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## **Civil Right to Counsel: *In re Marriage of King* and the Continuing Journey**

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Deborah Perluss<sup>1</sup>

### I. INTRODUCTION

In December 2007, the Washington Supreme Court decided the case of *In re Marriage of King*.<sup>2</sup> The case held that the state does not need to provide an indigent parent with counsel at public expense in judicial proceedings that threaten her parent-child relationship—more specifically, an attorney need not represent a mother before a court can remove her as the primary caregiver of her three children. The Washington Supreme Court arrived at this conclusion, even though the mother faced a grossly uneven playing field due to her limited education, her incapacity to present an effective case, and the father having the benefit of counsel. How and why the court arrived at this conclusion is worth some examination, both to gain insight into the contextual aspects of judicial decision-making and to inform strategies for enforcing constitutional rights in general and, in particular, the right to counsel in noncriminal cases.

This article examines the *King* decision in light of the substantiated need for indigent representation, the right to counsel jurisprudence in noncriminal cases in Washington, and with reference to the national movement in support of defined rights to counsel in certain compelling civil cases. The article also discusses recent research of the effects on individuals and courts when litigants are unrepresented, and it identifies circumstances in which judicially-established rights to counsel may still be achieved in Washington following *King*. Finally, this article examines the *King* decision in order to arrive at some understanding of how a supreme court, which is viewed as a leader in the cause of equal justice, could fail to be persuaded

by the contextual injustice that occurred in this case—one that is not an isolated occurrence in Washington courts.

First, I will briefly define the problem that is discussed in this article by referring to the overwhelming need for legal aid in Washington and some recent efforts in response to the problem. Then, I will briefly discuss the history and status of when Washington requires the provision of counsel for individuals in noncriminal cases. This is followed by a description of what happens to unrepresented individuals in courts to demonstrate that the issues being discussed have real day-to-day impacts for both litigants and the courts. This, hopefully, sets the stage for a discussion of the issues and the decision in *King*, followed by a discussion of recent research on whether, as a practical matter, lawyer representation has an impact on the outcome of a noncriminal case. Finally, I will discuss post-*King* developments and continuing efforts in Washington and nationally to advance access to justice for all persons through advocacy that promotes the right to counsel in cases that impact basic human needs and significantly affect the daily lives of individuals.

While this article necessarily discusses these issues with citation to cases, data, and other resources; the subjective arguments and speculative assertions are derived from insights, perceptions, and impressions gained from a thirty-year career as a civil legal aid attorney in Washington. Over the course of my career, I have witnessed or known of innumerable unrepresented individuals who have experienced unfair results in courts solely because a lawyer was not present to help tell their story coherently, bring out the relevant facts of their case, make a persuasive presentation, and/or inform the judge of applicable law.<sup>3</sup>

## II. DEFINING THE PROBLEM AND COMPELLING A RESPONSE

The need for help with noncriminal legal problems in Washington is high and mirrors the need nationally.<sup>4</sup> Certainly, legal aid programs cannot represent all low-income persons needing a lawyer in civil litigation.<sup>5</sup>

Indeed, every year thousands of individuals appear in Washington courts without a lawyer.<sup>6</sup> The consequences for low-income persons (who are forced to confront legal problems that are legislatively consigned to the courts for resolution) are even more pronounced because their legal issues often involve basic human needs such as housing, sustenance, and protection from family violence.<sup>7</sup> In many cases, one party is represented by a lawyer, while the other is not.<sup>8</sup> In a high percentage of these cases, the unrepresented party loses on meritorious causes or forfeits rights that are before the court.<sup>9</sup> In addition, unrepresented litigants often fail to exercise procedural rights that would benefit their cause or give them a strategic advantage, if they only knew about the procedural right or how to raise it.<sup>10</sup> As a result, a significant number of decisions are rendered each year by judges without full knowledge of the facts or consideration of the law that applies to a particular case.<sup>11</sup> The resulting outcomes are sometimes merely erroneous, but often they are life-changing and, occasionally, even tragic.

In response to this problem, the American Bar Association (ABA) spearheaded a national movement<sup>12</sup> to consider whether, in certain noncriminal cases, the issues for litigants are so fundamental or critical to their lives and well-being that governments ought to be providing those litigants with lawyers as a matter of right when faced with adversarial judicial proceedings. In 2006, the ABA's policy-making House of Delegates unanimously approved Report and Recommendation No. 112A, adopting the Report as official ABA policy for the right to counsel in non-criminal proceedings.<sup>13</sup> The policy statement urges "federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction."<sup>14</sup> Following the adoption of this brief policy statement, an ABA Presidential Task Force developed a statement of principles expanding on the concepts.<sup>15</sup> The principles are accompanied by a proposed Model Act to

assist jurisdictions with implementing the civil right to counsel with a workable structure.<sup>16</sup> Both of these initiatives were adopted as official ABA policy at the August 2010 meeting of the House of Delegates.<sup>17</sup>

### III. CIVIL RIGHT TO COUNSEL IN WASHINGTON

In Washington State, the equal justice community has long focused on efforts to expand the right to counsel in civil proceedings. Early cases established a right to counsel for parents in a few specific circumstances, such as juvenile court proceedings where the state sought to impair or terminate parental rights,<sup>18</sup> when a private civil contempt proceeding could result in the imprisonment of a party,<sup>19</sup> and when the competency of a lawyer is at issue in disciplinary proceedings that could impair their ability to practice law.<sup>20</sup> More recently, courts have held that counsel must be provided to a child in truancy hearings<sup>21</sup> and to protect parental rights in a nonparental custody proceeding that flows from a permanency plan process for a child who is a dependent ward of the juvenile court.<sup>22</sup>

Washington also affords a civil right to counsel by statute in limited circumstances.<sup>23</sup> Washington provides a discretionary right to counsel for petitioners who seek a sexual assault protection order if the respondent appears with counsel,<sup>24</sup> as well as for a child over the age of twelve in a dependency proceeding.<sup>25</sup> In 2007, the Washington Supreme Court also adopted a general court rule, GR 33, which affords the opportunity for indigent persons with disabilities to seek appointment of counsel when needed, as a reasonable accommodation to ensure meaningful access to the justice system.<sup>26</sup>

Despite the expansion of the above-established rights to counsel in civil proceedings, Washington courts have still not extended rights to counsel when judicial proceedings have threatened a party's basic needs. These include proceedings to evict one from rental housing,<sup>27</sup> to obtain economic governmental benefits,<sup>28</sup> and most recently, to protect parental rights in a private custody/parenting plan proceeding as between two parents.<sup>29</sup>

As discussed below, there are cases currently pending in the Washington courts that will address the right to counsel in other civil contexts post-*King*. In addition to *Bellevue School Dist. v. E.S.*<sup>30</sup>—which involves the right to counsel for children in truancy fact-finding proceedings—another case, *In re A.R./D.R.*, will address a child’s right to counsel in a parental rights termination proceeding in juvenile court.<sup>31</sup> In both of these cases, the trial courts had not provided counsel to children, resulting in their loss of rights to education and familial relations.

In all of these cases, as in *King*, the unrepresented parties faced a significant imbalance of power in the judicial process, with either the superior power of the state, school district, or an otherwise represented opposing party proceeding against them. The imbalance of power is not and cannot be cured by judges who struggle in such cases to accommodate the unskilled litigants and are often frustrated by their inability to proceed according to the formal rules and expectations of the adversarial process.<sup>32</sup>

Regardless of this frustration, how could a supreme court, which is viewed as a national leader in the cause of equal justice, fail to be persuaded by the contextual injustice that occurred in the *King* case—one that is not an isolated occurrence in Washington courts? A careful reading of *King*’s majority decision leaves one to infer that the judiciary is institutionally constrained to grant remedies that challenge the basic assumption that all litigants get justice in court, even though the structure of the judicial system itself is a barrier to justice.

#### IV. JUDICIAL INADEQUACIES FACING UNREPRESENTED LITIGANTS

Following the adoption of the ABA policy resolution in 2006, the Washington Supreme Court was the first state high court to have the opportunity to take up the ABA’s call in the case of *In re Marriage of King*.<sup>33</sup> Brenda King, an indigent mother of three with limited education and few resources, was the unrepresented parent and appellant who asked the court to provide her a lawyer to help her protect her interest in remaining

the primary residential parent of her three young children.<sup>34</sup> Because Brenda King could not get an attorney to represent her in her fight to keep primary residential care of her children, which culminated in a five-day trial, she was forced to advocate on her own behalf.<sup>35</sup> During the trial, Brenda King struggled to present and challenge evidence and to examine witnesses, including herself, her estranged husband, and a hostile guardian ad litem (GAL) for the children. Additionally, she found it difficult to make coherent legal arguments while trying to maintain a level of physical and emotional stamina needed to address the most basic and personal aspects of her life. In contrast, her husband had a lawyer representing him throughout the proceedings.

Needless to say, Brenda King lost her battle, leaving her to lament in the final hours of the case, “I am a good mother, I am a lousy lawyer!”<sup>36</sup> The observation is all the more prescient given the postdecision events in the case. On appeal, the Washington Supreme Court affirmed the trial court’s decision to grant primary residential care of the children to Mr. King. Subsequently, Brenda King returned to court, this time with a lawyer who agreed to take her case on a pro bono basis, and petitioned to modify the parenting plan so as to return primary custody of the children to her.<sup>37</sup> In July 2008, a Final Parenting Plan was entered that returned the children to her primary residential care.<sup>38</sup>

Indeed, when the trial judge denied Brenda King’s request for a new trial and appointment of counsel, he acknowledged that “[Mrs. King] was at a significant disadvantage through her inability to retain counsel to represent her at trial and her inability to secure pro bono representation, despite her requests for such representation, which circumstances mirror the access to justice crisis throughout the State.”<sup>39</sup> The trial judge further observed:

[C]andidly I agree . . . insofar as . . . Mrs. King not being well served because she was pro se. I think the record will bear that out. That she had a very difficult time at trial, that there were objections that she was unfamiliar with, [and that she] did not respond.

Evidence that she apparently had consisting, I think, in some cases, of police reports that didn't see the light of day because there were proper objections based on hearsay. And she didn't know enough about the rules to secure the presence of a witness to testify to what facts she thought might have been relevant. And I think in the materials that you submitted, you've also pointed out from the daycare or the school, rather, some information that did come in to evidence because it appears there was no objection. And some of that information was hearsay and may have been inaccurate, which is why we have hearsay objections, which Mrs. King did not raise at trial or I would have sustained an objection and kept some of that evidence out.<sup>40</sup>

In a passionate and compelling dissent to *King's* majority opinion, Justice (now Chief Justice) Madsen said that she viewed this demonstration of judicial inadequacy as the basis for why counsel should be provided as of right in such cases.<sup>41</sup> As she so eloquently stated, "Ms. King's struggle to represent herself in this case demonstrates the legal hurdles that arise every day in courtrooms across Washington, showing the importance of counsel to a parent in a dissolution proceeding seeking to secure her fundamental right to parent her children."<sup>42</sup>

One need only refer to Justice Madsen's dissenting opinion to get a flavor of the disadvantaged environment in which Brenda King found herself, and as a result, the skewed lens through which the trial judge ultimately viewed the case. The facts are recounted in detail and need not be repeated here.<sup>43</sup> It is sufficient to quote Justice Madsen's indisputable conclusion:

As the facts show, Ms. King lacked even a high school education, much less the education and training necessary to be a lawyer. She was unable to present her case effectively because she could not master the rules of evidence and she was unable to prevent admission of evidence that a lawyer would have been able to keep out. Ms. King was unable to match the skill of opposing counsel. Her emotions adversely affected her performance, and the record makes it clear that by the end of trial she had exhausted the court's

patience. The trial judge frankly acknowledged that Ms. King's self-representation had been inadequate.<sup>44</sup>

Thus, the question to address is: why against the facts and circumstances present in the *King* case, when it was clear that the Brenda King was significantly disadvantaged by the absence of a lawyer (even to the point that the trial judge himself acknowledged the adverse impact on his decision making), did a majority of the Washington Supreme Court not see fit to find any legal basis upon which Brenda King should have been provided counsel as a matter of right? An increasing body of research substantiates that the absence of representation for civil litigants in adversarial proceedings negatively impacts the judge's decision-making, the outcome, and calls into question the basic fairness and integrity of the judicial process.<sup>45</sup> A ruling that indigent persons in civil proceedings have a right to representation by competent counsel could be viewed as implicitly challenging the court system's image as a "just" process. Such a ruling would test the validity of judges as neutral fact-finders and purveyors of justice without regard to the status of the parties coming before them. It would also require some self-reflection and acknowledgement of the potential for bias within the judicial system, which may have been unpalatable for a court recognized as a leader on equal access to justice.

#### V. THE ISSUES ON APPEAL IN *KING*

Importantly, Brenda King pursued her request for appointed counsel even after having lost primary custody in a five-day trial, demonstrating a record replete with examples of her ineffectiveness, yet with no apparent legal error that she could easily point to in the court's decision on the merits. Thus, the only issue presented to the court for consideration on appeal was whether, in the context of a highly adversarial, high-stakes custody dispute in which one parent is represented by counsel and the other is not, does she, the unrepresented parent, have a constitutional right to appointed counsel.<sup>46</sup>

Certainly, Brenda King was well-represented in the appeal by highly competent pro bono counsel, and the cause was supported by respected *amicus curiae*.<sup>47</sup> One can speculate that the potential cost of counsel was the sole concern that influenced the court. However, because the U.S. Supreme Court has frequently ruled that cost alone cannot be a factor in considering what process is due under the Fourteenth Amendment,<sup>48</sup> and the Washington Supreme Court has not shied away from rendering decisions that result in significant additional cost to the state budget,<sup>49</sup> one cannot assume that cost alone was the impetus for the court's decision.

Nevertheless, cost was a focus of the briefs submitted by *amicus curiae* against Brenda King's claim for counsel, which effectively made it an issue for the court.<sup>50</sup> Without directly arguing the cost point, both the *amici* attorney general and the legislature characterized the right sought as "taxpayer-paid counsel in a civil case."<sup>51</sup> The Association of Counties more accurately defined the right sought as not merely access to the courts, but as the right to "*litigate effectively* once in court,"<sup>52</sup> and directly cited the limited budget available to fund competing human needs in support of its argument to deny the right.<sup>53</sup> However, other *amici*, in particular the Retired Washington Judges, focused their brief on the costs to the judicial system and to society at large of failing to provide counsel for unrepresented litigants in adversarial proceedings. Such costs include the time-consuming nature of dealing with unskilled litigants, the inefficiencies involved in multiple exchanges regarding sufficiency of evidence, lack of compliance with evidentiary rules and process, delayed proceedings due to improper paper work, costs to the integrity of the decision making process, and an impaired trust and confidence in the courts.<sup>54</sup> Although the judicial system is greatly affected by such inefficiencies, indigent individuals bear the ultimate costs resulting from wrong or inappropriate decisions flowing from the lack of adequate information.

In contrast to the above characterizations of the issue before the court, Brenda King defined the right she sought as "*meaningful* access to the

court.”<sup>55</sup> Supportive *amici* variously characterized the right at issue as a right to appointment of counsel when:

- a litigant is “facing the loss of basic human needs”<sup>56</sup> (focusing on the relevant need or interest as critical);
- the “absence of representation” for the particular litigant leaves the proceedings “constitutionally deficient”<sup>57</sup> (suggesting that a case-by-case determination should occur with respect to the abilities of the particular litigant and the complexity of the proceeding); or
- the right to a “fair trial” cannot be met otherwise<sup>58</sup> (advocating a broad general right to counsel in civil litigation as a matter of fairness).

Hence, while the issues were joined, the court had a number of options it could have chosen for how to analyze the right and could have found a broad right or, more realistically, limited its scope in any number of ways to the specific facts of the *King* case (such as disputed custody, the primary parent’s lack of representation, and the other parent’s representation) or to the category of disputed child custody cases, as determined on a case-by-case basis.

The court had a recent history of not only understanding the cause of access to the civil justice system but also a commitment to it,<sup>59</sup> and there was hope that the court would be sympathetic. In a recent decision, the Washington Supreme Court justices had commented on the potential need for courts to appoint lawyers for children in private custody disputes.<sup>60</sup> The confluence of circumstances suggested that, if ever there was a time and case to further expand the civil right to counsel beyond the narrow scope of state-initiated deprivation of parental rights (*Myricks*<sup>61</sup>/*Luscier*<sup>62</sup>) and physical incarceration cases (*Tetro*<sup>63</sup>), this was the time, and *King* was the case.

As it turned out, external events occurred that could not have been anticipated when Brenda King filed her appeal in early 2006. The case was

argued in May 2007 and the court issued its decision on December 6, 2007, just before the beginning of the 2008 legislative session. During the earlier 2007 session, the legislature had responded to the justice crisis and the need for increased funding (as championed by the court in their “Justice in Jeopardy” initiative) by approving a significant increase in state funding for civil legal aid over the 2007–2009 biennium.<sup>64</sup> How much this played into the justices’ reasoning is unknown. Even so, the additional state funds that the legislature had made available earlier in the year would not be enough to address the need for representation in disputed custody cases.

Neither would the funding have turned back the clock for Brenda King. The ultimate decision in the case was 7–2 against any expansion of the right to counsel,<sup>65</sup> with only Justices Madsen and Chambers dissenting.<sup>66</sup>

#### VI. THE MAJORITY DECISION IN *KING*

As discussed above, the court had a number of options available to grant Brenda King a new trial with appointed counsel without having to grant a broad right to counsel and otherwise threaten the status quo. Instead, the court chose a direct and calculated path that was more expansive than necessary to deny her the opportunity for a new custody trial with appointed counsel. In doing so, the court seemed to send a deliberate message cautioning against new cases that sought further expansion of a civil right to counsel. Nevertheless, as new cases continue to present this need in other compelling circumstances, close analysis of the *King* decision may help the cause of others who seek to advance the right.

The Washington Supreme Court’s antipathy toward Brenda King and her cause is suggested by the conclusion reached, the language used, and the unnecessarily broad scope of analysis. First, in contrast to the dissent’s focus on the parental rights issues at stake, the majority characterized the case strictly as a “dissolution”—a proceeding that historically carries a negative connotation.<sup>67</sup> Thus, from the outset, the majority framed the question as follows: “This case involves the issue of whether an indigent

parent has a constitutional right, primarily under the Washington State Constitution, to appointment of counsel at public expense in a *dissolution* proceeding.”<sup>68</sup> As such, the frame is less about the constitutionally-protected, parent-child relationship and more about the re-ordering of an estranged relationship, which is entitled to somewhat lesser protection under Washington law.<sup>69</sup> The majority described the impact of the trial court’s ruling in terms that minimized the consequences for Brenda King and her parent-child interests: “At the trial’s conclusion, the superior court entered a parenting plan granting primary residential care of the children to the father-respondent. The plan granted visitation rights to the petitioner-mother.”<sup>70</sup>

Second, in contrast to the dissenting opinion’s exhaustive recitation of the facts, the majority devoted one short paragraph to the facts: the parties were married (without any elaboration), Brenda King was the primary caregiver of the children, the parties separated, and Mr. King sought to become the primary residential parent.<sup>71</sup> This was followed by a minimal statement of what occurred at trial, essentially stating that Mr. King was represented at trial, Brenda King was not, and the court ruled in his favor.<sup>72</sup> Needless to say, the majority did not address the contextual circumstances surrounding Brenda King’s incapacity to present her case or the impact of her lack of representation on the fairness of the process itself.

Instead, the majority rested on the “nature of the interest implicated” as the guide to its constitutional analysis.<sup>73</sup> How it defined the interest would prove to be decisive. If an interest is defined as fundamental under existing law, it is entitled to “constitutional significance” and the full panoply of due process attaches, including appointed counsel at public expense.<sup>74</sup> In this case, even though the parent-child bond between Brenda King and her three minor children was directly at stake and subject to an involuntary interference by the state court, the majority framed the interest at stake and the adversarial process involved as “effectuating a legislative purpose of continued involvement in the children’s lives.”<sup>75</sup> In other words, as

portrayed, the state had done Brenda King a favor in providing her a means and process through which to maintain a relationship with her children, so why was she complaining?<sup>76</sup> Thus, the majority deemed the issue to be “fundamentally different” from the termination or impairment of parental rights that occurs in state-initiated dependency proceedings.<sup>77</sup> Hence, the majority concluded that the “interest at stake” was not of sufficient constitutional magnitude to warrant a right to counsel under existing *Myricks/Luscier* case precedents.<sup>78</sup>

The majority supported its conclusion by asserting that Washington’s parenting plan statutes provide numerous safeguards to protect parents from “erroneous decisions.”<sup>79</sup> In making this observation, the majority made no reference whatsoever to the record of the case, which, as acknowledged by the trial judge, was replete with opportunities for erroneous decision making.<sup>80</sup> Moreover, in most circumstances, these “safeguards” are illusory for indigent, parenting plan litigants who lack the means to pay for the resources authorized. Furthermore, as noted by the dissent and reflected in the *amicus curiae* brief from Northwest Women’s Law Center (now Legal Voice), the statutory “protection” for provision of a GAL contributes to the complexity of the process for unrepresented litigants, who may not understand the importance a GAL.<sup>81</sup> Indeed, in this case, Brenda King had to contend with a hostile GAL who recommended that the trial court place the children with Mr. King.<sup>82</sup> The other statutory “protections” cited by the majority were either not utilized by the trial court or not available to Brenda King, perhaps because she was not aware of them, did not know how to access them, or did not have the funds to pay for them.

The majority could have ended its discussion at the point of finding that due process protections under state and federal constitutional law do not afford a private indigent litigant in a divorce case a right to counsel. However, somewhat mixing the analysis of the constitutional claims related to the parent-child relationship (which the majority said “are not implicated in a dissolution proceeding”<sup>83</sup>) and Brenda King’s claim based on other

state constitutional grounds, the court proceeded to analyze the other bases for the claim, finding the interests “significant enough.”<sup>84</sup>

First, the majority analyzed and struck down Brenda King’s “meaningful access to justice” claim. In addition to the due process protections of the federal and state constitutions, Ms. King argued that appointment of an attorney to represent her in the disputed custody proceeding was necessary to enable her to have meaningful access to justice, a right guaranteed by article I, section 10 of the Washington State Constitution.<sup>85</sup> Even though Washington law has long held that access to courts is a fundamental right and courts have the inherent power to protect this right,<sup>86</sup> the *King* majority would limit courts’ inherent power to overcoming tangible barriers (e.g., physical facilities and court fees). In doing so, however, the court unnecessarily took the opportunity to define the concept of “access to courts” as merely a term of art that holds no “linguistic” meaning apart from literal egress to the courthouse and through the threshold of the courtroom door.<sup>87</sup>

Next, the majority went on to examine Brenda King’s claim for appointed counsel under the Washington State Constitution’s due process and privileges and immunities provisions.<sup>88</sup> In applying the Washington Supreme Court’s six-prong analytical framework set out in *State v. Gunwall*<sup>89</sup> (determining when a state constitutional provision is applied more protectively than the comparable provision in the U.S. Constitution), the *King* court could have justifiably found that the state constitution afforded greater protection than the federal constitution for a civil litigant’s appointment of counsel. The court did determine that, regarding the structure of the state constitution, the primacy of family law as a state interest, and the state history of providing counsel in dependency and parental rights termination cases, the Washington State Constitution’s article I, section 3 is more protective than Fourteenth Amendment due process.<sup>90</sup>

Nevertheless, the court refused to engage in the independent state constitutional analysis. The rationale for not doing so was twofold: (1) no other court has found a due process right to counsel in a custody context and (2) no fundamental rights of Brenda King were at stake.<sup>91</sup> Having already dismissed the idea that parental rights in a private custody dispute are fundamental, and having concluded “access to courts” does not encompass overcoming intangible barriers posed by court structure and process, the majority reiterated that a right to appointed counsel in child custody proceedings did not arise under article I, section 3 of the Washington State Constitution.<sup>92</sup>

It is hard to read much into the court’s apparent concern that it would be an “outlier” among the states by providing counsel to indigent child custody litigants at public expense. In fact, in 1979, the Alaska Supreme Court ruled that when one parent is provided free representation in a custody proceeding and the other parent is indigent and unrepresented, counsel must be appointed at public expense.<sup>93</sup> The Washington Supreme Court itself was an early adopter of a parent’s right to counsel in termination and dependency proceedings.<sup>94</sup> The ABA policy statements on point and the Washington State Bar Association’s amicus brief in *King* hardly suggest that the notion lies in radical legal thinking.

The final basis rejected by the court for providing Brenda King with a right to counsel was the privileges and immunities provision in article I, section 12 of the Washington Constitution.<sup>95</sup> Ms. King had argued that use of the courts to resolve disputes is a privilege afforded by the state,<sup>96</sup> although not equally available to persons without resources to hire an attorney.<sup>97</sup> The majority dispensed with the claim simply by characterizing the case as involving a “purely private matter initiated by the parties,”<sup>98</sup> without discussing the import of disparities in outcomes or the varying quality of justice received as between the represented and the unrepresented.<sup>99</sup>

## VII. DOES A LAWYER MATTER?

Although the majority failed to address the impact of having a lawyer on the quality of justice received, the dissent did not shy away from this issue. In her dissenting opinion, Justice Madsen pointed to empirical studies that demonstrate the differences in outcomes when litigants are represented and when they are not. One study of custody proceedings found that attorney-represented mothers were twice as likely as pro se mothers to be awarded full or joint custody when the opposing fathers were represented by counsel.<sup>100</sup> Another study, which focused on the early days following the adoption of Washington's Parenting Act,<sup>101</sup> found that shared parenting plans in King County were as much as 42 percent more likely to occur where both parties were represented by counsel than in cases where one party appeared pro se.<sup>102</sup>

In addition to the studies cited by Justice Madsen's dissent, more recent studies substantiate the earlier conclusions.<sup>103</sup> For example, Stanford researcher Rebecca Sandefur conducted a meta-analysis of several studies across various disciplines and found that litigants who were represented by lawyers were between 17 percent and 1,380 percent more likely to win, with the largest differences in the outcomes between lawyer-represented and unrepresented cases at every level of litigation.<sup>104</sup> Sandefur reports that unrepresented litigants "are often observed to make elementary errors, such as failing to make an argument, to address the other side's arguments, or to bring to trial important pieces of evidence."<sup>105</sup> As further confirmation of this observation, the ABA recently released a preliminary report on a survey of nearly one thousand judges regarding their experiences with unrepresented litigants. Sixty-two percent of all judges surveyed said the outcomes are worse for litigants when they represent themselves. Those judges cited the most common problem for litigants included, a failure to present necessary evidence, procedural errors, ineffective witness examination, and failure to properly object to evidence.<sup>106</sup>

In theorizing why the presence of a lawyer matters, in addition to the formal knowledge of law and the procedural rules of litigation, Sandefur proposes that the act of lawyering itself helps the client translate their problem into a solution through a process of diagnosis, inference, and treatment.<sup>107</sup> For example, in a child custody dispute, there is a need to separate the emotional response from the legal concepts and to constructively respond using the professional tools available with intellectual detachment. Sandefur calls this “the ability to distance oneself from the human mess of people’s problems and to identify the stakes, risks, and benefits of alternative courses of action.”<sup>108</sup> Certainly, the inability of Brenda King to distance herself from the potential impacts and the risk of loss to her and her children, as well as her inability to conform to procedural and evidentiary rules, both contributed to her inability to effectively advocate for her own interests.

Another theory is more subjective. Sandefur reports that the studies examining outcome disparities in cases between litigants with representation and those without indicate that the mere presence of an attorney representing a client can affect the judge’s perception of the merits of the case and, thus, can predict the outcome.<sup>109</sup> While certainly not conclusive and in no way covering the field of potential research of the issues, these studies, nevertheless, present another possible dilemma for litigants who lack representation. The largest differences in outcomes occur in cases impacting basic needs and fundamental rights, including landlord-tenant cases, asylum cases, and social security disability hearings.<sup>110</sup> Sandefur speculates that the disparity is greatest in these and other types of disputes that particularly involve concerns impacting low-income persons because these litigants frequently experience double or even triple stigmas, such as poverty, disability, limited education, limited English language proficiency, or immigrant status.<sup>111</sup> Thus, lawyer representation in cases involving “lower status parties” may act as an endorsement of the client and the client’s cause, which affects how judges and other court staff treat the

client and evaluate the client's claims. That is, judges and court staff believe that the lawyer-represented cases are more likely to be meritorious and, therefore, view the facts in this light, regardless of how they are presented.<sup>112</sup> Whether this "belief" was also an unconscious factor in the *King* decision must be left to conjecture.<sup>113</sup>

#### VIII. RIGHT TO COUNSEL DEVELOPMENTS POST-*KING*

So where does the *King* decision leave those who seek equal justice for all? What does it mean for those who believe that a core principle of the fundamental right of access to courts is the right to have a lawyer advocate for one's interests when basic human needs or fundamental rights are at stake? Given the breadth of the court's decision in *King* and the short shrift given to a contextual basis for considering appointment of counsel, it is unlikely that the Washington Supreme Court will soon revisit the issue in any case involving a "purely private matter initiated by the parties." However, pursuing the right in other contexts is not foreclosed—particularly those contexts in which matters of public interest are involved, or in which a governmental actor either initiates the action or is inextricably entwined in the proceedings.

As discussed above, two cases are currently pending before the Washington Supreme Court on whether children are entitled to be represented by counsel: first, in truancy proceedings brought by a school district;<sup>114</sup> and second, in proceedings brought by the state to terminate parental rights.<sup>115</sup> These cases may provide the opportunity for the court to carve out children as a special category for protection, given their minority, their lack of voice in processes that impact them directly, and the long-term implication for matters that affect fundamental rights, such as education, physical liberty, and familial relationship. Moreover, in each case, the power of the state is brought to bear on the child or interest at issue. In the truancy petition, the legal action is taken against the child as the named respondent who, after being hailed into court, is interrogated by the judge

presiding over the case without being given any adult assistance. The subsequent court order also operates directly against the child. If the court enters an order compelling the child to attend school and the child fails to comply with the order, the child could be held in contempt of court and incarcerated for up to seven days.<sup>116</sup> Thus, any violation of the order risks deprivation of the child's physical liberty.

Whether the court sees fit to find that a child is entitled to representation in truancy cases may very well depend on whether the presence of a lawyer matters. Representation by a lawyer for a child in truancy proceedings could have a direct and beneficial impact on the outcome for the child. Efforts to determine the reason why the child is not attending school and to provide services to address the concern are both statutory preconditions to a child being found "truant" by the court. Typically in truancy cases, the fact-finding hearing lasts just a few minutes, and more frequently, the hearings are not held at all. This is because the child is often pressured into agreeing to enter a court order finding them truant and compelling the child's school attendance.<sup>117</sup> Anecdotal evidence suggests that in virtually every case in which an unrepresented student is brought before the court, the student is found "truant" and subject to an order to attend school.<sup>118</sup>

The case of *In re Dependency of A.R. and D.R.*<sup>119</sup> asks the court to consider whether children are entitled to counsel in a different context—when their interest in the parent-child relationship is at stake in parental rights termination proceedings. This context varies from the truancy proceeding in several respects. For example, though the action is initiated by the state, it is not brought directly against the child. Rather, the state arguably pursues the action "in the best interests of the child."<sup>120</sup> The child's interests are represented by an independent advocate, a guardian *ad litem* (GAL), who may or may not be an attorney. However, because the GAL is not obligated to take direction from the child at issue, the presence of a GAL does not necessarily give a "voice" to the child in court.<sup>121</sup> Finally, how a lawyer can affect the outcome of the parental rights

termination process may be less clear in the termination context than in the truancy case. In a termination proceeding, the state has the burden of establishing that specific statutory criteria have been met,<sup>122</sup> once it has done so, the court is authorized to terminate the parental rights. There is little flexibility in the criteria, and the desires of the child are not a statutory factor. Moreover, the child often has little knowledge or information to bring to bear on the statutory criteria. Nevertheless, the child's "best interest" or desire can influence how the court interprets the other criteria and, ultimately, the outcome.

Indeed, there are strong reasons related to the child's emotional, psychological, or physical health that could influence the process and result in a conclusion that, even though the statutory facts have been met and the parents are not able to resume care of the child, the parent-child bond should not be severed.<sup>123</sup> In the absence of a lawyer for the child, however, the court relies on the state and the GAL to inform the court of these concerns, and consequently, the child's "voice" may never be heard.<sup>124</sup> Given the fundamental nature of the interest at stake and the precedent of the *Myricks/Luscier* cases, in which Washington first adopted a right to counsel for parents in juvenile court termination and dependency proceedings, there is strong basis for the court to extend the right to children as well.<sup>125</sup>

How the court resolves the question of counsel in each of these cases currently remains to be seen. The court could potentially recognize a right to counsel in both cases, in neither case, or in one case and not the other, and in doing so, may cite any number of differences in the proceedings. These include the differing interests at stake, the varying complexity of the proceedings, the impact of a lawyer on the outcome for the child, the nature of the potential outcome of the case (e.g., change in a child's placement versus potential incarceration), or the representation by a GAL in the termination proceeding versus lack of an advocate at all in the truancy proceeding. The court could also rule in both the termination and truancy

contexts that children should be entitled to representation by skilled counsel, separate and apart from the GAL role, in any adversarial proceeding in which their basic needs or fundamental rights are at stake.<sup>126</sup> This ruling could be based solely on their status as children, as persons in their own right, with their own unique and constitutionally-protected interests, but without the capacity or skill to represent themselves in court.<sup>127</sup>

Recently decided by the Washington State Court of Appeals, Division II, *Dependency of E.H.* raised the question of an indigent parent's right to counsel at public expense in an otherwise private custody proceeding when the state is inextricably entangled in the case and directly interested in the outcome.<sup>128</sup> *Dependency of E.H.* involved a foster parent who sought custody of a child who had been a dependent ward of the juvenile court for five years. Each biological parent, separately and to varying degrees, made significant strides in recent years to address the problems that initially caused the state to intervene to protect the child.<sup>129</sup> Rather than seek to terminate the parent-child relationship and to avoid the continuation of efforts to reunite the child with the parents, the state affirmatively encouraged the child's foster parent to seek custody as the recommended permanent plan for the child's care.<sup>130</sup> The third-party, nonparental custody proceeding was filed as a separate action from the juvenile court dependency.<sup>131</sup> The juvenile court then authorized the proceeding to go forward in the usual course through the county court's general civil division.<sup>132</sup>

The mother disputed that nonparental custody was appropriate and continued to ask for the child's return to her care, but she would have been left to show why she should be reunited with her child without an attorney at her side. Under the nonparental custody statutes, there is no expressed right to appointed counsel for indigent parents.<sup>133</sup> However, in the juvenile court dependency process, indigent parents are entitled to counsel at public expense for "all stages" of the dependency process.<sup>134</sup> Thus, the appellate

court had to decide whether the right to counsel extends to the family court custody proceedings when they are initiated as an integral part of the juvenile court dependency case.

The court of appeals found that the nonparental custody action was “inextricably linked” with the dependency issue of whether the child should be returned to either parent’s home.<sup>135</sup> Therefore, the court concluded that because there is a statutory right to counsel at all stages of the dependency process, it necessarily follows that the right to counsel attaches to the collateral, nonparental custody proceeding initiated pursuant to the permanency-planning phase of the dependency process.<sup>136</sup>

Even though the nonparental custody proceeding in *Dependency of E.H.* was brought by a private party, the *King* decision did not foreclose a ruling that the parent has a right to counsel in a custody case. Unlike in *King*, the state was directly involved in *Dependency of E.H.*—both as the child’s lawful custodian under the dependency court process and as the facilitator and advocate of the permanent plan. Arguably, counsel is even more critical for the parent in the nonparental custody proceeding because the statutory standards for nonparental custody are factually based, harder to meet, relate primarily to the fitness of the parent, and are only secondarily related to the best interests of the child.<sup>137</sup> The parents’ ability to present evidence, examine witnesses (including experts), and to present themselves in the best light is absolutely critical to the outcome. When 62 percent of judges responding to a survey say that unrepresented parties are negatively impacted by lack of representation,<sup>138</sup> the need for a lawyer to represent a parent in a nonparental custody case is apparent and essential to protect the parties and the court from an erroneous outcome—one that may have serious long-term consequences for the child.

In addition to the continuing efforts to gain recognition of the right to counsel as opportunistic cases come before courts, several developments are underway nationally to explore avenues for implementing the rights in cases involving basic human needs or fundamental rights. As discussed above, as

part of the ABA's continuing leadership on the issue, a Presidential Task Force worked to develop a Statement of Basic Principles of a Right to Counsel in Civil Proceedings<sup>139</sup> and a Model Access Act<sup>140</sup> to encourage implementation. These documents convey a sense of urgency and purpose among mainstream support for the equal justice cause not seen since the early 1960s and the aftermath of the newly-recognized right to criminal counsel in *Gideon v. Wainwright*.<sup>141</sup> This sense of urgency and purpose is also propelling the development of pilot projects<sup>142</sup> to demonstrate and evaluate both the beneficial impacts of counsel in civil cases and the cost savings that might be achieved through providing counsel to indigent litigants as a matter of right when basic human needs are at stake.<sup>143</sup>

Furthermore, legislation to increase access to representation for indigents has been adopted in California in the Shriver Basic Access Act.<sup>144</sup> The Shriver Act sets up a system that funds and delivers legal services that ensure some level of legal assistance for all eligible persons in certain categories of cases. The Act also requires representation for all indigent persons in adversarial judicial proceedings involving basic human needs and certain fundamental rights.<sup>145</sup>

Activities expressing support for a civil right to counsel when basic human needs are at stake continue to garner attention in national and local media and among advocates. The National Coalition for a Civil Right to Counsel monitors the efforts and documents them through its public website.<sup>146</sup> Locally, equal justice advocates continue to identify opportunities to raise right to counsel issues in appropriate cases and are working through programs like the Symposium sponsored by the Fred T. Korematsu Center for Law and Equality and Washington's three law schools.<sup>147</sup> The advocates actively participate in national efforts to study case outcomes and cost impacts of lack of representation for indigent civil litigants, explore pilot project opportunities, and continue to give visibility to the issue through organized and coordinated efforts.<sup>148</sup>

## IX. CONCLUSION

There should be no question that representation by a skilled and competent lawyer in an adversarial proceeding of any kind beneficially affects the outcome for the party represented. While the research is limited, recent evidence suggests that the lack of representation negatively impacts not only an unrepresented party but also the decision making process in the particular case<sup>149</sup> and the courts, in general.<sup>150</sup> Lawyers do matter, and though it may be obvious, it is also borne out by research.

Because it is increasingly apparent that lack of representation is often synonymous with lack of justice—despite the result in *King*—equal justice advocates will continue to pursue the right of all persons to be represented by competent counsel when their basic human needs and fundamental rights are at stake. Some will pursue the right in regard to certain constitutionally-recognizable interests, such as familial relationships; some on behalf of particularly vulnerable groups, such as children, persons with disabilities, and victims of domestic violence; some on a case-by-case basis when there are particularly compelling facts; and some through legislative policy or other nonjudicial forums. Then there are those advocates who will continue to pursue the right whenever possible and through whatever vehicles are available, regardless of which basic human need or fundamental interest is at stake, or whatever classification of litigant may be at risk. The struggle for the right to counsel will continue because it must—it is fundamental to the cause of justice.

The *King* decision settles the question for the moment in the context of Washington's purely private custody proceedings. As disappointing as the decision was to the cause of equal justice, it will not stand against the test of time. The need is too great, the reasons are too compelling, and the momentum toward change is too strong to be turned back.<sup>151</sup> Advocates for equal justice must continue to visualize the civil right to counsel as a core value and assert it when basic human needs and fundamental rights are at stake.<sup>152</sup> That vision will continue to fuel the pursuit of equal justice work

and, hopefully, inspire others as well. As the goal of equal justice is visualized and opportunities for asserting the right to counsel in civil proceedings arise, the *King* decision will be read and reread and its impacts on justice evaluated. Thus, the legacy of *King*, if for no other reason, will be that inquiring minds will ask, “if not now, when?”

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<sup>2</sup> See *In re Marriage of King*, 174 P.3d 659 (Wash. 2007).

<sup>3</sup> See facts set out in a recent unpublished Washington Court of Appeals, Division II decision, *In re J.T.G.-S.*, No. 39223-2-II, 2010 WL 2965381 (Wash. Ct. App. 2010) (affirming denial of motion to vacate based on procedural irregularity or manifest injustice due to lack of counsel for unrepresented mother in parentage case notwithstanding court’s recitation of numerous evidentiary and procedural errors mother claimed to have been committed by trial court). See also Deborah Perluss, *Washington’s Constitution Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571, 599–600 n.30 (2004) (citing *City of Moses Lake v. Smith*, No. 21783-3-III, slip op. (Wash. Ct. App. 2003)) (dismissed as moot by Order Denying Motion to Modify Commissioner’s Ruling, in which an indigent elderly mentally ill man was unrepresented in a court action to enforce a city building code that threatened the total destruction of the home he had built and lived in for fifty years.

<sup>4</sup> See generally Task Force on Civil Equal Justice Funding, *The Washington State Civil Legal Needs Study*, WASH. STATE SUP. CT. (Sept. 2003), <http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf>; Consortium on Legal Services and the Public, *Comprehensive Survey of Legal Needs and Civil Justice: A Survey of Americans*, AM. BAR ASS’N (1994), <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>.

<sup>5</sup> See generally *Documenting the Justice Gap in America: the Current Unmet Civil Legal Needs of Low—Income Americans*, LEGAL SERV. CORP. (2009), [http://www.lsc.gov/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

<sup>6</sup> The Civil Legal Needs Study found that in the aggregate one-million low income people experience important civil legal problems annually, and 85 percent are forced to face those problems without an attorney. See Task Force on Civil Equal Justice Funding, *supra* note 4, at 23–25.

<sup>7</sup> See *id.* at 23–25, 30. Most of the cases in which low income litigants are unrepresented involve housing evictions, child custody disputes, and debt collection cases.

<sup>8</sup> See Coalition for Justice, *Report on Survey of Judges on the Impact of the Economic Downturn on Representation in the Courts*, AM. BAR ASS'N, 3–4 (July 12, 2010), [http://www.abajournal.com/files/Coalition\\_for\\_Justice\\_Report\\_on\\_Survey.pdf](http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf).

<sup>9</sup> While there is currently no solid data on this point in Washington, the ABA Preliminary Report on Survey of Judges is a national study of judges' perspective on the quality of their decisionmaking when parties are not represented. See generally *id.* at 13. The preliminary report reveals that 62 percent of judges say that parties are negatively impacted when they are not represented by counsel. *Id.* at 3. Also troubling is that 26 percent of judges state that the court allows an injustice to occur when one of the parties is not able to properly present valid claims or defenses that they might have. *Id.* at 13. There is no reason to believe that the experience of Washington judges is substantially different from the national experience.

<sup>10</sup> See *id.* at 4.

<sup>11</sup> See e.g., *Miranda v. Sims*, 991 P.2d 681, 687 (Wash. Ct. App. 2000). (Ellington, J., concurring) (“Meaningful access requires representation. Where rights and responsibilities are adjudicated in the absence of representation, the results are often unjust. If representation is absent because of a litigant’s poverty, then likely so is justice, and for the same reason.”).

<sup>12</sup> This movement has developed into an organized advocacy effort supported by the National Coalition for the Civil Right to Counsel. See THE NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org/> (last visited Oct. 29, 2010). There is also increasing examination of the right within the academy. See, e.g., Symposium, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (2006); Seattle University School of Law Symposium, *Civil Legal Representation and Access to Justice: Breaking Point or Opportunity for Change* (Feb. 19–20, 2010), available at <http://www.law.seattleu.edu/x7433.xml>; Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009); Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065 (2009); Laura Abel, *Keeping Families Together: Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087 (2009); Andrew Scherer, Introduction, 25 TOURO L. REV. 1 (2009); and Symposium, *Right to a Lawyer, The Momentum Grows*, 40 CLEARINGHOUSE REV. 245 (July/August 2006). For a recent compilation of articles on point, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37 (2010), and advocacy within state and local bar associations as well as individual legal commentators. See Phila. Bar Ass’n Board of Governors, *Policy and Leadership*, [philadelphiabar.org](http://www.philadelphiabar.org), [http://www.philadelphiabar.org/page/RESOLUTION\\_CALLING\\_FOR\\_THE\\_PROVISION\\_OF?appNum=1](http://www.philadelphiabar.org/page/RESOLUTION_CALLING_FOR_THE_PROVISION_OF?appNum=1) (last visited Oct. 29, 2010); and William Glaberson, *Top New York Judge Urges Greater Legal Rights for the Poor*, N.Y. TIMES, May 3, 2010, at A21.

<sup>13</sup> See American Bar Ass'n, *2006 Annual Meeting*, DAILY JOURNAL, 10 (Aug. 7–8, 2006), [http://www.abanet.org/leadership/2006/annual/DAILY\\_JOURNAL.pdf](http://www.abanet.org/leadership/2006/annual/DAILY_JOURNAL.pdf).

<sup>14</sup> American Bar Ass'n, *Report to the House of Delegates*, ABANET.ORG 1, <http://www.abanet.org/legalservices/sclaid/downloads/06112A.pdf>BasicPrinciplesReportRec\_06232010.pdf.

<sup>15</sup> See *id.* at 7–8.

<sup>16</sup> See generally American Bar Ass'n, *Report to House of Delegates*, ABANET.ORG, [http://www.abanet.org/legalservices/sclaid/downloads/ModelActReportRec\\_06232010.pdf](http://www.abanet.org/legalservices/sclaid/downloads/ModelActReportRec_06232010.pdf).

<sup>17</sup> See *2010 Annual Meeting*, DAILY JOURNAL at <http://www.abanet.org/leadership/2010/annual/pdfs/dailyjournal.pdf>. Both Reports and Recommendations were co-sponsored by the Washington State Bar Association and the King County Bar Association.

<sup>18</sup> In re Luscier, 524 P.2d 906, 909 (Wash. 1974); In re Myricks, 533 P.2d 841, 842 (Wash. 1975). Washington also now provides parents counsel in juvenile court dependency and termination proceedings by statute. WASH. REV. CODE § 13.34.090 (2008).

<sup>19</sup> Tetro v. Tetro, 544 P.2d 17, 19 (Wash. 1977).

<sup>20</sup> See In re Meade, 693 P.2d 713, 717 (Wash. 1985); In re Diamondstone, 105 P.3d 1, 4–9 (Wash. 2005) (interpreting and applying former Rule for Lawyer Discipline 10.2).

<sup>21</sup> See *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009), *petition for rev. granted*, 210 P.3d 1018 (Wash. 2009); *but see* In re the Truancy of Perkins, 969 P.2d 1101 (Wash. Ct. App. 1999) (no right to counsel in initial fact finding truancy proceeding), *abrogated by Bellevue Sch. Dist.*, 199 P.3d 1010.

<sup>22</sup> In re the Dependency of E.H., 243 P.3d 130 (2010) (holding that parents of a dependent child are entitled to counsel when a nonparental custody proceeding under WASH. REV. CODE § 26.10.010 (2010), *et.seq.* as a consequence of a juvenile court permanency plan for the child.).

<sup>23</sup> By statute in Washington, counsel is provided to indigent persons at public expense in the following circumstances: for parents who contest termination of parental rights in adoption proceedings (*see* WASH. REV. CODE § 26.33.110(3)(b) (1995)); for a child seeking child welfare services and out-of-home placement and the parents (*see* WASH. REV. CODE § 13.32A.160(1)(cb) (2000)); for a child to re-establish a parent-child relationship (*see* WASH. REV. CODE § 13.34.215(3) (2010)); for an alleged incapacitated person in a private guardianship proceeding (*see* WASH. REV. CODE §§ 11.88.005045 (2001)); and for a person alleged to be a sexual predator and subject to confinement for an indefinite period (WASH. REV. CODE § 71.09.050(1) (2010)).

<sup>24</sup> WASH. REV. CODE § 7.90.070 (2010)

<sup>25</sup> See *Id.* at § 13.34.100(6).

<sup>26</sup> See WASH. GEN. R. 33.

<sup>27</sup> See *Hous. Auth. of King Cnty. v. Saylor*, 557 P.2d 321, 326 (Wash. 1976).

<sup>28</sup> In re Grove, 897 P.2d 1252 (Wash. 1995).

<sup>29</sup> See *King*, 174 P.3d at 666. The Washington Court of Appeals Division II, in a recent unpublished decision involving a right to retained counsel, recited a litany of apparent procedural errors, but affirmed the lower court's refusal to vacate a parenting

plan/custody order. *See Parentage of J.T.G.-S*, 157 Wn. App. 1014, 2010 WL 2965381. The unrepresented mother, who had theretofore been the primary caregiver of the child at issue, lost custody to the father who was represented by counsel throughout the case, finding. *See id.* The Court of Appeals found no irregularity in the trial court's allowing her retained attorney to withdraw from representation just before trial and without inquiry as to her consent. *See id.*

<sup>30</sup> *Bellevue Sch. Dist.*, 199 P.3d 1010.

<sup>31</sup> *See* In re the Termination of D.R. and A.R., No. 84132-2 (Wash. filed Jan. 27, 2010).

<sup>32</sup> For example, in *Marriage of King*, after unrepresented Brenda King posed a series of improperly framed questions in her effort to cross-examine the testifying guardian *ad litem* before the trial court in her case, the trial judge expressed utter frustration that could only have influenced his decision on the merits: "Well, if you cannot ask direct questions and persist in badgering the witness and arguing and phrasing questions that are just argumentative, then I'm going to have to cut-off your right to cross-examination." Verbatim Report of Proceedings at Vol. 5 15:1-5, In re Marriage of King, (Snohomish Cnty. Super. Ct. 2007) (No. 04-3-02385-0).

<sup>33</sup> *See King*, 174 P.3d 659.

<sup>34</sup> *See id.* at 661.

<sup>35</sup> *See id.*

<sup>36</sup> Verbatim Report of Proceedings 131 at 15-16, In re Marriage of King, 174 P.3d 659 (Wash. 2007).

<sup>37</sup> *See* Clerk Docket Record No. 164, In re Marriage of King, (Snohomish Cnty. Super. Ct. (2008) (No. 04-3-02385-0).

<sup>38</sup> *See* Clerk Docket Record No. 201, In re Marriage of King, (Snohomish Cnty. Super. Ct. (2008) (No. 04-3-02385-0).

<sup>39</sup> Order Denying Mot. for Recons. and New Trial, and Appointment of Counsel, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 04-3-02385-0).

<sup>40</sup> Resp't's Mot. for Recons. and New Trial, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 04-3-02385-0).

<sup>41</sup> *See King*, 174 P.3d at 673 (Madsen, J., dissenting).

<sup>42</sup> *Id.* at 672.

<sup>43</sup> *Id.* at 672-76.

<sup>44</sup> *Id.* at 676.

<sup>45</sup> *See* Coalition for Justice, *supra* note 8, at 3-4; and discussion at *supra* note 9.

<sup>46</sup> *See King*, 174 P.3d at 659.

<sup>47</sup> Participating as amici curiae in support of a right to counsel were a coalition of retired Washington judges, including former members of the Washington Supreme Court; the Northwest Women's Law Center (now Legal Voice), a coalition of International Law Scholars, and the National Coalition for a Civil Right to Counsel. The Washington State Bar Association also participated as *amicus curiae* and provided support for the inherent authority of a court to appoint counsel in a given case to ensure meaningful access to justice.

<sup>48</sup> *See* *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970); *Tennessee v. Lane*, 541 U.S. 509, 533 (2004).

<sup>49</sup> See, e.g., *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); cf. *Hillis v. Dep't. of Ecology*, 932 P.2d 139, 147 (Wash. 1997) (In situations involving constitutional rights or judicial functions, judiciary has power to compel funding.)

<sup>50</sup> Participating as *amici curiae* in opposition to a right to counsel were the Office of the Attorney General, the Washington State Legislature, and the Washington State Association of Counties.

<sup>51</sup> Brief for Attorney General as Amici Curiae at 3, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 79978-4) WA Court of Appeals Div. I (No. 57831-6). Most of the briefing was originally filed in the Washington Court of Appeals, Div. I (No. 57831-6). For ease of reference, both the Court of Appeals and Supreme Court case numbers in the source citation, with the Court of Appeals No. referenced as “COA”).

<sup>52</sup> Brief for Washington State Association of Counties as Amici Curiae at 7, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 77978-4).

<sup>53</sup> See *id.* at 3, 18.

<sup>54</sup> See Brief for Retired Washington Judges as Amici Curiae in Support of Appellant at 12–19, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 77978-4), (COA No. 57831-6).

<sup>55</sup> Brief of Appellant at 22, In re Marriage of King, 174 P.3d 659 (Wash. Aug. 10, 2006) (No. 77978-4), (COA No. 57831-6) (emphasis added.).

<sup>56</sup> Brief for Retired Washington Judges as Amicus Curiae in Support of Appellant at 5, 19, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 77978-4), (COA No. 57831-6) and Brief of National Coalition for a Civil Right to Counsel as Amicus Curiae in Support of Appellant at 18, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 77978-4), (COA No. 57831-6).

<sup>57</sup> Brief of Washington State Bar Association as Amicus Curiae in Support of Appellant at 16–18; In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 77978-4), (COA No. 57831-6) (“If despite all the help that the Court can properly and ethically give, a particular unrepresented litigant in a custody dispute is unable to present his or her case effectively, without legal assistance, despite diligent and good faith efforts, then the Court should hold that the State and Federal Constitutions require that such representation be provided.”).

<sup>58</sup> Brief of International Law Scholars as Amicus Curiae at 2, In re Marriage of King, 174 P.3d 659 (Wash. 2007) (No. 77978-4), (COA No. 57831-6).

<sup>59</sup> In recent years, then Chief Justice Gerry Alexander spoke often about the “justice gap” and the need for more resources to meet the legal needs of low-income persons in Washington. Justice Charles Johnson chaired a blue-ribbon Civil Justice Funding Task Force, which from 2001–2004 carried out its assigned mission to secure state funding to fully realize the principle that access to justice is a fundamental right. Other justices similarly demonstrated strong commitment to the cause through various public pronouncements and participation in activities devoted to this purpose. See *Task Force on Civil Equal Justice Final Report*, TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING (June 2004), <http://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=459>.

<sup>60</sup> See In re Parentage of L.B., 122 P.3d 161, 179 n.29 (Wash. 2005).

<sup>61</sup> See generally *Myricks*, 533 P.2d 841.

<sup>62</sup> See generally *Luscier*, 524 P.2d 906.

<sup>63</sup> See generally *Tetro*, 544 P.2d 17.

<sup>64</sup> See WASH. REV. CODE §§ 2.53.010–2.52.900 (2005). See Memorandum from Jim Bamberger, Director, Wash. State Office of Civil Legal Aid (Apr. 21, 2007) (on file with author.).

<sup>65</sup> While Justice Sanders concurred in the result, he wrote separately to assert that no state action is implicated in the process of state court resolution of private disputes, notwithstanding the long-standing holding of *Shelley v. Kramer*, 334 U.S. 1, 14 (1948), to the contrary. Justice James Johnson joined Justice Sanders' concurring opinion. Marriage of *King*, 174 P.3d at 671. The rationale ignores the fact that it is the power of the state court to compel enforcement of its orders that threatens the private interests at stake. For example, in *Tetro*, 544 P.2d at 19–20, the court held that indigent litigants charged with contempt are entitled to appointed counsel when facing incarceration.

<sup>66</sup> The dissenters would have directly found a right to counsel in private custody/"residential placement" proceedings in Washington:

The majority fails to appreciate the full extent of the liberty interest a parent has in the relationship with his or her child, and erroneously concludes that under the state constitution the right to counsel does not attach unless termination of the parent-child relationship is at stake and the State is a party to the action. I would hold that an independent constitutional analysis applies in this context under the state due process clause, article I, section 3. In accord with the principles enunciated in *Luscier* and *Myricks*, an indigent parent has a due process right to appointed counsel at public expense in residential placement proceedings involving child placement because a parent has a liberty interest in his or her children at stake just as it is in termination proceedings.

*King*, 174 P.3d at 681.

<sup>67</sup> See *id.* at 669. SANFORD KATZ, FAMILY LAW IN AMERICA 1 (Oxford University Press 2003) ("It should be remembered that divorce in the United States, opposed by some religions, was a taboo subject, and the status of a divorced person carried with it a social stigma."). Katz attributes the major changes in family law to the availability of representation in divorce courts by legal services lawyers.

<sup>68</sup> *King*, 174 P.3d at 661 (emphasis added).

<sup>69</sup> The reference to a "dissolution" proceeding versus a child custody proceeding both minimizes the nature of what is at stake and insinuates a negative social connotation, e.g., divorce as anti-family preservation. The Washington Supreme Court's view of marriage as entitled to less constitutional protection than the parent-child relationship may be inferred from its ruling in *Anderson v. King County*, 138 P.3d 963, 969, 978 (Wash. 2006) ("The plaintiffs have not established that they are members of a suspect class or that they have a fundamental right to marriage that includes the right to marry a person of the same sex.").

<sup>70</sup> *King*, 174 P.3d at 661. While perhaps unintentional, even the inversion of the parties' parental versus legal status in the case as "father-respondent" v. "petitioner-mother" emphasizes the "father" status in the case over the legal status of the "petitioner." Contrast this to the dissent's characterization of the trial court having "placed" the

children with Mr. King and the negative impact on the mother's relationship with the children, observing that "When a child is removed from the parent's home, thousands of moments of interactions are lost." *Id.* at 678 (Madsen, J., dissenting).

<sup>71</sup> *See id.* at 661.

<sup>72</sup> *See id.* at 661–62.

<sup>73</sup> *Id.* at 663.

<sup>74</sup> *Id.* at 662; *see also Luscier*, 524 P.2d 906; and *Myrick*, 533 P.2d 841 (holding that deprivation or impairment of parental rights in juvenile court dependency proceedings requires appointment of counsel at public expense for indigent parents); *cf. Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18 (1981) (holding that where no physical liberty is at stake, no right to counsel is presumed unless overcome by analysis of the competing interests at stake balanced against risk of error).

<sup>75</sup> *King*, 174 P.3d at 663.

<sup>76</sup> The majority noted that even when a parenting plan proceeding results in a child spending substantially less or even no time with one parent, "both parents remain parents and retain substantial rights, including the right to seek future modification of the parenting plan." *King*, 174 P.3d at 663. In fact, the statute that governs the modification of a parenting plan, WASH. REV. CODE § 26.09.260 (2008), creates a very high standard and burden of proof for modifying a plan once in place. Hence, the "right" to seek future modification provides little comfort to a parent-litigant in the first instance. In this case, Brenda King did successfully get the parenting plan modified after she was able to get pro bono counsel and due to changes in the father's circumstances.

<sup>77</sup> *King*, 174 P.3d at 662.

<sup>78</sup> *Id.* at 663. The majority's formulation of the interest at stake erroneously collapses two concepts: (1) the nature of the interest, and (2) the process that is due. There is no question that the interest at stake for Brenda King was protection of her parent-child relationship, an interest that has long been deemed fundamental by both the Washington and U.S. Supreme Courts. The majority's analysis failed to differentiate between the substantive due process rights of parents in the care, custody and control of their child (*see Troxel v. Granville*, 530 U.S. 57 (2000)) and the scope of potential deprivation at issue in a parenting plan dispute, which more logically resulted in the interest being afforded less protection than in the *Myricks/Luscier* cases. By confusing the analysis, the majority left the unfortunate impression that the substantive due process rights that inhere in the parent-child relationship are less fundamental post-*King*, e.g., "[T]he petitioner's fundamental liberty interest is not at stake here." *King*, 174 P.3d at 667. It is unclear if the court intended to carve out less substantive protection for parents in Washington and it seems inconsistent with the U.S. Supreme Court's decision in *Troxel*, 530 U.S. 57, as well as the Washington Supreme Court's own recent decision in *Parentage of L.B.*, 122 P.3d 161. This may need to be clarified in later cases.

<sup>79</sup> *King*, 174 P.3d at 664 (citing WASH. REV. CODE § 26.09.002, *et. seq.*) The majority identifies the following as "safeguards": the statutory focus on the "best interests of the child" (WASH. REV. CODE § 26.09.002); the court's authority to appoint an attorney to represent the child's interests (WASH. REV. CODE § 26.09.110); a court's ability to seek the advice of a professional (WASH. REV. CODE § 26.09.210); the court's authority to appoint a guardian ad litem for the children (WASH. REV. CODE § 26.09.220); the

provision of court facilitators for unified family courts (WASH. REV. CODE § 26.12.802(3)(d)); and, authority to shift expenses of attorneys to the opposing party. (WASH. REV. CODE § 26.09.140)). The majority also cites the parent's ability to seek modification of a parenting plan once entered as a basis for distinguishing the impairment of parental rights in a dependency/termination case versus what occurs in a parenting plan action between two parents. *King*, 174 P.3d at 663. However, modification of parenting plans is disfavored under Washington law and WASH. REV. CODE § 26.09.260 imposes strict requirements. *See, e.g.*, *In re Marriage of Pape*, 989 P.2d 1120, 1128–29 (1999).

<sup>80</sup> *See generally* Respondent's Motion for Reconsideration and New Trial, *In re Marriage of King*, (Snohomish Cty Court No. 04-3-02385-0).

<sup>81</sup> Brief for Nw. Women's Law Ctr. As Amici Curiae Supporting Appellant at 12–15, *In re Marriage of King*, 174 P.3d 659 (Wash. 2007) (No. 77987-4) (COA 57831-6).

<sup>82</sup> *See King*, 174 P.3d at 674–75.

<sup>83</sup> *Id.* at 663.

<sup>84</sup> *Id.* at 664 (“Though we determine that fundamental constitutional rights are not implicated in a dissolution proceeding, we address the petitioner’s constitutional claims. The interests, while not fundamental, are significant enough to analyze the constitutional claims.”). It is impossible to read the majority decision as anything other than ambiguous with respect to what interests are included as “significant.” The majority goes on to analyze the constitutional claims (i.e., right of access to courts, state privileges and immunities, and federal due process and equal protection) in a logic vacuum created by the absence of an identified protectable fundamental right in the purely private parent-child relationship.

<sup>85</sup> *See id.* (citing Wash. Const. art. I, § 10 (“Justice in all cases shall be administered openly, and without unnecessary delay.”)). Washington’s “open courts” mandate is often cited as the basis for the right of access to courts.

<sup>86</sup> *Bullock v. Roberts*, 524 P.2d 385, 387 (Wash. 1974) (stating that it is within the inherent power of the court to make such orders as are necessary to enable the poor to access the judicial system).

<sup>87</sup> While the physical facility was a barrier that the U.S. Supreme Court addressed in *Tennessee v. Lane*, 541 U.S. 509, 533 (2004) (holding that meaningful access to courts is an integral component of due process), the *Lane* Court did not limit its reasoning to physical barriers. Indeed, under both federal and state disability law, courts must reasonably accommodate litigants with non-physical disabilities to the same extent they must accommodate litigants with physical disabilities. *See, e.g.*, WASH. GEN. R. 33.

<sup>88</sup> Wash. Const. art. I, § 3 (2008); Wash. Const. art. I, § 12 (2008).

<sup>89</sup> *See State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (factors in analysis include “(1) The textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”).

<sup>90</sup> *See King*, 174 P.3d at 667.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 668.

<sup>93</sup> See *Flores v. Flores*, 598 P.2d 893 (Alaska 1979). More recently, the Maryland Supreme Court refused to take the opportunity when presented to similarly consider the question under the Maryland Constitution. However, three of the judges in that case would have taken up the issue and would have found that a right to counsel existed for the indigent mother-appellant in a private custody case. See *Frase v. Barnhart*, 840 A.2d 114 (Md. 2003) (Cathell, J. concurring).

<sup>94</sup> Compare *Luscier*, 524 P.2d 906 and *Myricks*, 533 P.2d 841 with *Lassiter*, 452 U.S. at 25–26 (U.S. Supreme Court holding that there is not a mandatory right to counsel for parents in termination proceedings under the federal constitution.).

<sup>95</sup> See Wash. Const. art. I, § 12 (“[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”) The intent of the provision is to prevent the state from affording special rights or privileges to certain classes to the detriment of all other citizens.

<sup>96</sup> See Brief of Appellant at 41, *In re Marriage of King*, 174 P.3d 659 (Wash. Aug. 10, 2006) (No. 77981-4), (COA No. 57831-6) (citing *State v. Vance*, 70 P. 34, 41 (Wash. 1902) (stating that the “usual remedies . . . to enforce . . . personal rights” are a “privilege”).

<sup>97</sup> See Brief of Appellant at 42, *In re Marriage of King*, 174 P.3d 659 (Wash. Aug. 10, 2006) (No. 77981-4), (COA No. 57831-6).

<sup>98</sup> *King*, 174 P.3d at 669.

<sup>99</sup> Brenda King also asked the court to interpret the Washington constitutional provision in light of “fundamental principles” as required by Wash. Const. art. I, § 32. Wash. Const. art. I, § 32 (“A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government.”) The fundamental principles at issue are those of fairness and justice and that all persons are equal before the law. The right to counsel effectuates these purposes in a civil context no less so than in a criminal context. The State as an Involved Party in *King*, so much as conceded the point. See Brief of Involved Party State of Washington by Snohomish County at 30, *King*, 174 P.3d 659 (Wash. Apr. 19, 2007) (No. 57831-6) (“With all due respect to the criminal defense bar, dissolution cases involving children are completely different, require different skills, and are in many ways more complex.”) The majority found no guidance in art. I, § 32 because “Ms. King identifies no natural right, in existence at the time of the constitution, to appointed counsel.” *King*, 174 P.3d at 667 n.14.

<sup>100</sup> See *id.* at 679 (citing ROBERT H. MNOOKIN, ET AL., PRIVATE ORDERING REVISITED: WHAT CUSTODIAL ARRANGEMENTS ARE PARENTS NEGOTIATING?, IN DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., Yale Univ. Press 1990)).

<sup>101</sup> Laws 1987, c 469, WASH. REV. CODE § 26.09.181 (2010), *et seq.*

<sup>102</sup> *King*, 174 P.3d at 679 (citing Jane W. 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 (1990)).

<sup>103</sup> For a very recent exploration and review of the existing research on lawyer-affected outcomes in litigation, see Engler, *supra* note 12. Engler reviews research data for both cases involving lawyer representation and cases in which a litigant received some self-

help assistance by either a lawyer or a lay advocate. He concludes that the data is clear that favorable outcomes for represented versus unrepresented litigants are statistically significant. However, the data is less clear for unrepresented persons who receive some self-help assistance from a lawyer or a lay advocate, even though persons who use such services report a relatively high level of satisfaction with the justice system. Thus, while education and de-mystification of the justice system seems to promote trust and confidence in the system for those who are otherwise unrepresented, obtaining favorable or as favorable outcomes that they might achieve with representation seems elusive. See also Carroll Seron, et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 428–29 (2001) (finding significant disparities in case outcomes between parties represented by counsel and parties without counsel on the basis of a randomized study of representation in housing courts.). To date, the Seron study is the only reported randomized study of impacts of representation by counsel and remains the leading scientific contribution to the debate from the perspective of the litigant.

<sup>104</sup> REBECCA L. SANDEFUR, *LAWYERS' IMPACT ON CIVIL TRIAL AND HEARING OUTCOMES* (forthcoming) (manuscript at 24) (on file with author) [hereinafter *LAWYERS IMPACT*]. See also Rebecca L. Sandefur, *The Impact of Counsel: an Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010) [hereinafter *Impact of Counsel*] and references cited therein for further discussion of the research and findings.

<sup>105</sup> See *LAWYERS' IMPACT*, *supra* note 104, manuscript at 29.

<sup>106</sup> See Coalition on Justice, *supra* note 8; see Coalition on Justice, *supra* note 9 and 10

<sup>107</sup> See *LAWYERS' IMPACT*, *supra* note 104, at 6.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> Sandefur, *supra* note 105, at 30.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.* Sandefur writes, “[I]n the barest sense: the presence of any lawyer, as opposed to no lawyer at all, signals something important about a case to the other people involved in processing it. The presence of a lawyer on one’s case would then lead to a kind of symbolic relational expertise. Ironically, to the extent that this is an important mechanism creating lawyers’ impact, that impact would be obviated by universal representation, as the presence of an attorney *per se* would no longer signal anything to [a court].” *Id.* at 30.

<sup>113</sup> The fact that Brenda King raised no error with respect to the merits of the trial court decision, choosing to focus instead solely on the absence of counsel, may have unwittingly created the impression that the merits of her claim to be the primary residential parent were so weak that the presence of a lawyer would not have changed the outcome. As noted above, this proved to be untrue as she regained primary care of the children subsequently.

<sup>114</sup> See *Bellevue Sch. Dist.*, 199 P.3d at 1011 (holding that children alleged to be truant under WASH. REV. CODE § 28A.225.020 (2008) are entitled to appointed counsel), *rev. granted*, 210 P.3d 1018 (Wash. 2009).

<sup>115</sup> In re Termination of D.R. and A.R., No. 84132-2 (Wash. filed Jan. 27, 2010).

<sup>116</sup> See WASH. REV. CODE §§ 28A.225.010–28A.225.020 (2008); WASH. REV. CODE § 28A.225.090(2) (2008); WASH. REV. CODE § 7.21.030(2)(e) (2008).

<sup>117</sup> See Brief for TeamChild and Committee for Indigent Representation and Civil Legal Equality as Amici Curiae Supporting Appellant at 14–16., *Bellevue Sch. Dist. v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2008) (No. 605283).

<sup>118</sup> *Id.*

<sup>119</sup> See *In re the Termination of D.R. and A.R.*, No. 84132-2 (Wash. filed Jan. 27, 2010).

<sup>120</sup> WASH. REV. CODE § 13.34.132 (2008).

<sup>121</sup> Under WASH. REV. CODE § 13.34.100 (2010), a guardian ad litem is appointed in juvenile court dependency and termination proceedings to represent the “best interests of the child,” but not necessarily to ascertain and advocate for the child’s articulated interest, position, or desired outcome for the case.

<sup>122</sup> See WASH. REV. CODE § 13.34.132. (2008).

<sup>123</sup> Some studies have concluded that regardless of the parent’s ability to care for the child, the child’s interest in knowing who his or her parents are and being connected to them at any level is better for the child psychologically and emotionally than not maintaining the relationship, even if only as a matter of law.

<sup>124</sup> WASH. REV. CODE § 13.34.100(6) (2008) provides discretionary authority to juvenile courts to appoint counsel for a child age twelve or older. Some counties in Washington, notably King, routinely appoint counsel to children age twelve or older upon request, while others rarely do so. A recent amendment to the statute requires the state and guardian ad litem to notify children age twelve and older of their right to request counsel. H.B. 2735, 2010 Reg. Sess. (Wash. 2010).

<sup>125</sup> Interestingly, children in Washington State who seek to reinstate a parent-child relationship which a juvenile court has terminated have a right to counsel at public expense. WASH. REV. CODE § 13.34.215(3) (2010).

<sup>126</sup> This basis is suggested by another recently adopted ABA policy statement, which urges that states provide counsel to children and/or youth at all stages of status offense proceedings, including truancy, as a matter of right and at public expense. See American Bar Ass’n, *Legal Counsel for Children*, ABANOW.ORG, [www.abanow.org/2010/07/am-2010-109a](http://www.abanow.org/2010/07/am-2010-109a).

<sup>127</sup> For example, in a recent case, an Ohio Court of Appeals ruled that a juvenile defendant in a civil domestic violence protection order proceeding is entitled to counsel as a matter of due process because the child is effectively unable to represent themselves. See *Leone v. Owen*, No. OT-09-019, 2010 WL 1730146 (Ohio Ct. App. 2010). (“Appellants young age alone would indicate that he should have been appointed counsel. Furthermore, the informal nature of the civil protection hearings exacerbates the problem of permitting juveniles to proceed pro se.”)

<sup>128</sup> *Dependency of E.H.*, 243 P.3d 160 (2010).

<sup>129</sup> See *Dependency of E.H.*, 243 P.3d at 161.

<sup>130</sup> See *id.* 243 P.3d at 162.

<sup>131</sup> See *id.*

<sup>132</sup> See WASH. REV. CODE § 26.10.030 (2003) (authorizing nonparental custody proceedings). See also WASH. REV. CODE § 13.34.155 (2009) (authorizing juvenile courts to either hear a nonparental custody proceeding directly or grant concurrent jurisdiction to the general division of the superior courts to determine the merits of a non-parent’s petition for custody of a child.).

<sup>133</sup> See WASH. REV. CODE §§ 26.10.010–26.10.912. (1987).

<sup>134</sup> See WASH. REV. CODE § 13.34.090 (2010); see also *Grove*, 897 P.2d 1252 (holding that when there is a statutory right to counsel there is a right to counsel at all stages of the proceedings).

<sup>135</sup> *Dependency of E.H.*, 243 P.3d at 165.

<sup>136</sup> See *id.*

<sup>137</sup> See WASH. REV. CODE § 26.10.030 (2003).

<sup>138</sup> *Preliminary Report on Survey of Judges*, *supra* note 8, at 11.

<sup>139</sup> See American Bar Ass’n, *supra* note 15, at 7–8.

<sup>140</sup> See American Bar Ass’n, *supra* note 16. See also American Bar Ass’n, *supra* note 127 (urging right to counsel for all children in status offense cases).

<sup>141</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>142</sup> Pilot projects have been developed and implemented in Boston in housing and guardianship cases and in Texas to provide for counsel as a matter of right in tenant eviction defense and foreclosure cases. The Boston Bar Foundation and the Massachusetts Bar Foundation provided a combined total funding of \$385,000 to implement the Boston pilots in two sites for eighteen months. Texas pilot projects were funded by the Texas Access to Justice Foundation for eighteen months each at a proposed cost of \$310,000 and \$347,000, respectively. A pilot project on providing counsel for mortgage foreclosure diversion and mediation is under consideration in Philadelphia and other parts of Pennsylvania. Finally, as part of the *Shriver Basic Access to Justice Act*, pilot projects are being developed in California to provide counsel as a matter of right in certain basic needs cases, with the goal of evaluating the most effective methods for further implementation. See *Equal Access to Justice Act*, POVERTYLAW.ORG, <http://www.povertylaw.org/poverty-law-library/category.html?catid:int=2010400>.

<sup>143</sup> See e.g., *Abel*, *supra* note 12.

<sup>144</sup> AB 590, Cal. State Leg., Chapter 457 (2009). The *Shriver Basic Access to Justice Act* appropriates funds for the development of pilot projects in eight California locations to provide counsel as matter of right in certain basic needs cases, with the goal of evaluating the most effective methods for further implementation.

<sup>145</sup> See *id.*

<sup>146</sup> See <http://www.civilrighttocounsel.org> (last visited Nov. 1, 2010).

<sup>147</sup> See Seattle University School of Law Symposium, *supra* note 12.

<sup>148</sup> See also Access to Justice Board, *Plan for the Delivery of Civil Legal Aid to Low Income People in Washington State*, WSBA.ORG 24 (May 8, 2006), <http://www.wsba.org/atj/documents/2006stateplan.pdf>. Washington’s *State Plan for Delivery of Civil Legal Aid*, a “blue print” for the development and implementation of delivery system goals and structures, which was adopted by and is periodically reviewed by the State Access to Justice Board. See *id.* The *State Plan* commits to efforts to establish a right to counsel to fill the gaps in services available through the civil legal aid system. See *id.*

<sup>149</sup> See Coalition for Justice, *supra* note 8, at 13. (finding “42 percent of judges are concerned that they compromise the impartiality of the court in order to prevent injustice.”).

<sup>150</sup> See *id.* at 12, 14 (“Seventy-one percent (71%) of the judges [responding to the survey] are concerned by the time staff must use to assist self-represented persons”;...The overwhelming consensus at 86 [percent] is that the courts would be more efficient if both parties were represented. Contrary to the popular belief that lawyers slow the wheels of justice, the court views advocates as an efficiency of the adversarial system.”).

<sup>151</sup> See American Bar Ass’n, *supra* note 13; American Bar Ass’n, *supra* note 14; American Bar Ass’n, *supra* note 15; American Bar Ass’n, *supra* note 16; DAILY JOURNAL, *supra* note 17; and Sargent Shriver Civil Counsel Act, Assem. B. 590, 2009 Leg., Reg. Sess. (Cal. 2009).

<sup>152</sup> See Deborah Perluss, *Keeping the Eyes on the Prize: Visualizing the Civil Right to Counsel*, 15 TEMP. POL. & CIV. RTS. L. REV. 719 (2006).