No. 79978-4

MADSEN, J. (dissenting)—Civil marriage is an institution that is created, maintained, and controlled by the State to serve state interests. The State controls access to the institution, and dissolution of it. In order for divorcing parties to resolve disputes over their child's care and placement in a dissolution action, Washington State law requires that parents comply with complicated legal procedures in a Washington State court of law and subjects them to a complex set of state statutes governing their dissolution action.

The fundamental interest at stake in this dissolution proceeding has long been recognized, that is, a parent's fundamental interest in the day-to-day companionship, care, and charge of his or her children. As this court has observed, a parent's right to custody and control of his or her children is "'more precious to many people than the right of life itself.'" *In re Welfare of Luscier*, 84 Wn.2d 135, 137, 524 P.2d 906 (1974) (quoting *In re Welfare of Gibson*, 4 Wn. App. 372, 379, 483 P.2d 131 (1971)).

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. The majority's decision does not begin to address the obstacles an indigent parent encounters when she is unrepresented by counsel, nor does it realistically assess the loss she faces.

In addition, contrary to the majority opinion, this court has already established an independent state constitutional analysis that applies when child custody issues are involved. Article I, section 3 of the Washington State Constitution provies that "[n]o person shall be deprived of life, liberty, or property, without due process of law." A parent's interest in the care, custody, and nurture of her child is a fundamental liberty interest protected under article I, section 3. *Luscier*, 84 Wn.2d at 139. Accordingly, under article I, section 3 of the Washington Constitution, Ms. King's interest at stake requires that counsel be appointed at public expense. Because the majority concludes otherwise, I dissent.

FACTS

It is fortunate that attorneys have undertaken to represent Ms. King pro bono on this appeal. They have done a good job of advancing her arguments in favor of a constitutional right to appointed counsel. The issue is one of law. *See Luscier*, 84 Wn.2d 135 (addressing the issue "'whether the right of a parent to his children is sufficiently fundamental to entitle an indigent parent to appointment of counsel at public expense in a permanent child deprivation proceeding as a matter of constitutional law'"). Nevertheless, as Ms. King's attorneys obviously

recognize, the constitutional question can only be fully appreciated in light of the facts, because the facts reveal the disadvantages to which our system exposes the unrepresented parent, who, as this court has recognized in the context of dependency proceedings,

> often lacks formal education, and with difficulty must present his or her version of disputed facts; match wits with . . . counselors, psychologists, and physicians and often an adverse attorney; cross-examine witnesses (often expert) under rules of evidence and procedure of which he or she usually knows nothing; deal with documentary evidence he or she may not understand, and all to be done in the strange and awesome setting of the . . . court.

*In re Welfare of Myricks*, 85 Wn.2d 252, 254, 533 P.2d 841 (1975).

Ms. King's case is complex, though not remarkably so. It is in a great many respects a microcosm of the legal hurdles that arise in quite ordinary circumstances, and therefore is a representative case for showing the importance of counsel to a parent seeking residential placement of her children. Because the facts illuminate the need for counsel and show how the absence of representation can frustrate proceedings in a court of law, I present them in some detail.

Brenda King and her former husband Michael were married in 1994. They have three children, and Ms. King also has two older children. Ms. King, who left school after the ninth grade, did not work outside the home. Instead, she was the primary caregiver for the five children and handled all the day-to-day parenting tasks.

The Kings initially separated in October 2003 and then permanently

separated in 2004. In September 2004, Michael King petitioned for dissolution of the marriage. Ultimately, he sought to become the primary residential parent for the Kings' three children. Until a few months before trial, the children remained with Ms. King, but then were placed with Michael King under a temporary order.

Michael King has been represented by counsel throughout these proceedings. Brenda King first sought help from the Northwest Justice Project, a statewide provider of civil legal aid, but this organization was unable to take her case at the time and referred her to Snohomish County Legal Services, a volunteer (pro bono) lawyer program. She visited their advice clinic in December 2004. In January 2005, Ms. King used her rent money to hire a private attorney who appeared on her behalf in connection with motions for temporary orders, commencement of discovery, agreement to handle Michael King's discovery requests, and requesting appointment of a guardian ad litem. When Ms. King was unable to make additional payments counsel withdrew, and as of mid-April 2005 Ms. King was again unrepresented.

Trial was continued from April 7, 2005 to August 17, 2005. In May, Ms. King made several calls and visits to Snohomish County Legal Services, which tried unsuccessfully over several months to find a lawyer who would provide pro bono services.

On August 17, 2005, at Ms. King's request trial was again continued, this time for five months. In her motion, she asked for the continuance to allow time

for discovery.[1] On September 13, 2005, she attended a Legal Services clinic and met with an attorney who noted that she was in "dire need of a *pro bono* attorney." Clerk's Papers (CP) at 57. Legal Services again unsuccessfully attempted to locate counsel. Although several attorneys viewed the file, they declined to take the case, citing complexities in parenting plan issues, the amount of discovery required, the time involved, and lack of preparation time.

One month before the scheduled trial date, Ms. King declined an offer by Legal Services to assist her with a motion for another continuance of trial. Ms. King told Legal Services that a request for a continuance would be futile given how close the trial date was and the lack of any success in securing pro bono representation. Nonetheless, she then filed a pro se motion for another continuance, raising issues she had raised earlier. Her motion was denied.

The trial court was clearly aware of her lack of representation. On several occasions Ms. King informed the court she needed counsel and that she could not obtain a lawyer because she could not afford one. For example, on May 18, 2005, she wrote, "I AM PRO SE Because I am broke." CP at 51.

The trial conducted in January 2006 lasted five days. Although there was only one contested issue, the primary residential placement of the three children, the trial involved psychological matters and allegations of domestic violence. Ms.

[1] According to Michael King, another reason for delay of trial until January 2006 was that neither party followed local court procedure for confirmation of trial.

King appeared pro se, acting as party, witness, and lawyer, under circumstances where the stakes for her were huge and her emotional involvement commensurate with the stakes.

Among other difficulties, she faced a guardian ad litem who was adverse to her position. The guardian ad litem recommended that the children reside primarily with their father and that he have sole decision-making authority on all major issues. The guardian ad litem also testified that the children missed school days when living with Ms. King, were often tardy, that Ms. King disrupted the school, and that the staff was very concerned. But the guardian ad litem testified without having contacted individuals that Ms. King had recommended as having knowledge about the children while having contacted many people recommended by Michael King. The guardian ad litem never prepared a final report, and the last "interim" report was prepared before Michael King underwent anger management evaluation. Ms. King needed the skills and knowledge of a lawyer to know when to object to the guardian ad litem's testimony and how to impeach her testimony. She was unable to do either effectively.

The guardian ad litem also testified that school officials had testified that the children came to school hungry while in Ms. King's care. Ms. King did not object to this hearsay testimony and the trial court gave it great weight in its decision. Testimony from school officials would have contradicted this hearsay. But Ms. King failed to subpoena and offer such contradictory testimony at trial.

Instead, after the trial court made its decision placing the children with Michael King, a school official delivered a letter to the court refuting evidence that anyone at the school had ever said the children came to school unfed. In the end, the trial court noted that it had "only sketchy information" about the children's school life, although such information was critical for a decision.

The trial judge commented several times about Ms. King's situation, saying that the court "tried to be patient and extend some courtesies to the mother because she [was] without counsel." CP at 84. The court tried to accommodate her lack of legal ability by giving explanations about legal processes such as how to admit exhibits, the hearsay rule, exceptions to the rule, questioning hostile witnesses, the scope of cross-examination, and what kind of evidence a court can properly consider. But not surprisingly, Ms. King simply could not conduct herself as a lawyer.

She could not understand and implement differences between offering testimony, questioning witnesses, and making argument to the court. Particularly damaging to her case was her lack of knowledge that pretrial reports, motions, and other submissions, aside from the guardian ad litem's report, would not be considered as evidence. Because she did not know this, she failed to subpoena witnesses. Thus, the trial court did not hear from some witnesses who had provided declarations favorable to Ms. King earlier in the case. She did not know how to get some exhibits admitted or introduce evidence from them through other

means. She also did not know how to obtain documents through discovery that a lawyer could have obtained, such as Michael King's financial records.

The guardian ad litem and the trial court relied on an anger management report about Michael that was admitted into evidence (the professional who prepared it did not testify). However, the report states it is "to be considered null and void if the client failed to provide or intentionally withheld any pertinent developmental or legal history." Pet'r's Ex. 6, at 6. Michael King had not disclosed a resisting arrest conviction or charges for violating a protection order, ongoing trouble with finances and employment, or that he had been required by an employer to take an anger management course because of threats he had made.

Ms. King was ill-equipped to handle issues that arose that would ordinarily require expert testimony, such as the question whether she suffers from attention deficit disorder and, if so, whether this affected her parenting ability. Due to her lack of skills as a lawyer, she did not present other testimony, for example, that of a therapist who would have testified, contrary to other witnesses, that the children were clean.

Ms. King was also unable to effectively counter the skilled lawyering of Michael King's counsel. She failed to object to hearsay evidence counsel introduced or to make other objections on the ground of leading witnesses, speculative testimony, or lack of foundation. Her present pro bono counsel cite to numerous places in the record where they believe successful objections to

admissibility of damaging evidence could have been made.

The trial court's patience and attempts to accommodate Ms. King's lack of knowledge and skills were sorely tried. The court said, for example, "[p]lease ask questions and avoid the commentary or I won't permit you to ask questions," 2 Verbatim Report of Proceedings (VRP) at 111, and "Ms. King, I'm a fairly patient person, and you're taxing my patience greatly," 3 VRP at 108. On its own, the court frequently refused to allow Ms. King's questions, testimony, and exhibits. The court also asked Michael King's attorney to object more, saying, "And if counsel will object when [Brenda King's] questions are so grossly inappropriate, I'd appreciate it." 3 VRP at 92.

In part due to Ms. King's lack of familiarity with legal procedures, the trial took a great deal of time. The court was also concerned about this and advised Ms. King that it would limit her time, and on several occasions did so.

Ms. King's self-representation not only fell far short of that which counsel could have provided, it affirmatively did her own case harm. This should surprise no one; the stakes were huge. She was facing the loss of her children. She could not separate her emotions from her conduct as her own legal representative. The judge commented at one point that her manner of cross-examining made him "feel [like] I'm in the middle of a marital argument between you and your husband that is initiated solely by you." 3 VRP at 108. Indeed, the judge stated that Ms. King's cross-examination of the guardian ad litem showed why she was not a capable

parent, stating that she had "not accepted the message, and instead . . . tried to shoot the messenger." CP at 102.

Following trial and issuance of the court's order placing the children with Michael King, a private attorney acting pro bono appeared on Ms. King's behalf and moved for a new trial and appointment of counsel. The trial judge stated:

> [A]lthough respondent 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, regrettably there are no public resources available with which to compensate counsel if an attorney were to be appointed to represent respondent and the court is unwilling to go beyond the present ethical encouragement that attorneys accept pro bono service and designate a family law practitioner to represent Ms. King without compensation.

CP at 39-40.

The trial judge also said:

> [C]andidly I agree with you insofar as your arguments about 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, 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.

> So, in principle, I agree with you that she should have been represented by an attorney. I think when there are issues of parenting and, in this case, a change from primary residential parenting, at least in fact from the mother to the father, these are critical issues. They're no less serious to the litigants, it seems to me, than the potential loss of liberty that comes from criminal proceedings.

VRP at 2-3 (Resp't's Mot. for Recons. & New Trial, Feb. 27, 2006).

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.

The record shows that Ms. King worked very hard, and tried as best she knew how, to secure placement of her children with her. While it cannot be said that she would have prevailed with the assistance of counsel, she was clearly at a significant disadvantage without it.

## ANALYSIS

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Fundamental liberty interests include the right of parents to establish a home

and bring up children, to control their education, to direct their upbringing, and to make decisions concerning their care, custody, and control. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997)).

Washington courts "have been no less zealous" than the United States Supreme Court in "their protection of familial relationships." *Luscier*, 84 Wn.2d at 137. Early in this state's history the court recognized parents' right to "the care, control, custody and education of their children." *Lovell v. House of the Good Shepherd*, 9 Wash. 419, 422, 37 P. 660 (1894). The parent has a "natural and *sacred right* . . . to the custody of his or her child." *In re Welfare of Hudson*, 13 Wn.2d 673, 678, 685, 126 P.2d 765 (1942); *accord Luscier*, 84 Wn.2d at 137. A parent's right to custody and control of her child is "'more precious to many people than the right of life itself.'" *Luscier*, 84 Wn.2d at 137 (quoting *Gibson*, 4 Wn. App. at 379).

Article I, section 3 of the Washington State Constitution provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law." A parent's interest in the care, custody, and nurture of her child is a fundamental liberty interest protected under article I, section 3. *Luscier*, 84 Wn.2d at 139.

The majority engages in a *Gunwall*[2] analysis and concludes that the state constitution's due process clause does not require an independent state constitutional analysis; instead, the analysis in *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), which applies under the Fourteenth Amendment to termination of parental rights proceedings, also applies under article I, section 3. This conclusion is a departure from the court's reasoning in *In re Dependency of Grove*, 127 Wn.2d 221, 229 n.6, 897 P.2d 1252 (1995). In *Grove*, which was decided after *Lassiter*, this court stated: "In civil cases, the constitutional right to legal representation is presumed to be limited to those cases in which the litigant's physical liberty is threatened, . . . *or* where a fundamental liberty interest, similar to the parent-child relationship, is at risk." *Grove*, 127 Wn.2d at 237 (emphasis added) (footnote omitted) (citations omitted) (citing *Luscier* and *Myricks*).

In *Luscier*, the court observed that "the lack of counsel, in itself, may lead improperly and unnecessarily to deprivation of one's children." *Luscier*, 84 Wn.2d at 138. In *Luscier*, this court held that indigent parents are entitled under

[2] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

the Fourteenth Amendment and article I, section 3 to appointed counsel at public expense in proceedings where parental rights may be terminated. Subsequently, the court reached the same conclusion with regard to dependency proceedings. *Myricks*, 85 Wn.2d 252. There, the court again noted that the right of a parent to the companionship of his or her child is fundamental. *Id*. at 254. The court explained that the essence of due process is the right to be heard, and the hearing must be both meaningful and appropriate to the case. *Id*. The court emphasized that in a dependency action an indigent parent acting pro se is at a distinct disadvantage. *Id*. The court concluded that "the nature of the rights in question and the relative powers of the antagonists, necessitate the appointment of counsel." *Id*. at 255.

Neither *Luscier* nor *Myricks* established any presumption limiting the right to representation to physical liberty. Nor did either case engage in the balancing test propounded in *Lassiter*. Both cases were decided under article I, section 3. By expressly reaffirming the decisions in *Luscier* and *Myricks*, and counterposing those cases to *Lassiter*, this court in *Grove* plainly recognized that a different analysis applies under article I, section 3 than applies under the Fourteenth Amendment when the fundamental interest in one's children is at stake. No Washington case has ever held that *Luscier* or *Myricks* was wrongly decided or is no longer valid.

*Grove* is not the only case recognizing that article I, section 3 calls for an

independent state constitutional analysis in certain contexts, either. Although this court has often treated the due process inquiry under the state and federal constitutions as the same, *Grove* and other precedent exists for the premise that in some contexts an independent analysis applies under article I, section 3. *See State v. Bartholomew*, 101 Wn.2d 631, 641, 683 P.2d 1079 (1984) (the reliability of evidence standard embodied in the state constitution's due process clause provides broader protection than federal due process).

Our precedent stands for the premise that when the fundamental liberty interest in one's children is at stake, an independent state constitutional analysis should be applied. The majority unfortunately departs from this premise. I would not.

The majority also reasons that unless termination of the parent-child relationship is at issue, either in an action for termination of parental rights or in a dependency proceeding that might eventually lead to termination of parental rights, a parent does not have a sufficient interest at stake to command appointment of counsel at public expense.

But as Ms. King's attorneys correctly point out, a parent's "liberty interest in [her child is in] the development of the parent-child relationship, not just its bare existence." Appellant's Answer to Br. of Amicus Curiae Robert M. McKenna, Att'y General at 12. The majority's reasoning ignores the very real effect of what happens when one parent is denied primary residential placement

after she has been the primary caregiver of her child. Where before she was involved in the day-to-day interactions, nurturing, and decision-making that together comprise a great part of a parent's relationship with her child, once her child is placed elsewhere she loses the day-to-day relationship in which she directed the upbringing and education of the child, nurtured him through the innumerable ups and downs of a young person's life, and helped prepare the child for his own responsibilities and duties in life. She loses the day-to-day emotional contact and physical contact. She loses the hectic surroundings of the morning when she helps the child get ready for school and the good-night rituals that precede bedtime for her child. Her child will not be in her home so that she can soothe him when he is hurting from a skinned elbow or from the unkind words of another child. She will not be present in her children's daily lives to provide ongoing spiritual guidance, if she wishes, or to teach manners and civic responsibility when each new day brings the opportunities to do so. She and her child will not be together day by day to nourish and share their love for each other. When a child is removed from the parent's home, thousands of moments of interactions are lost.

Those thousands of moments, adding up to years of development, are no longer hers. The loss of the parent's presence in the child's life and her contribution to the child's development exists regardless of whether the parent-child relationship still legally exists.

The fact that residential placement is subject to modification does not make the loss any less. Generally, modification of a custody decree cannot occur unless a court finds that there has been a substantial change in the circumstances of the child or the nonmoving party and that "modification is in the best interest of the child and is necessary to serve the best interests of the child." RCW 26.09.260(1). The circumstances under which a parent can move for modification of a custody decree are not within the control of the parent and may never occur. A parent cannot simply move to modify the decree once she obtains funds, if she ever does, to hire counsel to help her try to convince the court that primary residential placement should be with her.

The majority also believes that unless a parent is faced with the State as the party opponent, appointed counsel is not required. This is a somewhat puzzling conclusion, because whether faced with the superior and unequal resources of the State or the superior and unequal resources of an opposing parent who is represented by counsel, the parent is at a distinct and unfair disadvantage in proceedings to determine the primary residential placement of the child. Moreover, trial courts can access their own experts to conduct evaluations and studies of the parties, appoint guardians ad litem for the children, participate in questioning at trial and so on. An indigent pro se litigant in a "private" custody dispute can face resources as formidable as occur in parental termination proceedings.

But a marital dissolution cannot be viewed as a private affair akin to a contract dispute or a tort claim. Civil marriage is an institution that is created, maintained, and controlled by the State to serve state interests. The State controls access to the institution, and dissolution of it. State statutes govern the determination of child placement at the termination of a marriage. Even if the divorcing parents agree as to every aspect of their dissolution, their stipulations must be approved and entered by a court to have effect, and a court must agree that a parenting plan jointly agreed to by the parents is in the best interests of the child. RCW 26.09.002, .181, .184, .187.

Finally, as Ms. King's attorneys point out, safeguards that the majority cites as ensuring protection from erroneous decisions were followed, at least in letter, in the trial in this case. The trial judge nevertheless concluded, when ruling on the motion for a new trial and appointment of counsel, that Ms. King had been at a disadvantage because she lacked legal representation.

Under the independent state constitutional analysis applied in *Luscier* and *Myricks*, whether counsel must be appointed depends on the nature of the rights in question, and the relative powers of the antagonists. *Luscier* and *Myricks* involved the State as one of the parties, while here a parent is involved in a private dispute over custody.

Applying the analysis from *Myricks*: An indigent parent who lacks counsel is, as the trial court reasoned, at a distinct disadvantage. A contested custody

dispute often involves complex issues, expert witnesses, cross-examination of witnesses under the rules of evidence, documentary evidence, and the testimony and recommendations of a guardian ad litem who may be adverse to the indigent parent's position. In addition, the parent may face not only counsel representing the other parent, but also counsel for the children, if one was appointed. The parent's right at issue is her fundamental liberty interest in the care, custody, companionship, and control of her children—perhaps the most precious right a person may hold. That an individual may be deprived of liberty is the key issue in deciding whether counsel is constitutionally required. *Myricks*, 85 Wn.2d at 255. Although the State is not the party opponent in this case, if Ms. King loses she is deprived of the care, custody, companionship, and control of the children whether the State takes custody through termination or dependency proceedings or her former husband does through private litigation.

Given the nature of the rights in question, with so great a loss at stake, the enormous complexity of the domestic relations laws, and the fact that the unrepresented parent, due to indigency, is totally unequipped to put forward the necessary evidence, the circumstances here are sufficiently similar to those in *Luscier* and *Myricks* to require the same constitutionally-demanded right of counsel at public expense under article I, section 3. I would hold that she is entitled to appointed counsel at public expense under the due process clause of the state constitution.

It is important to bear in mind that beyond Ms. King's case, empirical studies have shown that indigent litigants without counsel receive less favorable outcomes than those with counsel. A Harvard law professor studied 900 families involved in custody proceedings. The study found that attorney-represented mothers were twice as likely as pro se mothers to be awarded full or joint custody when opposing fathers were represented by counsel. Robert H. Mnookin, Eleanor E. Maccoby, Catherine R. Albiston & Charlene E. Depner, *Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?, in Divorce Reform at the Crossroads* (Stephen D. Sugarman & Herma Hill Kay eds., 1990). A study in King County, Washington, found that shared parenting plans are as much as 42 percent more likely where both parties are represented by counsel than in cases where one party appears pro se. 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). Other studies show similar disparity between parties represented by counsel and parties acting pro se. *E.g.*, Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *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).

Pro se litigants, who frequently fail to present critical facts, cite relevant authority, or make proper objections (and understandably fail to do so) can affect

the decision-making process. Federal District Court Judge Robert W. Sweet observed that "every trial judge knows[] the task of determining the correct legal outcome is rendered almost impossible without effective counsel." Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 Yale L. & Pol'y Rev. 503, 505 (1998).

These studies and comments highlight the serious consequences of litigating child placement issues without legal representation. It is a fact of life that a pro se parent cannot navigate the legal channels in a custody dispute with the degree of success that a lawyer can. It is simply unfair to a parent to require her to face a represented opponent in a court of law when her relationship with her children is at stake.

Finally, I disagree with the concurrence that standing bars this claim. If Ms. King has a constitutional right to counsel at public expense, the only application such a right has is in legal proceedings. If she cannot complain in a court of law that she has a right to counsel but it was denied, then she cannot complain at all. I do not believe the standing doctrine was ever meant to preclude what is at the least a colorable claim to a constitutional right to counsel. Stated a bit differently, the issue here is not so much whether a recognized constitutional right has been violated, but rather whether the state constitution affords a right to counsel at all. That question is answered as a matter of law by examining the provisions of the constitution and applying our constitutional jurisprudence, it is

not answered by examining the conduct of the state as an actor.

Moreover, if the right to counsel does attach, then the only instance in which a violation can occur is in legal proceedings. In *Boddie v. Connecticut*, 401 U.S. 371, 376, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), plaintiffs were welfare recipients who claimed that because they could not afford court fees and costs imposed by the state they were denied access to the courts to obtain dissolution of their marriages. The United States Supreme Court explained, "[e]ven where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery." *Id*. at 376. The Court said that "[r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is . . . the only available one." *Id*. at 376-77. The Court held that due process prohibited a state from denying, solely because of inability to pay court fees and costs for service of process, access to its courts to persons who sought dissolution of their marriages.

Finally, following *Boddie*, the Court addressed a similar bar to an indigent's appeal, this time in circumstances closely akin to those in Ms. King's case. This time, the Court made it clear that requisite state action exists in cases where a court decree extinguishes certain fundamental rights. In *M.L.B. v. S.L.J.*, 519 U.S.

102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), the state of Mississippi required an appellant to pay the costs of record preparation in advance and denied an indigent mother's application to appeal in forma pauperis. The mother sought to appeal from a decree terminating her parental rights, in an action brought by her former husband and his wife *where the state was not a party* to the termination proceedings.

The Court stated that it "has consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships. In that domain, to guard against undue official intrusion, the Court has examined closely and contextually the importance of the governmental interest advanced in defense of the intrusion." *Id*. at 116. The Court explained that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *Id*. (quoting *Boddie*, 401 U.S. at 376). The Court stated that the indigent mother's "case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake." *Id*. at 116-17 (footnote omitted).

Of particular importance here and contrary to the concurrence's view that state action should bar this suit, the Court said that

> [a]lthough the termination proceeding in this case was initiated by private parties as a prelude to an adoption petition, rather than by a state agency, the challenged state action remains essentially the same: [the indigent mother] resists the imposition of an official decree extinguishing, as no power other than the State can, her parent-child relationships.

*Id*. at 116 n.8.

Analogously, here, although this is a private dispute, the only way a custody decree can ensue is by invoking the "state's judicial machinery" in a court of law. This is the only process through which Ms. King can be deprived of her fundamental liberty interest in her child, and the only forum in which she can seek to resist an official decree placing primary residential care of her children in someone else. Whether in a proceeding to terminate parental rights brought by the State or in a private custody dispute where she may be deprived of her relationship with her child, "the challenged state action remains essentially the same." Therefore, the required state action exists in sufficient measure in this case, just as it existed in *M.L.B*.

If Ms. King has a right to counsel, it can be violated only by denial in a court of law. If she cannot assert a violation under these circumstances because she lacks standing, the standing doctrine rather than the constitution decides, in effect, whether she has a constitutional right. But more to the point, the standing doctrine would render any constitutional right to counsel utterly meaningless. I would not permit the standing doctrine to act as an obstacle to determining

whether Ms. King has a right to counsel, nor to prevent her from asserting its violation.

## CONCLUSION

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.

No. 79978-4

AUTHOR:

Justice Barbara A. Madsen

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WE CONCUR:

Justice Tom Chambers

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