

No. 79978-4

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

In re the Marriage of:

MICHAEL STEVEN KING, Respondent,

v.

BRENDA LEONE KING, Appellant,

and

STATE OF WASHINGTON, involved party

Amicus Curiae Brief of International Law Scholars

in Support of Appellant

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IDENTITY AND INTERESTS OF AMICI CURIAE

Amici curiae are law professors, international law scholars, and legal clinics that focus professionally on international human rights law. There is growing recognition across the world that access to justice and a fair trial require parties to have counsel and that governments must provide lawyers to indigent people who could not otherwise be represented. *Amici* have special familiarity with this strongly persuasive body of authority and urge the court to consider it to determine that Ms. King has a right to a publicly provided lawyer in her dissolution case under the constitutions of Washington and the United States. The interests of *amici curiae* are described in greater detail in the motion for leave to file.

SUMMARY OF ARGUMENT

The status of the right to counsel under transnational law² is highly relevant to this Court's consideration of the scope of the right to counsel in Washington. The persuasive value of such law has been accepted by United States courts at all levels. These legal authorities are particularly relevant to state court jurisprudence, since our federal system accords states the primary responsibility for fulfilling many of our international human rights obligations.

² In this brief, we use the term "international law" to refer to treaties, covenants and similar materials that reflect the formal, collective agreement of many nations concerning relevant legal standards. The terms "foreign law" or "comparative law" are used to refer to the domestic law of other nations. The term "transnational law" encompasses both of these sources of law, i.e., both international treaties and domestic foreign law.

In this instance, the value of looking to foreign and international law is especially relevant. It was a family law case in which the European Court of Human Rights (ECHR) made the landmark decision that a “fair trial” often may require the assistance of counsel. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979). That decision reflected the jurisprudence of two-thirds of the then member states of the Council of Europe (COE).³ The right to publicly provide civil legal counsel extends back centuries in some countries and across diverse legal, cultural, and political traditions. Forty-nine member countries of the COE are implementing *Airey* and its progeny.⁴ *Amici* commend to this court the respect accorded the right to civil counsel within our common law tradition and within other legal systems.

ARGUMENT

I. The Persuasive Value of International and Foreign Law Is Well-Established, and U.S. Courts Have Frequently Looked to Such Sources When Adjudicating Domestic Rights

Both federal and state courts frequently draw on principles of transnational law to inform and illuminate domestic legal issues. Indeed, the Declaration of Independence explicitly notes the new nation’s desire to pay “decent respect to the opinions of mankind.” THE DECLARATION

³ See sec. II, *infra*..

⁴ There are 46 members of the COE, one of which, the United Kingdom is comprised of 4 countries, England, North Ireland, Scotland and Wales. This brief will focus on the right as it has developed in Europe. See *infra* sec. II and Appendix A. There are vibrant programs of civil legal aid in nine other foreign countries: Australia, Canada, India, New Zealand, Hong Kong, Japan, Zambia, South Africa, and Brazil.

OF INDEPENDENCE para. 1 (U.S. 1776).⁵ By examining relevant law from other jurisdictions in the course of resolving domestic legal issues, courts in the U.S. continue to pay this “decent respect,” while at the same time enriching and strengthening our domestic jurisprudence.

Judicial recognition of transnational law’s role in informing American jurisprudence is especially clear in areas that touch on due process rights. For example, in *Roper v. Simmons*, the U.S. Supreme Court examined the juvenile death penalty. Writing for the majority, Justice Kennedy looked to the opinions of other nations as persuasive authority. Responding to the dissenters who questioned this approach, Justice Kennedy opined that “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.” 543 U.S. 551, 578, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). *Roper* was not an aberration; the Supreme Court has frequently looked to the laws and opinions of other nations in determining issues pertaining to the rights guaranteed by the Eighth and Fourteenth Amendments of the Constitution.⁶ As the Supreme Court has found in these opinions, international and foreign law rulings help

⁵ See generally Harold Hongju Koh, *Edward L. Barrett, Jr., Lecture on Constitutional Law*, 35 U.C. DAVIS L. REV. 1085 (2002).

⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Atkins v. Virginia*, 536 U.S. 340, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); *Thompson v. Oklahoma*, 487 U.S. 815, 830, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988); *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 702 (1958).

illuminate the ramifications of different solutions to similar legal problems.

In addition to the U.S. Supreme Court's majority opinions exhorting the value of comparative legal analysis, individual Justices have also embraced transnational approaches in their judicial opinions and public statements. For example, Justice Ginsburg has noted the value of judicial decision-making that takes into account the decisions and opinions of international law and foreign jurisdictions. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 344, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (Ginsburg, J., concurring).⁷ Likewise, Justices Breyer and Stevens have found both comparative and international law materials to be valuable aids to constitutional interpretation.⁸

State appellate courts, including Washington courts, have

⁷ Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-First Cardozo Memorial Lecture—Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, “*A Decent Respect to the Opinions of [Human]kind*”: *The Value of a Comparative Perspective in Constitutional Adjudication*, Keynote Address at the American Society of International Law (Apr. 1, 2005).

⁸ *See, e.g., Patterson v. Texas*, 536 U.S. 984, 984, 123 S. Ct. 24, 153 L. Ed. 2d 887 (2002) (Stevens, J., dissenting from denial of *cert.*) (citing international consensus against the execution of a capital sentence imposed upon a juvenile to urge the Court to revisit the issue of the constitutionality of the sentence); *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 403, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000) (Breyer, J., concurring) (noting that other nations’ approaches to campaign finance are consistent with Supreme Court majority’s approach); *Knight v. Florida*, 528 U.S. 990, 995-96, 120 S. Ct. 459, 145 L. Ed. 2d 370 (1999) (Breyer, J., dissenting from denial of *cert.*) (citing Universal Declaration of Human Rights (UDHR) and case law of Canada, India, Great Britain and Zimbabwe to support the view that a lengthy delay in administering the lawful death penalty may be unusually and impermissibly cruel); *Printz v. United States*, 521 U.S. 898, 976-77, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (Breyer, J., dissenting) (discussing experiences of federal systems in Switzerland, Germany, and European Union as aids to deciding question of U.S. federalism).

demonstrated a similar interest in looking to transnational sources to illuminate domestic legal questions. For example, in 1973, the Washington Supreme Court in *Eggert v. Seattle*, 81 Wn.2d 840, 505 P.2d 801 (1973), examined Seattle's one-year durational residency requirement on applicants for civil service positions. In addition to citing the UDHR to support its holding that this requirement violated the state Constitution, the decision also cited the role of the right to travel under the law of England as a tool to assessing its significance under Washington state law. *Id.* at 841.⁹

Sister courts in nearby jurisdictions have also been active in developing comparative approaches to aid in resolving domestic legal issues. California courts have repeatedly cited transnational law. For example, the UDHR was cited by the California Court of Appeal in *In re Barbara White*, 97 Cal. App. 3d 141 (1979), in support of its determination that the California Constitution guaranteed freedom of movement within the state. Similarly, in *Santa Barbara v. Adamson*, 27 Cal. 3d 123, 130 n.2, 610 P.2d 436 (1980), the California Supreme Court

⁹ See also *Brewer v. Fibreboard Corp.*, 127 Wn.2d 512, 534, 901 P.2d 297 (1995) (citing English case law to establish that a plaintiff could sue one tortfeasor, obtain partial satisfaction, and then sue another tortfeasor because liability was several as well as joint); *Bauman by Chapman v. Crawford*, 104 Wn.2d 241, 251, 704 P.2d 1181 (1985) (Canadian case law demonstrating mounting criticism of the negligence per se doctrine cited by the concurrence); *Heidner v. St. Paul & Tacoma Lumber Co.*, 124 Wn. 652, 665, 215 P. 1 (1923) (citing English, Indian, and Australian case law in finding an executory contract was annulled by the commencement of war).

invoked the UDHR to interpret a state law protecting privacy.¹⁰

The Oregon Supreme Court's decision in *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), is one of the most cited exemplars of state courts' use of transnational law to provide interpretive guidance for state constitutional protections. *See, e.g.*, Ann I. Park, *Comment, Human Rights and Basic Needs: Using International Human Rights to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1261 (1987). In that case, the Oregon court dealt with a suit brought by male inmates of the Oregon State Penitentiary to enjoin prison officials from assigning female guards to duties that involved frisking male prisoners or supervising them in showers. The prisoners relied on a provision of the Oregon Constitution which prohibits treatment of prisoners with "unnecessary rigor." To ascertain the meaning of "unnecessary rigor," the Oregon Supreme Court examined pertinent international standards, crediting the relevance and usefulness of these "contemporary expressions of the same concern" regarding prisoner treatment. *Id. See also Humphers v. First Interstate Bank of Oregon*, 298 Or. 706, 710, 696 P.2d 527 (1985) (citing case law from Northern Ireland, Scotland, and New Zealand in discussing a physician's liability for disclosing confidential

¹⁰ *See also People v. Jones*, 17 Cal.4th 279, 322, 949 P.2d 890 (1998). (citing English case law in demonstrating the importance of the corpus delicti rule); *Gibson v. Gibson*, 3 Cal.3d 914, 916, 479 P.2d 648 (1971) (citing Scottish and Canadian case law in establishing that an unemancipated minor may maintain an action for negligence against his parents); *Follette v. Pacific Light & Power Corp.*, 189 Cal. 193, 214, 208 P. 295 (1922) (citing case law of Australia and Zambia in discussing property rights in an action for ejection).

information about a patient).

Appellate decisions in many other states – including Missouri,¹¹ New Hampshire,¹² Montana,¹³ and West Virginia¹⁴ – have also cited transnational law favorably in cases involving domestic legal issues. Further, sitting chief judges of state high courts have written approvingly of using transnational law in state court adjudication. *See* Margaret H. Marshall, *Wise Parents Do Not Hesitate to Learn from Their Children: Interpreting State Constitutions in the Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633 (2004) (Chief Justice, Massachusetts Supreme Judicial Court); Shirley S. Abrahamson & Michael Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273 (1997) (Chief Justice, Wisconsin Supreme Court).

There are practical as well as historic reasons for U.S. courts' embrace of transnational approaches. Experience has a longstanding role in the development and evolution of American jurisprudence. *See, e.g.*, Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881) (“the life of the law has not been logic, it has been experience”). Other courts' experiences dealing with the right to counsel are highly relevant to resolving whether this State's constitution should be construed to guarantee a right to counsel in

¹¹ *Simmons v. Roper*, 112 S.W.3d 397, 411 (Mo. 2003).

¹² *New Hampshire v. Robert H.*, 118 N.H. 713, 716, 393 A.2d 1387 (1978).

¹³ *Snetsinger v. Montana University*, 325 Mont. 148, 168 104 P.3d 445, 458 (2004) (Nelson, J. concurring)..

¹⁴ *Pauley v. Kelley*, 162 W.Va. 672, 679, 255 S.E.2d 859 (1979).

cases involving child custody. Taking into account transnational resolutions of similar legal issues will only enhance this Court's reasoning.

II. Publicly Provided Lawyers for Low-Income People in Non-Criminal Matters is a Robust Concept Elsewhere in the World

A. International Human Rights Treaty Law in Europe Requires Signatory States To Provide Low-Income Persons Representation Through a Lawyer in Civil Matters

Looking beyond our national borders to canvas the experience of other nations, this Court will quickly find that the principle of a right to counsel in civil matters is widely accepted. Europe provides a particularly compelling example, with clear relevance to the case at bar.

The Council of Europe was formed in 1949, in the aftermath of WWII, to protect human rights and the rule of law.¹⁵ The Council drafted the European Convention of Human Rights and Fundamental Freedoms¹⁶ (Convention) to which all members must become signatories. Cases brought under the Convention are interpreted by the European Court of Human Rights (ECtHR).

Article 6 (1) of the Convention reads:

¹⁵ Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I. Statute of the Council of Europe, 1949, ETS I ch. II, art. 3. *See also* COE Home Page, http://www.coe.int/T/e/Com/about_coe/ (last visited March 15, 2007).

¹⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, 228.

In the determination of his *civil rights and obligations* or of any criminal charge against him, everyone is entitled to a *fair* and public *hearing* within a reasonable time by an independent and impartial tribunal established by law.¹⁷ (emphasis added)

Interpreting this clause, the ECtHR had ruled that, “Article 6 (1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal.”¹⁸

Then in 1979 the ECtHR decided that access to a court may necessitate legal representation for the proceeding to be ‘fair.’ The case, *Airey v. Ireland*, involved a woman seeking a legal separation, with attendant issues regarding child custody, support, and protection from domestic violence. She lacked funds to hire a lawyer to represent her in the appropriate Irish court.¹⁹ Ms. Airey filed a petition in the European Commission for Human Rights²⁰ claiming access to court was denied.

In *Airey* the court stated:

The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey's appearance before the

¹⁷ *Id.*, art. 6, para. 1.

¹⁸ See, *mutatis mutandis*, Case “Relating To Certain Aspects of the Laws on the Use of Languages in Education in Belgium” (*Merits*), 6 Eur. Ct. H.R. (ser. A), 31, paras. 3 *in fine* and 4 (1968); *Golder v. U.K.*, 16 Eur. Ct. H.R. (ser. B), para. 35 *in fine* (1975); *Luedicke, Belkacem and KOç v. Federal Republic of Germany*, 29 Eur. Ct. H.R. (ser. A) 149, 161, para. 42 (1978); *Marckx v. Belgium* 31 Eur. Ct. H.R. (ser. A) (1976).

¹⁹ It is unclear from the record if she sought funds for a lawyer from the court. At the time, Ireland did not have a civil legal aid program.

²⁰ At the time the European system was two-tiered, a commission and a court. In 1998, the commission was abolished and all matters now go directly to the Court.

High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.²¹

The court then determined that in a proceeding for separation, potentially involving expert witnesses, complex legal issues and “often entail[ing] an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court,”²² it was improbable that she could do so. Additionally, the court took note of the disparity if her husband were to be represented by counsel.²³

Ireland had argued that it had not put positive barriers in her way, that she could petition for a separation in a *pro se* capacity and would have some assistance by the judge. While the ECtHR determined that there had been no unrepresented petitioners for separation in the Irish High Court and thus, it was not a proceeding for lay people, the reasoning of the result turned on the sophistication of the legal issues and the individual’s capacity to act in that setting:

Article 6 (1) may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.²⁴

²¹ *Airey*, para. 24.

²² *Airey*, para. 24.

²³ In later opinions “inequality of arms” has become a distinct basis for appointment of a lawyer. *See infra* Section II.D.

²⁴ *Airey*, para. 26.

Ireland also predictably objected to the decision in that the state would be required to pay funds to secure Ms. Airey a lawyer. The ECtHR's response was:

[f]ulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive.... The obligation to secure an effective right of access to the courts falls into this category of duty.²⁵

The *Airey* decision has become the foundation of a broad right to legal representation for low income people. Even at its narrowest, almost all member countries provide the right in family law matters.²⁶

B. The Right to a Publicly-Funded Civil Lawyer Has a Long History in Europe

The court's decision in *Airey* is not an isolated example. In fact, many of the nations making up the COE had reached similar conclusions regarding the right to civil counsel under their own national laws.

By at least 1495, England required courts to appoint lawyers for indigent civil plaintiffs.²⁷ There are indications from the Ninth Century onward that the English courts sometimes provided publicly paid counsel.

²⁵ *Airey*, para. 25. The ECtHR did not decide that a member state had to provide a lawyer in all civil matters. It declined to define the full scope but did suggest that one solution would be a "simplification of procedure"

²⁶ See sec. II.D. *infra*, and Appendix A.

²⁷ An Act to Admit Such Persons as Are Poor to Sue in Forma Paupis, 1494, 11 Hen. 7, c. 12 (Eng.).

Over the centuries coverage for defendants in civil matters was added and the range of substantive law matters broadened.²⁸

Other European countries have programs extending back centuries. Norway's program can be traced to the 1600's; Austria's since 1781; and, France, Germany, Italy, Portugal, and Spain since the 1800's.²⁹

Thus, for hundreds of years, numerous countries with diverse political, cultural and judicial systems have understood the necessity for parties in legal proceedings to have the benefit of counsel.

C. Differing Legal Traditions and Rationales All Lead to the Same Right to a Publicly-Funded Civil Lawyer for the Indigent

The European countries that have adopted a right to civil counsel embrace at least two distinct legal traditions: the Civil Law and the Common Law. These legal systems place very different emphasis on the role of the judicial branch in the political process. Court procedures and the kinds of matters which are justiciable vary enormously.³⁰ Despite

²⁸ See Luther M. Swygert, *Should Indigent Civil Litigants in the Federal Courts Have a Right to Appointed Counsel*, 39 WASH. & LEE L. REV. 1267 (1982); John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 365-66 (1923).

²⁹ Earl Johnson, Jr., et.al., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1975) [Justice Earl Johnson, Jr., Associate Justice of the California Court of Appeals]; Earl Johnson, *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985); Earl Johnson, *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrialized Democracies*, 24 FORDHAM INT'L L.J. S83 (2000).

³⁰ John Merryman, et. al., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, & EAST ASIA (1994).

these differences, many countries have concluded that low-income civil parties should have lawyers.

The rationales underlying this requirement are as diverse as the countries. They include confidence in courts as the state proffered dispute resolution mechanism; equality; access to justice; legitimacy of the state; the rule of law; social policy goals of poverty eradication; preservation of other human rights; and foundational for democracy. The ECtHR clearly focused on an access to justice as an essential element of fulfilling democracy's promise of, and reliance on, a fair trial. The English right to counsel derived from both a strong sense of equality and a desire to endow legitimacy on the King's courts.³¹ Switzerland's Supreme Court in 1937 found principles of equality between the rich and poor as the grounds for such a right.³² In 1973, the German Constitutional Court based the right on an access to justice rationale.³³

D. The Scope of the Right under the European Convention of Human Rights is Comprehensive for Low-Income Individuals

Substantively the right to counsel covers a wide spectrum of civil matters, including family law, housing, consumer and debt cases, and

³¹ See Seton Pollock, *LEGAL AID — DHE FIRST 25 YEARS* 12 (1975). A new system of legal assistance was created by statute in 1929. Joan Mahoney, *Symposium: Legal Services: Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 *ST. LOUIS U. PUB. L. REV.* 223, 226 (1998).

³² Francis William O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 *OHIO ST. L.J.* 1, 5 (1967) (citing judgment of Tribunal federal Suisse 1937, 63 *Arrets du Tribunal Federal Suisse [ATF]* 1, 209 (Switz)).

³³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 17, 1953, 26 *Entscheidungen des Bundesverfassungsgerichts [BverfGE]* 2, 336 (F.R.G.).

public benefits.³⁴ Approximately fifteen countries use language suggesting coverage of all civil disputes. Most identify specific exclusions rather than listing extensive inclusions. Typical exclusions are assigned claims, small claims, matters involving the running of a business or profession, and defamation.³⁵

Notwithstanding the traditional exclusion of defamation cases,³⁶ in *Steel and Morris v. United Kingdom* in 2005, the ECtHR found in favor of a right to counsel for individual defamation defendants sued by McDonald's Corporation.³⁷ Here, the court looked beyond the label of defamation to the fairness of the underlying procedure. The court determined that the case was factually, legally, and procedurally complex, and that lack of a lawyer familiar with the case throughout made the

³⁴ See Appendix A for a summary of the programs in the COE countries. For an extensive review of the right to counsel up to 1975, see MAURO CAPPELLETI et al., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1976); For a current look at the right to civil legal counsel in 58 countries, see Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP.POL. & CIV. RTS L. REV. 760 (2006). For detailed information see questionnaires answered by each country on COE and European Union websites, and conference papers collected at the International Legal Aid Group, Open Society and Public Interest Law Initiative websites. Council of Europe, Legal Aid — How to Benefit From It, http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/; European Union, Legal Assistance, Legal Aid, <http://ec.europa.eu/civiljustice/> (last visited Mar. 15, 2007). For an in depth look at the programs in specific countries, see Public Interest Law Initiative, Country Reports, <http://www.pili.org/en/content/view/51/53> (last visited March 15, 2007) (presenting New Developments in Legal Aid in Central and Eastern Europe and updates since the first Forum on Access to Justice held in December 2002, compiled by Open Society Justice Initiative and Public Interest Law Initiative, Second Forum on Access to Justice, 2005); International Legal Aid Group, National Reports, <http://ilagnet.org/> (last visited March 5, 2007).

³⁵ *Supra*, note 34 and Appendix A

³⁶ *Munro v. the United Kingdom*, App. No. 10594/83, 52 Eur. Comm'n H.R. Dec. & Rep. 158 (1987) (See especially para. 54).

³⁷ *Steel and Morris v. United Kingdom*, 22 Eur. Ct. H.R. 403 (2005).

procedure unfair. The court specifically noted “the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonalds....”³⁸ While the full impact of this opinion has yet to be felt, it appears to extend the right to free civil counsel where there is inequality of arms.

Almost all of the countries of Europe³⁹ provide free legal advice, often in areas outside of the scope of matters covered for further representation. All also provide lawyers for litigation in the first instance and on appeal. Roughly one-third include mediation and transactional matters. Two-thirds cover representation in administrative hearings.⁴⁰ Most of the countries have some type of standard for determining if the case has merit prior to appointment of counsel.⁴¹ Some countries have a “likelihood of success” test, the continuing viability of which is in doubt. In *Aerts v. Belgium*, the ECtHR reversed a determination by Belgium that the claim was not ‘well-founded’, holding that “it was not for the Legal Aid Board to assess the proposed appeal’s prospects of success; it was for the Court of Cassation to determine the issue.”⁴²

Financial need standards are in place in all countries with a right to a lawyer. In a few, such as Sweden and The Netherlands, the income

³⁸ *Id.* at 430.

³⁹ As can be seen in Appendix A, there are 5 member countries for which there is no information on their programs.

⁴⁰ *Supra*, note 34 and Appendix A.

⁴¹ *Supra*, note 34 and Appendix A.

⁴² *Aerts v. Belgium, 1998-V Eur. Ct. H.R. 83, para. 60.*

standards go well into the middle class. At the lowest income level the services are completely free, with a sliding scale for those earning more.⁴³

Financial need may not be the sole determinant for a right to a free lawyer. Often the aged, disabled, veterans, people on social security, and immigrants are automatically eligible for free counsel. In some countries such as France, Denmark, and Iceland, financial eligibility is waived if the issue is of significant public interest.⁴⁴

In sum, far from moving into new, untested waters, a decision extending the right to counsel here would follow upon the sound logic and experience of many jurisdictions that have reached a similar conclusion about the importance of providing counsel in civil matters, especially in family law cases.

III. States Have a Special Role in Implementing the Nation's International Human Rights Obligations

In addition to the persuasive value of foreign law, international law has special status in U.S. jurisprudence. The U.S. Supreme Court has long recognized that U.S. laws should be construed to be consistent with international law whenever possible. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L. Ed. 208 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”); *Talbot v. Seeman*, 5 U.S. (1

⁴³ *Supra*, note 34 and Appendix A.

⁴⁴ *Supra*, note 34 and Appendix A.

Cranch) 1, 43, 2 L. Ed. 15 (1801) (“the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations). Similar principles govern adjudication in state courts, since the Supremacy Clause of the U.S. Constitution provides that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.⁴⁵ The Supreme Court of Washington confirmed this status accorded treaties in *Broad v. Mannesmann Anlagenbau, A.G.*, where the court found that the Hague Convention on the Service Abroad of Extrajudicial Documents in Civil or Commercial Matters preempts inconsistent state laws. 141 Wn.2d 670, 674-75, 10 P.3d 371 (2000).

One of the international treaties ratified by the U.S. is the International Covenant on Civil and Political Rights (ICCPR).⁴⁶ The ICCPR has been interpreted by its treaty-monitoring body, the U.N. Human Rights Committee, to encompass procedural fairness in civil adjudication,

⁴⁵ This gives duly ratified treaties “a legal status equivalent to enacted federal statutes. As such, they prevail over previously enacted federal law (to the extent of any conflict) and over any inconsistent state or local law.” United States, Initial Report to Comm. on Elim. of Racial Discrimin. (CERD), addendum, para. 50, I.N. Doc. CERD/C/351/Add,1 (Sept. 21, 2000) [hereinafter U.S. CERD Report].

⁴⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. DAOR Supp.. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, art. 2.

including the right to counsel in civil matters.⁴⁷ The Committee has frequently suggested that legal assistance may be required to ensure fairness in civil cases in legal systems based on both common law and civil law traditions.⁴⁸

In our federal system, both the national government and the states must meet the U.S.'s obligations under international treaties. As the U.S. stated in its first report to the U.N. Human Rights Committee, the federal government is

a government of limited authority and responsibility . . . [and] state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, *marriage and divorce, the care of children* and exercise of the ordinary policy power. . . . Some areas covered by the Covenant fall into this category.

United States, Initial Report of the United States of America, delivered to the U.N. Human Rights Comm. (HRC), Addendum, para. 3, U.N. Doc. CCPR/C/81/Add.4 (Aug. 24, 1994) (emphasis added). The U.S. government explained that in order to comply with the treaty, “the United

⁴⁷ Article 14 of the ICCPR generally addresses fairness before domestic tribunals in both civil and criminal matters, and has been applied to issues of civil counsel. *See, e.g.*, Human Rights Committee, General Comment 13, art. 14 (21st sess. 1984) para. 8, Compilation of General comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 14 (1994) (noting that Art. 14 of the ICCPR applies to civil as well as criminal proceedings); Annual Report of the Committee to the General Assembly: 9th Report, Spain, para. 419, U.N. Doc. A/40/40 (1985) (Human Rights Committee requesting information on availability of legal aid in civil cases); List of Issues: Trinidad and Tobago. 16/08/2000, 70th Sess., U.N.Doc. CCPR/C/SR. 1879 (2000). *See generally* Northeastern Law School Program on Human Rights and the Global Economy, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases* (Dec. 2006), available at <http://www.slw.neu.edu/clinics/RightToCounsel.pdf>.

⁴⁸ *Id.* at 11.

States will implement its obligations . . . by appropriate legislative, executive and judicial means, federal or state, and that the federal government will remove any federal inhibition to the abilities of the constituent states to meet their obligations in this regard.” *Id.* para. 4. The Human Rights Committee has acknowledged this multi-level responsibility, most recently asking the U.S. to include additional information on state implementation of the ICCPR in its future compliance reports.⁴⁹

In sum, because the state of Washington is primarily responsible for implementing the ICCPR provisions relating to “marriage and divorce, [and] the care of children,” this Court should be guided by the principles relating to the right to counsel set out in this international treaty.

CONCLUSION

The brief is prepared to assist the Court in deciding this case by providing the court with a review of the right to counsel in civil cases across the world, with particular emphasis on Europe. Although the jurisdictions identified in this brief have a broad range of legal systems, they all provide a civil right to counsel in family matters. The rationales for requiring counsel for indigent persons are diverse, but the result is the

⁴⁹ Human Rights Committee, *Consideration of Reports Submitted by the States Parties Under Article 40 of the Covenant*, 87th Sess., U.N. Doc. CCPR/C/USA/CO/3 (2006), at ¶ 39.

same. *Amici* urge the Court to consider Appellant's claims in light of these principles.

RESPECTFULLY SUBMITTED May 1, 2007

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Under penalty of perjury under the laws of the State of
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DATED and signed this 1st day of May, 2007.

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Appendix A: Council of Europe Member Country Specific Information On The Scope Of The Right to Free Lawyers for Low-Income People In Civil Matters*

Country	Scope of Right					Client Qualifications	
	Covered Matters	Excluded Matters	Lawyer Services	Fora	Merits Test	Need	No need
Armenia	Alimony, personal injury to breadwinner	All others	A, L, M	TC, AH App	Case by case	Case by case	
Austria	All civil		A, L	TC, App	Not manifestly unfounded, in good faith	Yes SS	
Azerbaijan	All	None	A, L	TC, AH App		Yes SS	
Belgium	All	None	A, L, M, T	TC, AH App	Apparently well-founded	Yes SS	Asylum Disability minors
Bulgaria	Family, Emp't Pensions, Patent, Social Welfare	Property disputes	A, L	TC, AH App		Yes	Disability
Czech Republic	All civil		A, L, M, T	TC, AH App	Likelihood of success, not capricious	Yes SS	Case by case
Cyprus	Human rts, family		A, L	TC App		Yes	
Denmark	Broad	Def., Bus.,	A, L	TC	Fair chance of winning, Reasonable cause	Yes LEI	public interest, Principle, Ess.
Estonia	Broad	Def., Bus. IP	A, L, T	TC, AH App	Possibility of winning is clearly unlikely	Yes SS NGO	Equality of power, Complex
Finland	Estate, Emp't, LL/T, Social Security, Consumer, Wages, Family	Agreed divorce. Taxation	A, L, M, T	TC, AH App	C/B	Yes SS	Victims of DV &, sexual offense
France	All + enforcement	None	A, L, M, T	TC, AH App	Not manifestly inadmissible	Yes SS	Worthy interest, Imm., Vet. pensions, Minors
Germany LP - Yes	Broad	Taxation, Bankruptcy	A, L	TC, AH App	Likelihood of success	Yes SS	

* Unable to find information on Albania, Andorra, Bosnia-Herzegovina, Moldova and Georgia.

						LEI	
Greece	All	None	A, L, M, T	TC, AH App	Balance of probabilities	Yes SS NGO	Disability, Unemployed, Refugees, Ethnic minorities
Hungary LP - Yes	Broad	Bus., Customs, Bank loans, Const'l claims	A, L, M, N	TC, AH App	None	Yes SS	Homeless, Asylum
Iceland LP - Yes	Extensive list				Sufficient grounds, Important public pol'y	yes	Police misconduct, Paternity
Ireland LP - Yes	Broad	Defamation Land disputes, Conveyance, Class actions, Election pet'n, Test cases.	A,L	TC, App,	C/B, Likely to succeed	Yes SS minimum contribution	Asylum
Italy	Broad	Assigned claims	L	TC,A, AH	Not manifestly groundless	Yes NGO	Parental rights, Deport'n
Latvia			A, L, T	TC, AH App		Yes	Age, Disability
Liechtenstein LP -No	Broad + enforcement	Car acc., Bus. Profess'l activities	L	TC, App	Not frivolous, nor w/o prospect of success	Yes SS	
Lithuania	All	None	A, L, M, T	TC, AH App		Yes SS	
Luxembourg	All	None	A, L, M, T	TC, AH App	C/B, unlikely to succeed	Yes	
Macedonia LP - Yes	All	None	L	TC, App		Yes SS	
Malta LP -Yes	All	None	L	TC, AH App	Reasonable grounds	yes	
Monaco	All	none	L, M, N, T	TC,AH, App		Yes	
Netherlands	Broad	Matters of business or professions	A, L, M, N,T	TC,AH App	C/B, Manifestly unfounded	Yes SS	

Norway	All inc'g rule-making or legislative advocacy	Matters of business or professions, Real estate, Property damage, Consumer	A, L, M, N, T	TC, AH	Likelihood of success. C/B	Yes SS	Imm., Involuntary medical treatment custody
Poland	All + enforcement	None listed	L	TC, AH App,	Facts merit legal aid	Yes, SS NGO	Age, Disability
Portugal	All	None	L	TC, AH App		Yes SS Corps	
Romania	Broad	Def.	A, L, M, N, T	TC, AH App,		Yes	
Russia	Broad	Bus.	A, L,	TC, AH App		Yes	Age, Emp't, Disability, Political repression Alimony, WWII vets
San Marino			A, L, M, N, T	TC, AH App		Yes FF	
Serbia/ Montenegro	All civil	none	A, L, T	TC, App	C/B	Yes SS	
Slovak Republic	All + enforcement	None	A,L,	TC, AH	Not manifestly unreas'ble, Importance of claim	Yes SS	Minors, Alimony
Slovenia	Broad	Def., Maintenance Debts Property damage	A, L,	TC, AH App.	C/B, Likely to succeed. Well founded Reasons	Yes SS NGO	Advice, Exceptional costs
Spain	All + enforcement		A, L, T	TC, AH App	Likelihood of success,	Yes SS NGO	If other party represented
Sweden	Broad	Defamation Most family	A, L, M, T	TC, AH App		YES SS LEI	Minors
Switzerland	All Civil	None	L	TC, App	C/B, No hope of favorable outcome	Yes	
Turkey	All		L	TC, AH App	Likely to prevail	Yes	
Ukraine LP -Yes	Broad	Def., bus. Small claims	A, L	TC, AH App	No	Yes	Extensive list

United Kingdom							
England LP-Yes	Broad	Def., PI, Bus., Wills, Boundary disputes,	A, L	TC, App, AH-only Imm. and Emp't	C/B, Reasonable prospect of success, Wide public interest	Yes SS	Ess., Unable to proceed w/o funding
North Ireland LP – Yes	Broad	Defamation, Elections	A, L	TC, App, AH-only Land tribunals	Reasonable grounds		Minors
Scotland LP – Yes	Broad	Defamation, Elections, Simple divorce	A, L	TC, App, AH-only Land & Emp't tribunals	C/B, Plausible case	Yes SS	
Wales	Same as England						

Key

Lawyer Services

A - Advice
L - Litigation
M -Mediation
T - Transactions

Scope of right

All - All civil and Administrative
All Civil - All civil, no Administrative
Broad - Most civil with listed exclusions, see Fora if administrative matters are included.

Types of Fora

TC - Trial Court
AH - Administrative Hearings
App - Appeals

Merits Tests

C/B - Cost/benefits, often phrased as a reasonable person with resources would pay a lawyer to pursue
Reasonable Basis - Reasonable grounds for taking, defending, continuing

Need

Yes - Means there is an income standard for eligibility
SS – Sliding Scale
NGO – Non-Governmental Organizations: includes non-profits, charitable organizations.

No Need

Advice - Advice free to all
Ess. - Essential to Applicant
Imm. - Immigration
Public Interest - If matter of public interest
Prin. - Principle

APPENDIX B: COUNCIL OF EUROPE MEMBER STATES

Albania	Lithuania
Andorra	Luxembourg
Armenia	Macedonia
Austria	Malta
Azerbaijan	Moldava
Belgium	Monaco
Boznia-Herzegovina	Netherlands
Bulgaria	Norway
Czech Republic	Poland
Cyprus	Portugal
Denmark	Romania
Estonia	Russia
Finland	San Marino
France	Serbia/ Montenegro
Georgia	Slovak Republic
Germany	Slovenia
Greece	Spain
Hungary	Sweden
Iceland	Switzerland
Ireland	Turkey
Italy	Ukraine
Latvia	United Kingdom
Liechtenstein	