneys in criminal cases. "Lawyers have traditionally been responsible for representing indigent clients, and courts have traditionally supervised the terms and conditions of this representation. Wood offers no authority for the proposition that this practice unconstitutionally encroaches on the executive or legislative domain and we can perceive none," the Court wrote. *Id.* at 1228. The Court also observed that the existence of the Office of Public Advocacy did not limit its own authority to appoint counsel, and the allocation of funds could be determined separately.*

Applying these holdings to the case at hand, Amici urge this court to use its authority to enforce the due process and equal protection rights of litigants such as Ms. Jonsson. Without a bright line rule that would require provision of counsel to indigent parents pitted against represented parties in a custody case, many such litigants would have no effective means of vindicating their rights. By recognizing that they are entitled to attorneys provided at public expense in such cases, the Court gives meaning to their right to access the courts.

V. Conclusion

This case is the natural outgrowth of what this Court has already recognized in *Flores v. Flores*. Failing to extend that ruling to the case at bar would leave an

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* Amici Retired Judges do not intend to express a view herein on whether counsel should be provided by the Office of Public Advocacy or the Alaska Court System. They simply point out that the Court has authority, both to decide constitutional issues, as it did in *Flores v. Flores* and is called upon to do here, and to promulgate rules effectuating such rights, as it did with Alaska Administrative Rule 12.

inequitable, unfair and unconstitutional disparity among indigent parents in contested custody litigation. Under *Matthews v. Eldridge*, the importance of the interests at stake, the inherent complexity and fraught nature of contested custody cases, the substantial threat to correct determinations, and the administrative burden on the courts, all point to the same conclusion: counsel must be provided at public expense to an indigent parent facing a represented party in a contested custody case.

Respectfully submitted,

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Prepared in Times New Roman Font, Size 13

Date: November 19, 2008

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