

## Why Can't I Get a Free Lawyer Appointed to Represent Me in My Family Law Case?

By: Marie White

The Washington Supreme Court decided this issue in the case of In Re the Marriage of King, 162 Wn.2d 378 (2007). You can get a copy of the full decision from the following link: <http://www.mrsc.org/mc/courts/supreme/162wn2d/162wn2d0378.htm>. In King, the court decided that an indigent parent has no right under the Washington State Constitution to appointment of counsel at public expense in a civil family law proceeding.

**The facts of King.** Brenda and Michael King were married for approximately 10 years and had three children. During the marriage, Brenda was the primary at-home caregiver. In September 2004, the parties separated and Michael filed for dissolution of the marriage and asked to be named the children's primary residential parent. He was represented throughout the case. Brenda was represented for a time, but was pro se for her five-day trial. Michael was awarded primary care of the children and Brenda was granted a visitation schedule and joint decision-making. Following trial, Brenda obtained counsel and moved for a new trial and requested that counsel be appointed to represent her at public expense. The superior court denied the motion, explaining that the legislature had not provided funding for counsel. The court also cited its lack of authority to appoint an attorney without compensation. Brenda appealed. The Washington Supreme Court affirmed the trial court's denial of Brenda's request for appointment of indigent counsel.

**The law analyzed in King.** Brenda's constitutional claims were primarily based on article I, section 3; article I, section 10; and article I, section 12 of the Washington State Constitution.

**Washington State Constitution Article I, Section 3.** This article provides, "no person shall be deprived of life, liberty, or property, without due process of law." The court found that Brenda's fundamental liberty interest was not at stake regarding her parenting plan because she maintained a parental relationship with her children and the opportunity to make decisions regarding their upbringing. In addition, the court found that the State plays a meaningfully different role in a private dissolution case than it does in dependency cases or in termination of parental rights cases. It neither applies its resources against either party nor instigates the proceeding. In fact, the court found that state resources reduce the risk of erroneous results.

**Washington State Constitution Article I, Section 10.** This article provides, "justice in all cases shall be administered openly, and without unnecessary delay." Brenda argued that the right of access is violated by less than meaningful access. She asserted that the right of access is violated when (1) the proceeding is adversarial; (2) crucial interests are at stake; (3) the unrepresented litigant is indigent and has made reasonable, but unsuccessful, efforts to obtain counsel; and (4) the unrepresented litigant is unable to adequately or effectively advocate for his or her interests. The Court disagreed, finding that indigence is not a barrier to meaningful access to the courts. It also found that the Washington courts already allow access by reducing or waiving court-imposed fees for indigent litigants. The court considered it too great a leap to include a right to publicly funded legal representation as part of the definition of "meaningful access." In addition, the court found that Brenda's approach would require a case-by-case hearing to determine whether the indigent parent requesting appointment of counsel has a right to counsel. The court found that such an approach would be unwieldy, time-consuming, and costly and that the proceeding might itself require appointment of counsel to present the parent's case.

**Washington State Constitution Article I, Section 12.** This is our privileges and immunities clause. It provides, "no 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." For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens to the detriment of the interests of all citizens. The terms "privileges and immunities" refers solely to those fundamental rights that belong to citizens of Washington by reason of their citizenship. The court found that in Brenda's case, the dissolution statutes do not create a privilege

and that Brenda was not denied, as a result of the statute's application, a privilege to which she would have been entitled but for government interference. Nothing affirmatively done by the State in this matter facilitated Michael's litigation or hindered Brenda's ability to litigate. This was a purely private matter initiated by the parties.

**Conclusion.** In deciding against Brenda, the Washington Supreme Court concluded that it may be that the legislature should expend resources to address the complexity that often accompanies dissolution proceedings. A wise public policy may require that higher standards be adopted than those minimally tolerable under the Constitution. However, the decision to publicly fund actions other than those that are constitutionally mandated falls to the legislature. Outside of that scenario, it is not for the judiciary to weigh competing claims to public resources.

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Marie White is Founder and CEO of Pro Se University PS ([www.ProSeUniversity.com](http://www.ProSeUniversity.com)). After witnessing many people represent themselves in a family law case, Marie realized that most of these people made mistakes in the process. She is changing this by offering affordable, explanatory services to guide people through common family law issues. Contact her at [marie@proseuniversity.com](mailto:marie@proseuniversity.com).

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