

WISCONSIN COURT OF APPEALS
DISTRICT 4

In re the Paternity of K.J.P.:

Jerome E. Parrish,

Appeal No.
2006AP000243

Petitioner-Respondent,

Circuit Court Case
No. 1992PA000011A

v.

Diana Romfeldt-Mendoza,

Respondent-Appellant.

APPEAL FROM CIRCUIT COURT FOR RICHLAND COUNTY,
HONORABLE EDWARD E. LEINWEBER, PRESIDING
BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	iv
I. STATEMENT OF THE ISSUES	1
II. STATEMENT AS TO WHETHER ORAL ARGUMENT IS NECESSARY	2
III. STATEMENT AS TO WHETHER THE OPINION SHOULD BE PUBLISHED	2
IV. STATEMENT OF THE CASE	2
A. Description of the Nature of the Case	2
B. The Procedural Status of the Case Leading up to the Appeal	3
C. The Disposition in the Trial Court	3
D. Statement of Facts Relevant to the Issues Presented for Review	4
V. STANDARD OF REVIEW	23
VI. ARGUMENT	24
A. DIANA MENDOZA HAS A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL IN THE CIRCUIT COURT.	24

	<u>Page</u>
B. ARTICLE I, SECTION 1 OF THE WISCONSIN CONSTITUTION REQUIRING EQUAL PROTECTION OF THE LAW IS VIOLATED WHEN INDIGENT LITIGANTS ARE DENIED THE FUNDAMENTAL RIGHT TO COUNSEL	29
C. ARTICLE I, SECTION 21(2) OF THE WISCONSIN CONSTITUTION GUARANTEES THE FUNDAMENTAL RIGHT TO AN ATTORNEY IN CIVIL ACTIONS TO ANY SUITOR; THIS INCLUDES IMPOVERISHED SUITORS	39
1. The Right to Counsel in the Wisconsin Constitution is a Fundamental Right.	39
2. The plain meaning of Section 21(2) guarantees to impoverished suitors the fundamental right to be represented by an attorney.	41
3. The constitutional history shows that Section 21(2) guarantees to impoverished sutors the fundamental right to an attorney.	41
4. <i>Piper v. Popp</i> is not authority for the denial of the fundamental right to counsel to impoverished suitors under Article I, Sections 1 and 21(2).	43
5. Article I, Section 21(2) does not require an impoverished suitor to represent herself.	46

	<u>Page</u>
D. SECTION 22 OF ARTICLE I OF THE WISCONSIN CONSTITUTION, READ IN PARI MATERIA WITH SECTIONS 1 AND 21(2), PROVIDES TO IMPOVERISHED SUITORS THE RIGHT TO COURT-PROVIDED ATTORNEYS.	48
E. THE CIRCUIT COURT’S FINDING THAT MS. MENDOZA WAS IN DEFAULT DUE TO HER NON-APPEARANCE WAS AN ERRONEOUS EXERCISE OF DISCRETION.	49
F. THE CIRCUIT COURT’S ORDER OF JANUARY 5, 2006 DENYING PRIMARY PLACEMENT TO MS. MENDOZA, GRANTING PRIMARY PLACEMENT TO MR. PARRISH, AND MANDATING CHILD SUPPORT AND WORK SEARCH AGAINST MS. MENDOZA WHERE SHE WAS UNREPRESENTED BY COUNSEL AND IT WAS IMPOSSIBLE FOR HER TO APPEAR AT THE HEARING WAS AN ERRONEOUS EXERCISE OF DISCRETION.	50
VII. CONCLUSION	51

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<i>Aicher v. Wisconsin Patients Compensation Fund</i> , 2000 WI 98, 237 Wis. 2d 99, 128, 613 N.W. 2d 849, 865-66 (2000).	29
<i>Ball v. District No. 4 Area Bd.</i> , 117 Wis. 2d 529, 537, 345 N.W. 2d 389, 394 (1984).	23
<i>Bearden v. Georgia</i> , 461 U.S. 660, 664-665, 103 S. Ct. 2064, 2068-2069 (1983)	33
<i>Boddie v. Connecticut</i> , 401 U.S. 371, 381, 91 S. Ct. 780, 788 (1971).	31, 37
<i>Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.</i> , 2001 WI App. 205, ¶ 11, 247 Wis. 2d 521, 634 N.W. 2d 544 (Wis. App. 2001).	49
<i>Carpenter v. County of Dane</i> , 9 Wis. 249 (1859)	40
<i>Dept. of Housing and Urban Development v. Rucker</i> , 535 U.S. 125, 131, 122 S. Ct. 1230 (2002).	41
<i>Douglas v. California</i> , 372 U.S. 353, 83 S. Ct. 814 (1963).	36
<i>Durkee v. City of Janesville</i> , 28 Wis. 464, 471 (1871).	38
<i>Evelyn C.R. v. Tykila S.</i> , 2001 WI 110, ¶ 18, 246 Wis. 2d 1 (2001).	23

	<u>Page</u>
<i>Flores v. Flores</i> , 598 P. 2d 893 (Alaska 1979).	38
<i>Griffin v. Illinois</i> , 351 U.S.12, 76 S. Ct. 585 (1956).	32, 33, 34, 35, 36, 38, 44
<i>In the Interest of D.B. and D.S.</i> , 385 So. 2d 83, 92 (Fla. 1980).	26
<i>In re Gault</i> , 387 U.S. 1, 87 S. Ct. 1428 (1967).	34
<i>In the Matter of the Condition of S.Y.</i> , 162 Wis. 2d 320, 469 N.W. 2d 836 (1991).	45-46
<i>Jacobs v. Major</i> , 139 Wis.2d 492, 508, 407 N.W.2d 832, 838 (1987).	38
<i>Jacobs v. Major</i> , 132 Wis. 2d 82, 27, 390 N.W. 2d 86, 103 (Wis. App. 1986) (Gartzke, J., concurring)	40
<i>Jadair, Inc. v. U.S. Fire Ins. Co.</i> , 209 Wis.2d 187, 205, 562 N.W.2d 401 (1997), <i>cert. denied</i> 522 U.S. 998, 118 S. Ct. 565, 139 L. Ed.2d 405.	47
<i>Johnson v. Allis Chalmers Corp.</i> , 162 Wis. 2d 261, 275, 470 N.W. 2d 859 (1991).	49
<i>Joni B. v. State</i> , 202 Wis. 2d 1, 15, 549 N.W. 2d 411 (1996).	30
<i>Kenny A. v. Sonny Perdue</i> , 356 F. Supp. 2d 1353 (N.D. Ga. 2005).	38

	<u>Page</u>
<i>Lassiter v. Department of Social Services</i> , 452 U.S. 18, 101 S. Ct. 2153 (1981).	44, 45
<i>Matter of Eisenberg's Estate</i> , 90 Wis. 2d 620, 280 N.W. 2d 359 (Wis. App. 1979).	30
<i>Matter of Ella B.</i> , 30 N.Y. 2d 352, 285 N.E. 2d 288 (N.Y. 1972).	38
<i>Mitchell v. Moore</i> , 786 So. 2d 521, 527 (Fla. 2001).	29
<i>M.L.B. v. S.L.J.</i> , 519 U.S. 102, 117 S. Ct. 555 (1996).	34, 35
<i>Olmsted v. Circuit Court for Dane County</i> , 2000 WI App. 261, 240 Wis. 2d 197 (Ct. App. 2000).	10
<i>Piper v. Popp</i> , 167 Wis. 2d 633, 482 N.W. 2d 353 (1992).	43, 44, 45
<i>Powell v. Alabama</i> , 278 U.S. 45, 72 (1932)	40
<i>Saenz v. Roe</i> , 526 U.S. 489, 507, 119 S. Ct. 1518, 1528 (1999).	31
<i>Schmelzer v. Murphy</i> , 201 Wis. 2d 246, 251, 252, 548 N.W. 2d 45, 47 (1996).	32
<i>State v. Martin</i> , 191 Wis.2d 647, 652, 530 N.W.2d 423 (Wis. App. 1995).	29, 40
<i>Tennessee v. Lane</i> , 541 U.S. 509, 533, 124 S. Ct. 1978, 1994 (2004).	30, 40

	<u>Page</u>
<i>Tomczak v. Bailey</i> , 218 Wis. 2d 245, 261, 578 N.W. 2d 166, 174 (1998)	32
<i>Treiber v. Knoll</i> , 135 Wis. 2d 58, 76, 398 N.W. 2d 756, 763 (1987).	37
<i>Williams v. Illinois</i> , 399 U.S. 235, 90 S. Ct. 2018 (1970)	34

CONSTITUTIONAL PROVISIONS AND STATUTES

Wis. Const. Article I, Section 1	29, 37, 44, 48, 51
Wis. Const. Article I, Section 21(2)	30, 33, 35, 37, 39, 40, 41, 42, 44, 46, 47, 48, 51
Wis. Const. Article I, Section 22	48, 51
U.S. Const., 6 th Amendment	43
U.S. Const., 14 th Amendment	43

OTHER AUTHORITIES

Robert Catz & John T. Kuelbs, <i>The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area</i> , 13 <i>J. Fam. L.</i> 223, 233 (1974).	46
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	<u>Page</u>
“Governor’s Budget Recommendations” - Department of Tourism, Budget p. 489, See www.doa.state.wi.us/debf/execbudget.asp	26
Hand, Learned, “Thou Shalt Not Ration Justice,” address before the Legal Aid Society of New York (9 Brief Case No. 4, pp. 3, 5 [1951]).	25
Legislative Reference Bureau Informational Bulletin 76-IB-9, “Constitutional Amendments Given ‘First Consideration’ Approval by the 1975 Wisconsin Legislature” (December 1976), pp. 1-7.	43
<i>New York Times</i> , November 4, 2003, p. A1.	26
NLADA <i>Legal Aid News</i> - “President’s 2007 FY Budget for Legal Aid,” February 7, 2006.	26
Quaife, Milo M., <i>The Constitution of 1846</i> , pp. 295, 586.	42
Quaife, Milo M., <i>The Attainment of Statehood</i> (1928).	28, 43
SCR 20:3.1	32
State Bar of Wisconsin President John S. Skilton, “Our Justice System Can’t Afford Cuts to Legal Services for Poor,” <i>Milwaukee Journal–Sentinel</i> (September 29, 1995)	25

I. STATEMENT OF THE ISSUES

- A. Whether Ms. Mendoza¹ has a constitutional right, under the Wisconsin Constitution, Article I, §§ 1, 21(2) and 22, to court-appointed counsel to represent her in the Circuit Court.

The trial court answered this “no.”

- B. Whether the Circuit Court’s finding that Ms. Mendoza was in default due to her non-appearance was an erroneous exercise of discretion.

The trial court answered this “no.”

- C. Whether the Circuit Court’s order denying primary placement to Ms. Mendoza, granting primary placement to Mr. Parrish, and mandating child support and work search against Ms. Mendoza where she was unrepresented by counsel and it was impossible for her to appear at the hearing, was an erroneous exercise of discretion.

The trial court answered this “no.”

¹ Ms. Mendoza now uses her married name: Mendoza. The correct spelling of her other name is “Ronfeldt.” We will use “Ms. Mendoza” throughout.

II. STATEMENT AS TO WHETHER ORAL ARGUMENT IS NECESSARY

Oral argument is necessary because a significant question of state and federal constitutional law is presented; a decision by this Court will help develop and clarify the law; and the question of right to counsel in civil cases is a novel one, the resolution of which will have statewide impact.

III. STATEMENT AS TO WHETHER THE OPINION SHOULD BE PUBLISHED

The opinion should be published for the above reasons.

IV. STATEMENT OF THE CASE

A. Description of the nature of the case

This case was originally a paternity action, filed in 1992. In 2004, it became an action to decide the custody and best interests of the parties' daughter, K.J.P. On January 5, 2006, the Circuit Court of Richland County entered a final order denying Ms. Mendoza all of her requested relief,

including her motion for primary placement and for court-appointed counsel. Ms. Mendoza appeals that final order.

B. The Procedural Status of the Case Leading up to the Appeal

This case began with the filing by Jerome Parrish of a Petition for Determination of Custody on February 26, 1992 (R. 2), and a Stipulation and Order Amending Oral Judgment of Paternity on August 12, 1992, declaring Mr. Parrish to be the natural father of a girl, K.J.P. (R. 7). On December 15, 2000, Jerome Parrish was granted primary physical placement of K.J.P. (R. 15).

In March of 2004, there began a series of procedural events culminating in the final order of January 5, 2006, which events are described fully in the Statement of Facts, *infra*.

C. The Disposition in the Trial Court

The trial court, in its January 5, 2006 order, denied Ms. Mendoza's request to be represented by a court-provided attorney; denied her motion

for primary placement of her daughter; ordered her to pay Jerome Parrish, the Petitioner-Respondent, through a wage assignment, child support in the amount of \$151.75 per month; ordered Ms. Mendoza to seek work by applying for ten positions per month; ordered her to report her work-search efforts to Mr. Parrish's attorney by the first day of each month; granted Mr. Parrish judgment in the amount of \$339.25 in guardian *ad litem* fees; found Ms. Mendoza in default for failure to appear when that appearance was impossible because her car broke down in Appleton on the way to the hearing; and ordered that all previous orders of the Circuit Court remain in effect. (R. 67).

D. Statement of Facts Relevant to the Issues Presented for Review

On July 15, 2005, Ms. Mendoza filed with the Circuit Court for Richland County a Motion for Appointment of Counsel, asserting as grounds her right to the appointment of an attorney under the Wisconsin Constitution, Article I, Sections 1, 21(2) and 22. (R. 44, p. 1). Ms. Mendoza's affidavit in support of this motion stated that she could not

afford to hire an attorney and that she needed an attorney to represent her in the case, as she did not know enough about the law to represent herself. (R. 45, p. 1). Her affidavit also set forth facts establishing her indigency. *Id.* The Circuit Court did not grant her motion on July 15. (R. 72, p. 21, L. 5-7).

Ms. Mendoza thus had to proceed through this July 15, 2005 hearing without a lawyer. (R. 72, p. 3, L. 8-9). A lawyer would have made a difference. Ms. Mendoza had, on August 13, 2004, filed a motion to change physical placement of her daughter K.J.P. from Mr. Parrish to her because of her concern that K.J.P. was being abused by her stepmother, that K.J.P. didn't have sleeping quarters, and because of K.J.P.'s expressed wishes. (R. 25 and 26). Ms. Mendoza intended to raise these issues at the July 15 hearing (R. 72, p. 6, L. 2-6), and though she had K.J.P. present in the courtroom to testify (R. 72, p. 5, lines 9-10), K.J.P. was sent by the court into the hallway, (R. 72, p. 3, lines 13-21), was not permitted to testify, and the questions of the abuse, no sleeping quarters, and of K.J.P.'s wishes were neither argued nor decided. (R. 72). To the contrary, most of the hearing was devoted to castigating Ms. Mendoza for failing to respond properly

throughout a case in which the court and both lawyers were themselves confused. Mr. Parrish's attorney's arguments, the guardian *ad litem*'s arguments, and the court's decision were based not on the child's best interests, but on Ms. Mendoza's alleged malfeasance. (R. 72).

Ms. Mendoza had no opportunity at the hearing to make any kind of record as to abuse of her daughter or a basis for a change of placement and, that opportunity having been foreclosed, the guardian *ad litem* made a recommendation *based on that very lack of record*. (R. 72, p. 15, L. 5-25, p. 16, L. 1-4). The guardian *ad litem* implied that Ms. Mendoza was engaged in "shenanigans" (R. 72, p. 15, L. 24-25); an attorney would have defended her against this accusation. Unrepresented as she was, the statement went un rebutted, and possibly adversely affected the court.

Ms. Mendoza attempted to speak for herself. She stated "Can I say . . .", and was then cut off by the guardian *ad litem*. (R. 72, p. 16, L. 5-10). She again said: "Can I say one thing?" and was not permitted to speak. (R. 72, p. 16, L. 11-15). A third time she said: "I called him and . . .", and this time the court cut her off, stating "Ms. Romfeldt, I will give you plenty of opportunity to speak, but when you're given the floor." (R. 72, p. 16, L. 16-

19). The only subsequent “plenty of opportunity” for Ms. Mendoza to speak was when the court asked “. . . what else would you like to say Ms. Romfeldt?” and she tried to explain that she had tried to reach the guardian *ad litem* with regard to continued placement with her, to tell him that her daughter indicated that she was going to run away if she went back to Mr. Parrish. (R. 72, p. 17, L. 17-25). The guardian *ad litem* then immediately moved the discussion away from the point Ms. Mendoza was attempting to make, and complained about Ms. Mendoza not keeping an appointment with him, to which she responded that she could not drive because she had had an injection. (R. 72, p. 18, L. 1-18). Thus, she had no real opportunity to make her case, whereas a lawyer could have kept the hearing focused and made the case about abuse and neglect, K.J.P.’s wishes, and the child’s best interests.

Ms. Mendoza had little time to prepare for the hearing. (R. 72, p. 5, lines 15-17). Preparation would have been difficult, because the case confused even the lawyers. The court asked the guardian *ad litem* what was his view as to the status of the matter, and he replied that at the last court appearance “we had I think a status conference or something . . .”. (R. 72,

p. 7, L.3-4). There was significant confusion as to whether there existed an order that Ms. Mendoza was required to pay the guardian *ad litem* fees and child support, and as to how much she was to have paid. (R. 72, p. 7, L. 16-25; R. 72, p. 8, L. 1-24).

Although Ms. Mendoza was roundly criticized for failing to participate, it was not clear whether she even knew about a purported status conference on April 4, 2005; she stated that she did not know that there was a court “hearing” on that date. (R. 72, p. 9, L. 1-4). The Court Record shows that Ms. Mendoza had appeared at a status conference on November 9, 2004, that the court had held a status conference on February 1, 2005 with no appearances recorded, and that the court held an April 4, 2005 status conference without Ms. Mendoza’s participation, and issued an order to dismiss. (R. 74, p. 3 of 5). It was also a matter of confusion as to who was to submit an order for guardian *ad litem* fees and for dismissal, and who was to review those orders. (R. 72, p. 9, L. 13-25; R. 72, p. 10, L. 1-25).

It was also apparent that, because Ms. Mendoza was apparently not on the telephone for the April 4 status conference, she was not made aware

of the dismissal for lack of prosecution, if such there was. (R. 72, pp. 9-10; R. 74, p. 3 of 5). The guardian *ad litem*, Mr. Rudolph, claimed that his order regarding his fees went to all parties, and then opposing counsel, Ms. Campbell, stated that, after the April 4 status conference, she had been asked to prepare an order regarding the dismissal. (R. 72, p. 10, L. 17-23). Ms. Mendoza denied receiving that order (R. 72, p. 11, L. 4-5), and the court indicated that there was no signed order in the file. (R. 72, p. 11, L. 14-15, 17, 21-23). Opposing counsel, Attorney Campbell, also did not possess a signed order, and the court stated: “looks like it got stuck in the file unsigned.” (R. 72, p. 11, L. 21).

Since Ms. Mendoza indicated that she had not received the order, the court asked to what address the order had been sent. Attorney Campbell could not say, because her letter did not indicate any address. (R. 72, p. 11, L. 25; p. 12, L. 1-5, 22-25). The court’s file showed Ms. Mendoza’s address at 314 Cass Street in Green Bay, which was incorrect. (R. 72, p. 12, L. 6-9). Ms. Mendoza, on April 10 or 11, 2005, had written the court that “I have a new change of address which is 1078 Roscoe Street, Green Bay, WI 54304 . . .” (R. 34, p. 5). Nevertheless, the court continued to list her

address as 314 Cass Street, Green Bay, and the record shows that Notices of Hearing were mailed to her at that address as of May 6 (R. 35) and July 19, 2005 (R. 50).

Even though Ms. Mendoza had, back on August 4, 2004, submitted to the court a Petition for Waiver of Filing and Service Fees with an Affidavit of Indigency, and even though the court then found her indigent (R. 23), and even though she submitted two more affidavits, on April 21 and July 15, 2005, showing her continued indigency (R. 34, pp. 1-2; R. 45, pp. 1-3), it appears that she was nevertheless ordered to pay a \$1,000 fee for the guardian *ad litem*. (R. 33). In fact, at the July 15, 2005 hearing, the court and parties ignored the August 13, 2004 finding of indigency. (R. 72, p. 13, L. 1-20). Had she been represented, her attorney would certainly have drawn the court's attention to its August 4, 2004 indigency order and this Court's holding in *Olmsted v. Circuit Court for Dane County*, 2000 WI App. 261, 240 Wis. 2d 197 (Ct. App. 2000), that an order requiring an indigent former wife to begin making monthly payments for guardian *ad litem* fees infringed on her due process right of access to the courts, and thus constitutes an erroneous exercise of discretion.

There appears to have been further confusion as to whether Ms. Mendoza was justified in failing to keep an appointment to speak with the guardian *ad litem*. This failure was held against her at the July 15 hearing. The date of the appointment is not in the record. Ms. Mendoza stated that she had received an injection for her deteriorating disk and was unable to drive from Green Bay to Richland Center on the appointed day, and that she had notified the guardian *ad litem*'s receptionist. (R. 72, p. 18, L. 11-18). Ms. Mendoza had also notified the court of her serious back problems on April 21, 2005 by attaching to her Affidavit of Indigency an April 11 letter from her physician. (R. 34, p. 3). She also attached a statement of limitations signed by her physician which showed that driving was limited to "1-3 Hours." (R. 34, p. 4). Disregarding all of this, the guardian *ad litem* claimed that "she had a scheduled appointment that she failed to make." (R. 72, p. 18, L. 5-6). Had Ms. Mendoza been represented by an attorney at the time her degenerative disk disease forced her to cancel, the attorney could have rescheduled for her, and confirmed this by letter to the guardian *ad litem*.

Next, the court apparently signed, *but not until the July 15, 2005*

hearing, a proposed order which Attorney Campbell had drafted at some point after April 4, 2005. The court on July 15 made that order effective *nunc pro tunc* to April 4, 2005, and then gave Ms. Mendoza some period of time “. . . to make a showing that we were thinking about when that order was granted when you failed to call in.” (R. 72, p. 20, L. 11-16). The court provided no explanation as to what “we” were “thinking about” on April 4, when “we” discussed matters in Ms. Mendoza’s absence.

There is, significantly, no April 4, 2005 court order in the record, and no note of it in the court’s “Civil Court Record.” (R. 74, p. 3 of 5). The latter contains notes of an April 4, 2005 status conference which provides: “. . . This matter dismissed 20 days from today for lack of prosecution. Mr. Rudolph to submit order for GAL fees. Ms. Campbell given 15 days to review order.” *Id.* Of course, these notes did not go to Ms. Mendoza. There is no indication of any subsequent written order of dismissal, or any steps which Ms. Mendoza should have taken to avoid dismissal, which was sent to Ms. Mendoza or to any other party.

The next document from the court clerk is a Notice of Hearing for July 15, 2005, with an indication that it was mailed to Ms. Mendoza’s

former address – 314 Cass Street. (R. 35). In view of the fact that this hearing was scheduled, the case was obviously not dismissed pursuant to some unwritten April 4, 2005 order.

The record also discloses that there was confusion and uncertainty as to what Ms. Mendoza and Mr. Parrish had agreed upon between themselves as to the time in the summer during which their daughter could reside with Ms. Mendoza. (R. 72, p. 5, L. 7-10; p. 14, L. 2-5). An attorney would have reduced any such agreement to writing, eliminated that confusion, and in doing so enhanced Ms. Mendoza's position before the court.

There was also significant confusion as to what the standard for reviewing the placement of the child was to have been under the statute. (R. 72, p. 24, L. 17-25, p. 25, L. 1-5). That issue was never resolved at that hearing, and an attorney representing Ms. Mendoza could have ensured that the standard was clarified, and that the best interests of K.J.P. received a hearing.

On July 19, 2005, the court clerk issued a Notice of Hearing for December 6, 2005 at 1:30 p.m. This notice was mailed to Ms. Mendoza's former address at 314 Cass Street in Green Bay at a time when her address

was 1078 Roscoe Street. (R. 50; R. 34, p. 1).

On July 20, 2005, the court issued an order providing, *inter alia*:

1. *Respondent would have 15 days from the date of the hearing [this would be less than 10 days when and if Ms. Mendoza received this order] to show cause why her motion for a change of placement should not be dismissed for the reasons “. . . set forth in the Court’s order of July 15, 2005 nunc pro tunc April 4, 2005”;*
2. *The court would withhold ruling on respondent’s indigency application [ignoring the fact that it had already found her indigent];*

** * **
6. *The matter would be scheduled for further proceedings on December 6, at which time the court would hear respondent’s indigency application and motion for court-appointed counsel and petitioner’s motion for child support.*

(R. 51). (Our comments are in brackets and nonitalicized.)

When the December 6 hearing began, the court was aware that Ms. Mendoza had called the court clerk to say that, because her truck had broken down in Appleton, she could not attend the hearing, and would like to have it adjourned. The court stated:

. . . Ms. Romfeldt [Mendoza] does not appear. She has called the clerk’s office a number of times today and, Ms. Fruit, can you more or less make a record on that?

THE CLERK: I just heard fragments of the conversation that Ann had with her, the clerk, but she stated that her truck was not working and she had no other way or means of getting to court today.

THE COURT: Maybe counsel have heard more. She says, or the person who called identifying themselves as her said that they got to Appleton and the car broke down and were going to attempt to make other arrangements to get here and then ultimately called back and said she would not be here.

THE CLERK: Right.

** * **

THE COURT: Okay. Well would you buzz down to Ms. Robinson and ask whether Ms. Ronnfeldt specifically asked that this matter be continued.

THE CLERK: Ms. Robinson had an appointment she had to go to this afternoon.

THE COURT: Okay. The messages that came back from Ms. Robinson to me I did not get that message. She inferred she couldn't be here. She didn't want the thing to go forward. I can't specifically say I got that, and beyond that I would say this case has been characterized by Ms. Ronnfeldt not being here. I don't know, Ms. Campbell, what's your request as to how we proceed?

MS. CAMPBELL: Well, your Honor, I agree with this. This has been characterized by her antics either not being here or being here and having antics. At this point in time, your Honor, this is her motion for the placement change, and the Court at the last hearing, an order filed July 20th indicated she had 15 days to show, for her motion to change placement, why it shouldn't be dismissed. Nothing has been filed in that regard. She has not taken any steps to file anything. The only thing she did file through Mr. Ebbott is a writ of prohibition. As I understand where that sits right now, I talked to my associate at my office who was working on the brief, the Supreme Court asked for a response from us on the writ of prohibition that was sent in about a week to two weeks ago. I'm not entirely sure of the date. They haven't ruled on the writ of prohibition so I guess where we stand right now, your Honor, I'm requesting that her motion for a change of placement be dismissed.

THE COURT: Well I think that already has happened. She was given, there had been an earlier dismissal for failure to appear at an earlier hearing, and then when she was here on July 15th I think that she said,

and there is a transcript of this, I think she said she didn't know about that or something and it was dismissed for failure to prosecute. So then an order was entered. It was actually entered on July 15th nunc pro tunc back to April 4th dismissing it for lack of prosecution unless within 20 days – no, I'm back to being confused again.

MS. CAMPBELL: Well, Judge, as I understand it, you gave her a, basically you gave her a second chance.

THE COURT: That's what I'm recalling is that she had an opportunity to come into compliance. Are you recalling that any more specifically, Mr. Rudolph?

MR. RUDOLPH: Yeah, I do have some specifics, and I think it, it ties into not appearing here today in this sense. It could be 40 below zero and she might not make it for that reason but it would not change the Court's prior order. Here's what happened. You did dismiss. You ordered a dismissal on 4/4/ of 05, gave her 20 days to show cause why it should not be dismissed for failure to prosecute. She failed to do that. But as was mentioned, when we were here on July 15th you gave her a second chance, for whatever reason, but she had 15 days to show cause after July 15th why the prior order for dismissal should not be entered. You did specifically, that day, reaffirm your prior order so there is no --

THE COURT: Thank you. That is the order of July 20th which has been entered.

MR. RUDOLPH: Well, but there is not, there is not a separate order yet on file which would come from today formally dismissing the action so that's point A. You gave her fifteen more days. You might be able to read the July 24 order that way but I think there needs to be a separate order for dismissal.

So bottom line, there was no sub zero weather that time. She had her fifteen days, a second kick at the cat, and she didn't even comply in that 15 days to show why it should be dismissed for failure to prosecute. The failure to prosecute had to do with not showing up at the April hearing, [actually, a status conference] not paying the GAL deposits and so forth. She's not done any of those and she's not complied with this court's order on July 15th on the indigency matter, again unrelated to car problems. She was told she was to provide, you were going to hold that open to today and she was to provide a completed FDS to the Court

[there is no written order in the record ordering Ms. Mendoza to provide an “FDS” or anything else additional to the three affidavits of indigency which she had already provided] and then you would resolve it today, 12/6, but she’s never provided a completed FDS, so not one of your orders has been complied with, be it April or July, so at this point cars don’t matter because the Court’s orders have not been complied with that would even give her the opportunity to continue her action today, and I can’t speak to the Supreme Court matter. I’m not involved in that and I don’t know anything about it.

MS. CAMPBELL: My opinion is if her motion for child placement is dismissed, the other issues all become moot. Why do we care if she’s indigent or not indigent? We filed a motion for child support and she hasn’t specifically asked for a court-appointed attorney for the child support motion. That’s another issue we want to address today.

(R. 73, p. 3, L. 16-25, pp. 4-7, p. 8, L. 1-3). (Emphasis supplied; our comments are in brackets and nonitalicized.)

Had Ms. Mendoza had an attorney, there would have been no question of “default,” as that attorney would have appeared for Ms. Mendoza. In addition, that attorney would, on July 15 and December 6, have presented Ms. Mendoza’s side, to counter the statements from the opposing counsel and the GAL regarding her alleged noncompliance with an unwritten order which confused the court itself. Without an attorney, Ms. Mendoza was completely defenseless.

The fact that it was admittedly impossible for Ms. Mendoza to attend the hearing made no difference to the court and attorneys when it came to

denying her relief. She had, on July 15, asked for counsel to be provided by the court to assist her. The court on December 6 denied that request. The court stated that

. . . Article I, Section 21(2) of the Wisconsin Constitution does not and cannot be read to require that any litigant in court in a civil matter be provided with a lawyer if he or she is not in a position to hire his or her own. . . .

(R. 73, p. 8, L. 23-25; p. 9, L. 1). The court failed even to mention Article I, Sections 1 and 22, the other bases of Ms. Mendoza's request. *Id.*

Ms. Mendoza had asked for a change of placement to protect her daughter from abuse – physical attacks by the stepmother, only one permitted shower per week, no sleeping quarters and lack of proper medical care. The court denied this request, without any examination as to whether the best interests of the child warranted this change. (R. 73, p. 9, L. 14-23; p. 10, L. 1-9). The court stated, among other things, that “She, as counsel point out, failed to take repeated opportunities to pursue her motion in this court . . .” (R. 73, p. 9, L. 14-15). This is not only the wrong issue, but completely ignores the fact that Ms. Mendoza was present in court on July 15, 2005, with her daughter, and prepared to have her daughter testify as to the abuse by her stepmother and as to the daughter's wishes. She was not

permitted to do so. In fact, Ms. Mendoza had already attempted to “take repeated opportunities to pursue her motion” by placing before the court, on March 29, 2004, evidence relating to her daughter’s best interests. (R. 17, Exs. 1, 2 and 3). One piece of that evidence was a March 15 letter from K.J.P. stating:

I am writing in regards to living with my mom. . . . Another reason is that my step mom physically, verbally, and mentally abuses me. There has been many times she has thrown me to the ground and sat on me, grabbed me and through [sic] me either on the ground or into the car, she yells at me all the time for doing things not right for her. Also I am only allowed to take a shower once a week so I sneak one when they both go to work in the morning. The last time she hits me she grabbed me so hard and through [sic] me in the chair and I ended up with bruises on my arm. Another time I didn't get the right onion out of the fridge so she started throwing them at me and my dad just sits and lets it happen. She told me last time that if I would be her kid she would half kill me and my dad said yeah and you would be in jail. I don't like it there I am very scared to go back home . . . About a couple months ago I was passing out and my dad wouldn't take me to the doctor so my mom did whenever I am sick my dad never takes me to the doctors and I feel like they don't care. Another thing that bothers me is when I have friends over Kathy my step mom will pinch there butts and my friends don't like that. I am hoping that you will make my dreams come true and give me my wish of living here with my mom if you don't and I have to go back to my dads my life will be crushed and I will feel like millions of swords went through my heart. . . . Please make my wish come true and let me live with my mom I think I am old enough to say who I want to live with an di want that to be with my mom. Thank you.

K.J.P.

There is no doubt as to what K.J.P. would have testified at the July 15, 2005 hearing, but she was not so permitted. Instead, she was told to sit in the

hall.

Another piece of evidence submitted by Ms. Mendoza was a Protective Service Report dated 3/11/2004, which stated, in the “Department Response” section:

... I have spoken to both parents who report that there was an altercation between [K.J.P.] and her stepmother and it was verified that the stepmother did indeed grab [K.J.P.] by the arm, and it could have caused a bruise. Although inappropriate discipline, there no indication that injury was intentional, the act of grabbing the child by the arm was intentional. Additionally, the mother is pursuing a change in custody/placement, and child is safe.

(R. 17, Ex. 2, p. 14 [p. 3 of 4 of 3/11/04 Protective Service Report]).²

Two other pieces of evidence which Ms. Mendoza submitted to the court were two handwritten letters, one dated “August [*illegible*],” the second dated “Monday, Sept. 22 [*illegible*],” from K.J.P. that said, in part:

1) To my favorite mom,

** * **

My I don't know how to say how much I love you. And when I leave your house I come home and feel like somebody has just stabbed a knife in my heart and I cry, cry, and cry! I usually get over it in like 2 days but this time it won't go away. I don't

² Ms. Mendoza’s attorney could have illuminated the Sauk County Protective Service’s concern about “Mexican men” in Ms. Mendoza’s home, its linking of “Mexican men” with drug activity, and the effect of that linkage on its investigation. The paragraph reciting this linkage is blotted out in the court record. Compare the same report in Supplemental Appendix, p. 118.

mean to keep bugging you about getting an eternity [sic], but you don't know how much I want to live with you. . . . Oh I'm crying so hard I cant write. . . . I sure hope you win or we win at court. I know we will, I have confidence. But if we don't I am going to cry so hard and I'll feel like killing my self. . . . Gosh I can't stop crying. I Hate It Here! I Hate It Here! . . . Anyways I love you so much. Tell Everyone I said HI!

And that I'll be up as soon as I can.

I love you Mucho.

2) *Dear Mom,*

. . . Mom I really want to know if you are actually getting an aterny [sic]. You keep saying how you are going to get one but then I ask you if you did and you keep saying I will tomorrow. Mom this is serious. I keep thinking you are just saying it to make me stop worrying. . . . I'm so sick of living down here. I'm so depressed. And the boys in my class call me mexican fuckers because I like mexicans. I'm so sick of it and they were saying it the other day and I couldn't hold it in anymore and I bursted out crying. . . .

Love ya

K.P.

(R. 17, Ex. 3, pp. 2-6).

Submitting these documents to the court hardly constitutes a failure to pursue a change of placement. If Ms. Mendoza did not submit them at the right time, or in conjunction with the right hearing, or was not successful in having her daughter testify, it is because she was proceeding *pro se*, and needed an attorney. As it was, on July 15 and December 6 she

didn't even have a chance to argue that she *had* pursued a change of placement by submitting this evidence, and that the court should have looked at these documents and considered what was in K.J.P.'s best interests. Indeed, the court's and the two attorneys' entire focus was on whether Ms. Mendoza had fully carried out all of her responsibilities as a litigant. Their focus was not at all on the best interests of K.J.P. (R. 72 and 73).

Having denied Ms. Mendoza, *in absentia*, primary placement, the court on January 5, 2006 ordered her to pay Mr. Parrish child support of \$151.75 per month because Mr. Parrish had primary placement. The court also ordered her to pay Mr. Parrish \$339.25 in guardian *ad litem* fees. The court also ordered her to seek work by applying for ten positions per month, and to report her efforts to Attorney Katherine Campbell, her opponent's attorney! This order was entered despite the fact that the court had already found Ms. Mendoza indigent, and that there were two subsequent affidavits of indigency before the court. The court also had a physician's statement showing that Ms. Mendoza has degenerative disk disease and can perform only sedentary work, can drive for only 1-3 hours, can only occasionally

bend, squat, climb or twist her body, and should be allowed to change position every half hour. (R. 34, pp. 3-4). Ms. Mendoza obviously has very limited job prospects but, having no attorney and not being able to be present herself, her disability was apparently not considered. (R. 73, p. 10, L. 14-25; p. 11, L. 1-10, p. 12, L. 20-25, p. 13).

V. STANDARD OF REVIEW

The standard of review on the issue of the constitutional right to court-provided counsel is that the reviewing court is not bound by the trial court's conclusions of law and may decide those issues *de novo*. *Ball v. District No. 4 Area Bd.*, 117 Wis. 2d 529, 537, 345 N.W. 2d 389, 394 (1984).

The standard of review for the issues of default due to nonappearance and the order denying placement and ordering child support is the erroneous exercise of discretion standard. *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶ 18, 246 Wis. 2d 1 (2001).

VI. ARGUMENT

A. DIANA MENDOZA HAS A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL IN THE CIRCUIT COURT.

On July 15 and December 6, 2005, in the Richland County Circuit Court, Diana Mendoza badly needed a lawyer. Her opponent had a lawyer. The guardian *ad litem* was a lawyer. The judge was a lawyer. Diana Mendoza had no lawyer. She couldn't afford one. All she had was her high school education, and it wasn't enough. As one would expect, without a lawyer, she lost everything.

“Equal Justice Under Law.” This phrase greets all who enter the United States Supreme Court building. It is a phrase which has become almost hackneyed through our doggedly repeated assertions that it is, indeed, one of the most fundamental precepts of our democracy. Yet equal justice under law is seldom realized. Why? Because of the tremendous differences in wealth among those who use and are haled into our justice system.

In a 1951 speech to the Legal Aid Society of New York on its 75th anniversary, Judge Learned Hand uttered his famous declaration: “If we are

to keep our democracy, there must be one commandment: Thou shalt not ration justice.”³ Like many other ringing odes to equal justice, this statement of fundamental principle seldom finds its way into reality. Every day, all over the country, Learned Hand’s commandment is disobeyed as we ration justice. The largest rations go to the affluent, the meager rations to the poor.

If Learned Hand was correct, and equal justice is vital to our democracy, then whose responsibility is it to ensure that equal justice is not just an insincere promise, mere hollow rhetoric? As with defense, highways, health care, education, Social Security and other elements essential to life, liberty and the pursuit of happiness in America today, equal justice under law is the responsibility of all of the American people together, as a society:

*Lawyers cannot solve these problems alone – any more than the medical profession can solve the public health problems of this country alone. In the end, the delivery of legal services to the poor must be accepted for what it is – a public responsibility, and a public trust.*⁴

³ Hand, Learned, “Thou Shalt Not Ration Justice,” address before the Legal Aid Society of New York (9 Brief Case No. 4, pp. 3, 5 [1951]).

⁴ State Bar of Wisconsin President John S. Skilton, “Our Justice System Can’t Afford Cuts to Legal Services for Poor,” *Milwaukee Journal*–

Yet the national allocation of resources to equal justice is shamefully minuscule. While at the present time this country is spending \$87.5 *billion* to occupy and “rebuild” Iraq and Afghanistan (an amount larger than the annual budgets of seven cabinet departments),⁵ the national appropriation to the Legal Services Corporation for 2006, including rescissions, is a mere \$326 million.⁶ This is only \$4.7 million more than was appropriated in 1981 - 25 years ago. Would Learned Hand believe that we can “keep our democracy” with this pitiful ration of equal justice?

Wisconsin, too, funds everything but equal justice. For example, the state budget recommendation for the Department of Tourism increased 9.1% from FY 05 to FY 06, to \$30,925,200 over the biennium.⁷ Is tourism really more important than equal justice in Wisconsin? Would Learned

Sentinel (September 29, 1995). *Accord, In the Interest of D.B. and D.S.*, 385 So. 2d 83, 92 (Fla. 1980): “There was no intention to place the entire fiscal burden on the legal profession to perform a function which is the constitutional responsibility of the government.”

⁵ *New York Times*, November 4, 2003, p. A1.

⁶ NLADA *Legal Aid News* - “President’s 2007 FY Budget for Legal Aid,” February 7, 2006.

⁷ “Governor’s Budget Recommendations” - Department of Tourism, Budget p. 489. [See www.doa.state.wi.us/debf/execbudget.asp](http://www.doa.state.wi.us/debf/execbudget.asp)

Hand say today that “if we are to keep our democracy, there must be one commandment: Thou shalt promote tourism”?

Equal justice under law is not free, or cheap. It has a cost, because representation by a competent attorney is critical to the securing of equal justice. Without attorney representation provided for impoverished suitors, there simply is no equal justice. Indeed, the essentiality of an attorney to doing real justice in the courts is recognized across the country and throughout the world. *See* Appendix, pp. 90-100, for a list of statutes, cases and countries.

We estimate that providing attorneys to impoverished civil suitors in Wisconsin would cost approximately \$40 million per year. This cost is justified.

In Wisconsin, there is a way to make equal justice a reality. It is found in our Constitution, which guarantees the right to an attorney to any suitor, rich or poor. In recognizing this right, this Court can fulfill the wish of a founder of our Constitution, Delegate James T. Lewis:

. . . I have a strong feeling for Wisconsin. I have adopted her as my home. If God should spare my life I expect long to live within her borders, and my wish is that she may hold out to the world a noble example of a free government; that she may dispense equal justice to all

– *the rich and the poor, the lame and the blind* . . .⁸

The Wisconsin Constitution has two clauses which together guarantee the right to counsel to impoverished suitors such as Diana Mendoza. The first is Wisconsin’s Equal Protection Clause, Article I, Section 1. That clause, through its incorporation of the “principle of equal justice” established by *Griffin v. Illinois*, 351 U.S.12, 76 S. Ct. 585 (1956) and *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963), requires that, where a state makes a court-access remedy available, including the right to counsel, it cannot deny that remedy to indigents solely because of their lack of means. Since Wisconsin has made the court-access right to appear by counsel available to “any suitor” in Article I, Section 21(2) of its Declaration of Rights, it may not deny that right to indigents. Therefore, Diana Mendoza, an impoverished suitor, has the constitutional right to court-provided counsel. The full argument follows.

⁸ Milo M. Quaife, *The Attainment of Statehood*, 655-656 (hereafter “Quaife 1847-48”).

B. ARTICLE I, SECTION 1 OF THE WISCONSIN CONSTITUTION REQUIRING EQUAL PROTECTION OF THE LAW IS VIOLATED WHEN INDIGENT LITIGANTS ARE DENIED THE FUNDAMENTAL RIGHT TO COUNSEL.

Article I, Section 1 provides:

Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.

This is Wisconsin's equal protection clause. Numerous Wisconsin decisions have established the principle that, in equal protection analysis under Section 1, strict scrutiny is to be applied to a classification when the classification interferes with a fundamental right. *See e.g., Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98 ¶ 56,, 237 Wis. 2d 99, 128, 613 N.W. 2d 849, 865-66 (2000).

Fundamental rights are based on the Constitution, either explicitly or implicitly, and they include access to the courts. *State v. Martin*, 191 Wis.2d 647, 652, 530 N.W.2d 422-423 (Wis. App. 1995). Where a right is specifically mentioned in the state constitution, it is entitled to more protection than those rights found only by implication, and warrants strict scrutiny. *See Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

A right secured by the Wisconsin Constitution, but not the federal Constitution, is nevertheless considered "fundamental" and warrants strict scrutiny. *Matter of Eisenberg's Estate*, 90 Wis. 2d 620, 280 N.W. 2d 359 (Wis. App. 1979). The right to appear by an attorney in civil cases is a fundamental right, expressly set forth in Article I, Section 21(2) of the Wisconsin Constitution. *See* Section C, *infra*.

In applying strict scrutiny to the denial of this right, it must be determined whether there is a compelling state interest to support the denial of counsel to Ms. Mendoza, who cannot afford to hire an attorney. While the avoidance of wasteful or needless public expenditures may be one claimed state interest, it certainly cannot be claimed that avoidance of a *justified* public expenditure which protects a constitutional right is a compelling state interest. Pecuniary interests have been found by the Wisconsin Supreme Court not to be compelling when balanced against fundamental interests. *Joni B. v. State*, 202 Wis. 2d 1, 15, 549 N.W. 2d 411 (1996). As the United States Supreme Court stated in *Tennessee v. Lane*, 541 U.S. 509, 533, 124 S. Ct. 1978, 1994 (2004):

Each of these cases [Boddie, M.L.B., Smith, Burns, Griffin, Gideon, Douglas] makes clear that ordinary considerations of cost and

convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts.

Further, the state's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens. *Saenz v. Roe*, 526 U.S. 489, 507, 119 S. Ct. 1518, 1528 (1999).

A second possible interest which may be claimed by the state is the desire to keep frivolous claims out of the judicial system. Whether or not this interest is compelling, the classification now being drawn by the courts – all poor suitors – is not narrowly tailored to achieve that interest. Indigent respondents such as Ms. Mendoza are not bringing lawsuits; they are responding to the claims of suitors, like Mr. Parrish, who have lawyers. Even with regard only to claimants, the classification is overinclusive: Not all indigent claimants will make claims which are frivolous; many claims will be valid. There is “. . . no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit.” *Boddie v. Connecticut*, 401 U.S. 371, 381, 91 S. Ct. 780, 788 (1971). Thus, the excluded class, consisting of all impoverished suitors, is not narrowly tailored, but is extremely overinclusive.

Moreover, this state interest in minimizing frivolous claims is more likely to be served by providing counsel to indigents than by denying that right. *Pro se* litigants have no professional ethical obligation not to pursue frivolous claims or defenses. Attorneys do. *See SCR 20:3.1*. As the Public Defender does in criminal cases, attorneys will serve a screening function, and will thus reduce the number of cases of dubious merit with which the courts must grapple. *See Schmelzer v. Murphy*, 201 Wis. 2d 246, 251, 252, 548 N.W. 2d 45, 47 (1996).

Therefore, there are no compelling state interests which justify the denial of the fundamental right of counsel to impoverished suitors. In fact, the compelling state interest is in *providing* counsel, and thus minimizing the tremendous problems now caused by *pro se* litigants.

Wisconsin applies the same interpretation to the state Equal Protection Clause as that given to the equivalent federal provision.

Tomczak v. Bailey, 218 Wis. 2d 245, 261, 578 N.W. 2d 166, 174 (1998).

In the foundation case, *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585 (1956), the United States Supreme Court held that, where a state grants the right to appellate review of a criminal conviction, it may not discriminate

against some convicted defendants, solely on account of their poverty, by denying an appeal to those unable to afford a transcript. Justice Black framed the issue as:

Whether Illinois may, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, administer this statute so as to deny adequate appellate review to the poor while granting such review to all others.

351 U.S. at 13. The issue in the instant case may be similarly put: Whether the Wisconsin courts may, consistent with Wisconsin's Equal Protection Clause, administer Section 21(2) of the Declaration of Rights so as to deny the right to appear by counsel to the poor while granting that right to all others.

The Court in *Griffin* thus fashioned a “principle of equal justice”: If the state makes a court-access remedy available, it cannot deny that remedy to indigents solely because they are poor. In 1983, the Court expressly recognized this principle in *Bearden v. Georgia*, 461 U.S. 660, 664-665, 103 S. Ct. 2064, 2068-2069 (1983):

Griffin's principle of “equal justice,” which the Court applied there to strike down a state practice of granting appellate review only to persons able to afford a trial transcript, has been applied in numerous other contexts. See, e.g., Douglas v. California, 372 U.S. 353 (1963) (indigent entitled to counsel on first direct appeal) . . .

In 1996, the Court, in *M.L.B. v. S.L.J.*, 519 U.S. 102, 117 S. Ct. 555 (1996), observed that “*Griffin*’s principle has not been confined to cases in which imprisonment is at stake,” 519 U.S. at 111, and that that principle was “of prime relevance” to the purely civil appeal which the Court was considering. The *M.L.B.* case is of critical significance because it applied *Griffin* to a civil, not a criminal, action. In thus extending the *Griffin* principle of equal justice, the Court noted that, in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967), it had resisted the “feeble enticement of the ‘civil’ label-of-convenience.” 519 U.S. at 119. The Court in *M.L.B.* found the State’s pocketbook interest insufficient to require M.L.B. to pay Mississippi’s document preparation fees as a condition of appeal.

The Court looked to *Griffin* and to its opinion in *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018 (1970), in reaffirming the principle that a law nondiscriminatory on its face may be grossly discriminatory in its operation, and is particularly offensive when it affects *only* indigents. 519 U.S. at 126-127. The Court then cited *Bearden v. Georgia* for *Griffin*’s “principle of equal justice.” 519 U.S. at 127.

Like *M.L.B.*, the right to counsel involves access to justice. In our case, the fundamental right is the Wisconsin Constitutional right to prosecute or defend one's suit by an attorney, and the State may not "bolt the door to equal justice," *Griffin, supra* at 24 (Frankfurter, J., concurring), by forcing impoverished suitors to appear *pro se*. Here, as in *M.L.B.*, the State's pocketbook interest in saving money is insufficient to justify denying the fundamental right to counsel.

Although Section 21(2) is nondiscriminatory on its face, it is grossly discriminatory in its operation if suitors of means can appear by counsel and indigent suitors cannot. In this operation, the prohibition affects *only* indigents, and thus is "particularly offensive". *M.L.B., supra* at 127. The right to counsel is "wholly contingent on one's ability to pay," *id.*, and the operation of Section 21(2) visits "different consequences on two categories of persons," *id.*: the denial of counsel applies to all indigents, and does not reach anyone outside that class.

In *M.L.B.*, under such circumstances, the *Griffin* principle of equal justice prohibited Mississippi from withholding from M.L.B., simply because she could not pay the \$2,352.36 cost, ". . . a record of sufficient

completeness to permit proper appellate consideration of her claims.” *Id.* at 128. In the instant case, the *Griffin* principle of equal justice requires that Wisconsin not withhold from Ms. Mendoza, simply because she is too impoverished to retain an attorney, the aid of counsel in her custody case.

Griffin and its Equal Protection reasoning was the explicit foundation for the Court’s decision in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963). In a unanimous opinion, the *Griffin* principle of equal justice was applied to grant the right to counsel to indigent criminal defendants in an appeal of right. The *Douglas* Court described the issue before it as whether or not an indigent shall be denied the assistance of counsel on appeal, and then said:

In either case the evil is the same: discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has,’

citing *Griffin*. 372 U.S. at 355.

In examining the relevance of *Douglas v. California* to the case at bar, it should be remembered that the United States Constitution does not contain a suitors’ rights provision which contains the right to counsel. *Wisconsin’s Constitution does.* Thus, the argument for counsel is even

stronger under the Wisconsin Constitution.

In light of this federal jurisprudence, it is appropriate to construe Article I, Section 1 of the Wisconsin Constitution to accord the Section 21(2) right to counsel to impoverished civil suitors. There is a fundamental Constitutional right at stake – the express right to counsel in Article I, Section 21(2). *See* Section C, *infra*. This right has been created by the state and placed in the Declaration of Rights article of its founding document, and given to affluent suitors. Equal treatment under *Griffin's* “principle of equal justice” and under *Douglas* means that indigent suitors must be accorded the aid of counsel through court-provided counsel.

Thus, in federal jurisprudence, in civil cases as well as criminal cases, meaningful access to the courts cannot be denied solely because of indigency, especially where the court is the only forum in which the parties' rights can be resolved. Wisconsin is the same. In *Treiber v. Knoll*, 135 Wis. 2d 58, 76, 398 N.W. 2d 756, 763 (1987), the Wisconsin Supreme Court, after discussing *Boddie v. Connecticut*, 401 U.S. 371 (1971), held:

We conclude that the right to court access, where a fundamental interest is involved, is not a guarantee of free access for all [to wit, the wealthy plaintiff in that case] but instead is a right not to be denied court access because of indigency.

The Wisconsin Supreme Court has long held that the state cannot constitutionally discriminate between classes of suitors or parties to the same suit, giving one an unjust pecuniary advantage over the other. *Jacobs v. Major*, 139 Wis.2d 492, 508, 407 N.W.2d 832, 838 (1987); *Durkee v. City of Janesville*, 28 Wis. 464, 471 (1871). Under this authority, then, it is unconstitutional for the courts to permit one suitor to appear by counsel and to force the other suitor, in the same suit, to appear without counsel because the latter can't afford one.

Like the United States Supreme Court, the supreme courts of other states have recognized the *Griffin* and *Douglas* principle of equal justice: If the state makes the right to appear by counsel available to the affluent suitor, equality demands that it be made available to the impoverished suitor. *See, e.g., Flores v. Flores*, 598 P. 2d 893 (Alaska 1979); *Matter of Ella B.*, 30 N.Y. 2d 352, 285 N.E. 2d 288 (N.Y. 1972); and other cases in the Appendix, p. 92.

Moreover, in a recent federal case, *Kenny A. v. Sonny Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005), the court declared a right to counsel under

the Georgia Constitution for children in “deprivation” actions.

**C. ARTICLE I, SECTION 21(2) OF THE WISCONSIN
CONSTITUTION GUARANTEES THE FUNDAMENTAL
RIGHT TO AN ATTORNEY IN CIVIL ACTIONS TO ANY
SUITOR; THIS INCLUDES IMPOVERISHED SUITORS.**

**1. The Right to Counsel in the Wisconsin Constitution is a
Fundamental Right.**

Article I, Section 21(2) provides:

Rights of Suitors. Section 21.

* * *

*(2) In any court of this state, any suitor may prosecute or
defend his suit either in his own proper person or by an
attorney of the suitor's choice.*

The Wisconsin Constitution provides the right to the aid of counsel in civil matters. This right is fundamental. It is fundamental because it is expressly set forth in the Constitution itself, and because, in 1977, it was deliberately transferred into the Declaration of Rights through a constitutional amendment. As Judge Gartzke has written:

*A declaration or bill of rights is, at its very least, a solemn
statement of those powers, privileges and liberties
considered basic and most important.*

Jacobs v. Major, 132 Wis.2d 82, 127, 390 N.W.2d 86, 103 (Wis. App. 1986)(Gartzke, J., concurring).

The Section 21(2) right to counsel is also fundamental because, as Ms. Mendoza's experience dramatically demonstrates, counsel is an essential element of meaningful access to the courts. Access to the courts is itself a fundamental right. *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004); *State v. Martin*, 191 Wis. 2d 647, 652, 530 N.W. 2d 420, 423 (Wis. App. 1995).

Because of the explicit and specific language of Section 21(2), and the fact that Section 21(2) has been placed in the Declaration of Rights, in Wisconsin the right to counsel is a fundamental right, both in and of itself and because it is essential to meaningful access to the courts. And,

... the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.

Powell v. Alabama, 278 U.S. 45, 72 (1932), citing *Carpenter v. County of Dane*, 9 Wis. 249 (1859).

2. The plain meaning of Section 21(2) guarantees to impoverished suitors the fundamental right to be represented by an attorney.

Section 21(2) guarantees the fundamental right to be represented by an attorney to *any* suitor, not just to suitors with sufficient wealth to hire their own attorneys. The key word in Section 21(2) is “any”. “Any” means just that: “any” as in “each and every.” “Any” has an expansive meaning, that is, “one or some indiscriminately of whatever kind”. *Dept. of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131, 122 S. Ct. 1230 (2002).

3. The constitutional history shows that Section 21(2) guarantees to impoverished suitors the fundamental right to an attorney.

Section 21(2) is now in Article I of the Constitution, the “Declaration of Rights.” While it did not begin there, it has, since November 30, 1846, been a provision which establishes the fundamental right to be represented by an attorney. As such, Section 21(2) should be construed in a manner which confers its right in the broadest possible fashion.

The history of Section 21(2) is, as constitutional provisions go, somewhat dramatic. It began life as Section 22 of the Judiciary Article in the first Constitutional Convention, that of 1846. On October 27, 1846, the Convention's Judiciary Committee established criteria for the practice of law in Wisconsin:

*Section 22. Any male citizen residing in this state, of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state.*⁹

Section 22 remained in this form for nearly a month. When a Judiciary Committee amendment to Section 22 arose before the Convention on November 30, Delegate William A. Dennis immediately moved to amend that committee amendment by adding:

*“Any suitor in any court of this state shall have the right to prosecute and [or] defend his suit either in his own proper person or by an attorney or agent of his own choice.”*¹⁰

This amendment was a complete and total change in the language and in the purpose of Section 22, from regulating a profession to establishing a broad right of representation in favor of suitors.

⁹ Milo M. Quaife, *The Constitution of 1846 (1919)*, p. 295.

¹⁰ *Id.* at 586.

This was the way Section 22 appeared in the final version of the Constitution of 1846, which was defeated by the people of Wisconsin over other issues, such as banking. When Wisconsin tried again in the Constitutional Convention of 1847-1848, the language of Section 22 did not change.¹¹

The 1977 “Court Reorganization” constitutional amendments moved the suitors’ rights provision from Article VII, Section 20 to Article I, Section 21(2), where it currently resides in the Declaration of Rights.¹²

4. *Piper v. Popp* is not authority for the denial of the fundamental right to counsel to impoverished suitors under Article I, Sections 1 and 21(2).

In *Piper v. Popp*, 167 Wis. 2d 633, 482 N.W. 2d 353 (1992), the “constitutional right” to counsel which the Wisconsin Supreme Court interpreted was that provided by the United States Constitution, not the Wisconsin Constitution. The Court’s discussion focused exclusively on the United States Supreme Court’s construction of the 6th and 14th Amendments

¹¹ Quaipe 1847-48, Preface, p. vii, 250, 730 (1928).

¹² Legislative Reference Bureau Informational Bulletin 76-IB-9, “Constitutional Amendments Given ‘First Consideration’ Approval by the 1975 Wisconsin Legislature” (December 1976), pp. 1-7.

to the United States Constitution. It referred only obliquely, in a footnote, to Article I, Sec. 21(2) of the Wisconsin Constitution, and did not purport to consider Section 21(2) to undergird the Court's holding. It also did not consider the equal protection guarantee of Article I, Section 1.

In the instant case, Ms. Mendoza does not invoke the federal Due Process Clause. She bases her argument instead on the Equal Protection Clause as construed in *Griffin v. Illinois*, *Douglas v. California*, and the other cases discussed in Section B, *supra*. Therefore, this Court need not, and should not, rely on *Piper v. Popp* or *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153 (1981).

An additional reason for not looking to *Lassiter* is the trial in *Piper v. Popp*, which is exemplary of the difficulty of the *Lassiter* analysis. There the trial judge, *after* the trial, not prior thereto, attempted to justify his pretrial decision to deny Popp an attorney by stating for the record that Popp did an "amazingly good job," (Supplemental Appendix [hereafter "S.A."] p. 86) and that there was nothing a lawyer could have done for Popp that he didn't do himself. (S.A. 87). In fact, there were many things that a lawyer could have done for Popp that Popp failed to do for himself,

such as conducting a *voir dire* and exercising his three peremptory juror strikes. (S.A. 5). A lawyer could have prevented Popp from telling the jury that he had been sentenced to 40 years in Waupun. (S.A. 37). The damning medical evidence was introduced by Piper's lawyer through his reading of the deposition of a doctor. (S.A. 50-53). Popp was not even present at that deposition (S.A. 103-104), and at trial failed to object to any part of it. (S.A. 50). Piper's attorney was permitted to ask all manner of leading questions. Popp had no physician expert to minimize Piper's damages. At one point, the judge even prompted Piper's attorney to pursue a line of questions which would enhance damages. (S.A. 28).

Popp's "amazing effectiveness" can be seen from the jury's award of \$402,000, including \$200,000 in punitives, to Popp's opponent. The jury deliberated for all of an hour. (S.A. 99-100).

Piper v. Popp shows how badly *pro se* litigants such as Ms. Mendoza need the assistance of counsel. This court should not rely on *Piper v. Popp* or on *Lassiter* to deny Ms. Mendoza that right. *In the Matter of the Condition of S.Y.*, 162 Wis. 2d 320, 330, 469 N.W. 2d 836 (1991), contrary to *Piper*, provides authority for the right to counsel in the Court's

statement that Section 21(2) affords “. . . the right to be represented by an attorney.”

5. Article I, Section 21(2) does not require an impoverished suitor to represent herself.

For the indigent, the right to “hire an attorney at their own expense is a cruel sham; the protection it confers is a fiction.”¹³ The words of Justice Frankfurter, concurring in *Griffin v. Illinois, supra*, are applicable here:

To sanction such a ruthless consequence, inevitably resulting from a money hurdle, erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the “majestic equality” of the law. “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” John Cournos, A Modern Plutarch, p. 27.

351 U.S. at 23. Are we to say that Section 21(2), in its majestic equality, permits the poor as well as the rich to come into court with their hired attorneys?

The purpose of Section 21(2)'s right to self-representation is merely to grant that right to those who don't *want* an attorney. This is, however,

¹³ Robert Catz & John T. Kuelbs, *The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 *J. Fam. L.* 223, 233 (1974).

far different than a constitutional *obligation* to represent oneself.

If, by the words of Section 21(2), every natural person has an absolute right to appear *pro se*, *Jadair, Inc. v. U.S. Fire Ins. Co.*, 209 Wis.2d 187, 205, 562 N.W.2d 401 (1997), *cert. denied* 522 U.S. 998, 118 S. Ct. 565, 139 L. Ed.2d 405, then, by those very same words, there is a companion “absolute right” to appear by an attorney. If one has an absolute right to the least adequate representation, that of oneself, then certainly one has a right to competent representation through an attorney.

The courts rigidly protect the public and parties from non-attorneys who could theoretically harm them, yet are satisfied to force suitors themselves to proceed *pro se*, with no representation at all, even if they are *less* competent than the unlicensed executor or other non-attorney. This state of affairs makes absolutely no sense, and it denies justice, as it did in the case at bar.

D. SECTION 22 OF ARTICLE I OF THE WISCONSIN CONSTITUTION, READ IN PARI MATERIA WITH SECTIONS 1 AND 21(2), PROVIDES TO IMPOVERISHED SUITORS THE RIGHT TO COURT-PROVIDED ATTORNEYS.

A third section of the Wisconsin Constitution which was enacted together with Sections 1 and 21(2) and concerns the same subject matter -- justice -- is Article I, Section 22. Section 1 and 21(2) should be construed harmoniously with Section 22, which provides:

The blessings of free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Equal justice under law is a fundamental principle. The right to counsel is a fundamental principle. Both constitute “justice.” A “firm adherence to justice” and “frequent recurrence to [the] fundamental principles” of equal justice and the right to counsel would not produce a construction of Section 21(2) which reads poor people out of “any suitor” and “any court.” Quite the contrary: a firm adherence to justice and the fundamental principle of equal justice require that Sections 1 and 21(2) be read to guarantee poor people like Ms. Mendoza a right to representation by

an attorney.

E. THE CIRCUIT COURT’S FINDING THAT MS. MENDOZA WAS IN DEFAULT DUE TO HER NON-APPEARANCE WAS AN ERRONEOUS EXERCISE OF DISCRETION.

Entry of a default judgment “. . . is improper, i.e. not ‘just,’ unless bad faith or egregious conduct can be shown on the part of the non-complying party.” *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 275, 470 N.W. 2d 859, 864 (1991). Because “[d]efault judgment terminates litigation without regard to the merits of the claim . . . a circuit court should impose it as a sanction only when a harsh sanction is necessary.” *Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.*, 2001 WI App. 205, ¶ 11, 24 7 Wis. 2d 521, 634 N.W. 2d 544, 549 (Wis. App. 2001).

Ms. Mendoza was not guilty of bad faith or egregious conduct, nor was a harsh sanction necessary. She had driven four hours from Green Bay to Richland Center on July 15 with a painful back to attend a hearing during which she could hardly get a word in edgewise. She then drove four hours back to Green Bay. On December 6, her vehicle broke down – hardly an incident showing bad faith. She called the court several times, once to say

she would try to get there and again to say she couldn't get transportation – hardly egregious conduct. The court's entering default judgment on January 5, 2006 was an erroneous exercise of discretion.

F. THE CIRCUIT COURT'S ORDER OF JANUARY 5, 2006 DENYING PRIMARY PLACEMENT TO MS. MENDOZA, GRANTING PRIMARY PLACEMENT TO MR. PARRISH, AND MANDATING CHILD SUPPORT AND WORK SEARCH AGAINST MS. MENDOZA WHERE SHE WAS UNREPRESENTED BY COUNSEL AND IT WAS IMPOSSIBLE FOR HER TO APPEAR AT THE HEARING WAS AN ERRONEOUS EXERCISE OF DISCRETION.

The circuit court's exercise of discretion was erroneous for all of the reasons set forth in our argument, above. In addition, the court made no reasoned finding that it is in the best interests of K.J.P. to be primarily placed with Mr. Parrish rather than with Ms. Mendoza, especially given the allegations of child abuse and neglect.

If this Court finds an erroneous exercise of discretion, a remand to the Circuit Court for an additional hearing without counsel for Ms. Mendoza will not afford her constitutional relief. She would, under those circumstances, again and still be denied meaningful access to the court and

her constitutional right to counsel.

VII. CONCLUSION

Diana Mendoza has a constitutional right, under the Wisconsin Constitution, Article I, §§ 1, 21(2) and 22, to court-provided counsel to represent her in the Richland County Circuit Court, in Case No. 1992 PA 11A. The Circuit Court erroneously exercised its discretion in finding Ms. Mendoza in default on December 6, 2005 and in entering its order of January 5, 2006.

Respondent-Appellant Diana Mendoza respectfully requests that this Court remand to the Circuit Court of Richland County, with directions to provide counsel for Ms. Mendoza and to hold another hearing to consider all issues, including primary placement, child support, guardian *ad litem* fees and work-search requirements.

Dated: April 27, 2006

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