

WISCONSIN COURT OF APPEALS  
DISTRICT 4

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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.

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

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## **I. STATEMENT OF THE CASE**

There is little dispute between the parties as to the facts relevant to this appeal. However, no fact in the record supports the conclusion that Ms. Mendoza received notice of the April 4, 2005 status conference, or the conclusion that she actually received a signed court order arising out of the April 4 status conference at any time prior to July 20, 2005. Since neither the trial court's own "Civil Court Record" (R. 74, p. 3 of 5) nor the record on appeal contains the unsigned draft order or cover letter in Mr. Parrish's appendix (Parrish Appendix, pp. 14-15), these items should not be considered by this court.

## **II. ARGUMENT**

Throughout his brief, Mr. Parrish mischaracterizes Ms. Mendoza's argument, minimizing her Equal Protection argument and claiming that the only fundamental right available to Ms. Mendoza is access to the courts.

**A. Article I, Section 1 of the Wisconsin Constitution requiring equal protection of the law is violated when indigent litigants are denied the right to counsel.**

The right which is guaranteed by the Wisconsin Constitution is not just a right of initial access to the courts – the right to walk through the courthouse doors – but the specific right to appear with a lawyer once inside. This right must be enjoyed by rich and poor *equally*. If persons of means have the constitutional right to appear in court by counsel, the poor have an *equal* constitutional right to do so. Equal justice, not mere presence in a courtroom, is the issue.

Mr. Parrish argues:

*Even if the fundamental right at issue is the access to the courts through counsel at public expense, it has only been established in cases where a person's due process rights are at issue.*

Parrish Brief at 10. This is not correct. *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963), was an Equal Protection case, not a Due Process case. It granted Mr. Douglas the fundamental right to an attorney, not just access to the courtroom.

Mr. Douglas was already through the courthouse doors. The Court held that, once inside, he, like affluent appellants, should have the aid of counsel

as a matter of Equal Protection:

*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.'*

372 U.S. at 355. When it made this statement, the Court expressly cited *Griffin v. Illinois*, 351 U.S. 12 (1956). Thus, the *Griffin* principle of equal justice clearly reaches inside the courthouse doors to accord impoverished litigants the aid of counsel in court proceedings themselves.

When Mr. Parrish appeared in the Richland County Circuit Court, he had a fundamental right to choose to be represented by Attorney Campbell. Judge Leineweber had no power to order him to appear without an attorney; the Wisconsin Constitution forbids that order. That is as fundamental as a right can be.

*If there is a constitutional right to retained counsel, then there is an equal constitutional right to appointed counsel.* Mr. Parrish attempts to weaken the force of the United States Supreme Court's statement in *Powell v. Alabama*, 278 U.S. 45, 72 (1932). Citing the Wisconsin case of *Carpenter v. County of Dane*, 9 Wis. 249 (1859), the *Powell* Court stated:

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

Mr. Parrish claims that this language is inapplicable because the right to counsel in *Powell* derived from the Fourteenth Amendment to the United States Constitution. Parrish Brief at 7. However, the Court laid down this rule as a proposition of logic – “a logical corollary” – not as a matter limited to Fourteenth Amendment construction. Thus, this rule has force wherever there is a constitutional right to be heard by retained counsel. As Professor John Winters of the Marquette University Law School stated in his *Preliminary Report: Counsel for the Indigent Accused in Wisconsin* (1963), the words of the Wisconsin Supreme Court in *Carpenter v. County of Dane* “. . . can only mean that the right to have counsel appointed is coextensive with the right to appear by one’s own counsel.”

Mr. Parrish claims that our argument is “inherently flawed” because we cite “. . . no case in which a state examined a provision of its own constitution for being unconstitutional under another provision of the same *state* constitution.” Parrish Brief at 12-13. We are not arguing that a provision of the Wisconsin Constitution is unconstitutional. We do cite other state court decisions which have recognized the *Griffin* and *Douglas* principle of equal justice. *See 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), cited at page 38 of our brief, and the 16 other cases included at page 92 of our Appendix.

The parties agree that *Piper v. Popp*, 167 Wis. 2d 633, 482 N.W. 2d 353 (1992), cannot be relied on as authority to deny Ms. Mendoza the aid of counsel. *See* Parrish Brief at 9. *Piper* is not applicable because the constitutional right which the Wisconsin Supreme Court interpreted in *Piper* 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 6<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution, and cited and discussed United States Supreme Court cases, including *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), as controlling. The Court referred only obliquely, in a footnote, to Art. 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 Section 1's equal protection guarantee.

In the instant case, where petitioners do not invoke the federal Due Process Clause, this Court need not, and should not, rely on *Piper* or on

*Lassiter*. Not only is the *Lassiter* analysis very difficult, but it consumes time and resources of the trial and appellate courts in determinations which are peripheral to the main issues in the litigation. In each case, in order to assure a meaningful opportunity to be heard, the trial court will have to elicit and weigh the *Mathews v. Eldridge* elements, and then match the outcome against the *Lassiter* presumption. The trial court must conduct some kind of preliminary procedure, whether a small hearing or perhaps an interrogation of the suitor together with an evaluation of opposing counsel's skills and a review of the trial issues, and then make a *prediction* as to whether a trial which has not yet been held, with one party having no attorney, will lead to an erroneous decision.

It is hardly surprising that *Lassiter* has been criticized in the scholarly journals and in several cases. See *State v. Pultz*, 206 Wis. 112, 122, 125-129, 556 N.W. 2d 708 (1996); *In re Adoption of K.L.P.*, 198 Ill. 2d 448, 461, 763 N.E. 2d 741 (Ill. 2002); *Matter of K.L.J.*, 813 P. 2d 276 (Alaska 1991). One commentator, Douglas Besharov, observed of *Lassiter*:

*Lassiter, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty*

*than a parent's permanent loss of rights in a child.*<sup>1</sup>

**B. Article I, Section 21(2) of the Wisconsin Constitution guarantees the fundamental right to an attorney in civil actions to any suitor; this fundamentality is evidenced by its plain language, placement, history and precedent.**

Mr. Parrish mischaracterizes our Section 21(2) argument when he states:

“Diana argues that Section 21(2) creates a fundamental right to counsel because counsel is an essential element of meaningful access to the courts.”

Parrish Brief at 7. Mr. Parrish ignores our full argument, which we summarized thus:

*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.*

Mendoza Brief at 40.

### **1. Plain Meaning**

As to “plain meaning,” Mr. Parrish completely overlooks the significance of “any” in Section 21(2). Parrish Brief at 6. The holding of

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<sup>1</sup> Douglas J. Besharov, “Terminating Parental Rights: The Indigent Parent’s Right to Counsel After *Lassiter v. North Carolina*,” 15 *Fam. L.Q.* 205, 221 (1981).

the United States Supreme Court that “any” is to be given an expansive meaning, *Dept. Of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002), is reinforced by Webster’s definition:

1b: One, no matter what one: EVERY - used as a function word esp. in assertions and denials to indicate one that is selected without restriction or limitation of choice (~ child would know that) (forbidden to enter in house)<sup>2</sup>

Thus, when Section 21(2) is applied, the selection of “suitors” who will be entitled to counsel cannot be restricted, or the choice limited, to affluent suitors.

Mr. Parrish gives the wrong meaning to “may.” Parrish Brief at 6. In Section 21(2), “may” can only be construed to mean “shall have the right to.” This construction is compelled by the fact that the choice – the right – remains the suitor’s. It is the suitor’s call – she “may” appear herself, or she “may” appear by an attorney. She decides. Therefore, she has the *right* to appear herself, or she has the *right* to appear by an attorney. “May,” as used here, clearly means “has the right to.”

This interpretation is reinforced by the very fact that Section 21(2) was transferred *into* the Declaration of Rights. In so doing, the legislature

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<sup>2</sup> Webster’s Third New International Dictionary (Unabridged), p. 97.

viewed the right to appear by an attorney as an individual right belonging to the suitor, not as a privilege to be conferred or denied in the discretion of the state. Indeed, the Legislative Reference Bureau analysis of that transfer characterized the suitor’s right to an attorney as a “citizen right” in its analysis of both Article I, Section 21(2) and Article VII, Section 20.<sup>3</sup> There is no indication whatsoever that the legislature intended the use of “may” to diminish a fundamental right to a mere privilege, and “any suitor may” cannot be so read.

## **2. Constitutional History**

In arguing that the 1846 Dennis amendment to then Section 22 only allows suitors to appear *pro se*, Mr. Parrish reads only half of it. Parrish Brief at 8. The amendment didn’t end after stating “own proper person,” but continued to state “or by an attorney.” Mr. Parrish’s reading of the amendment renders “or by an attorney” useless surplusage.

Mr. Parrish also claims that we cite no authority for the principle that, because the right to counsel was placed in the Declaration of Rights, that right is fundamental. He is wrong. We quote Judge Gartzke in *Jacobs v.*

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<sup>3</sup> LRB-8129/3 at 2, 4; LRB-76-IB-9 at 2-3.

*Major*, 132 Wis. 2d 82, 127, 390 N.W. 2d 86, 103 (Wis. App. 1986):

*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.*

Mendoza Brief at 39-40. “Basic and most important” is the same as “fundamental.”

Additional authority is: *Pointer v. Texas*, 380 U.S. 400, 404, 85 S. Ct. 1065 (1965); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965); *Bergdoll v. Commonwealth*, 858 A. 2d 185, 201 (2004); *Pop ’s A.M. v. City of Erie*, 571 Pa. 375, 397, 812 A. 2d 591 (2002); *Gryczan v. State*, 283 Mont. 433, 449, 942 P. 2d 112 (1997); *See also, Gideon v. Wainwright*, 372 U.S. 335, 341, 83 S. Ct. 792, 795 (1963).

### **3. Precedent**

Mr. Parrish erroneously states: “The Diana cites no precedent, state or federal, that supports her interpretation.” Parrish Brief at 6. We have supplied one case in particular which Mr. Parrish overlooks. In *In the Matter of the Condition of S.Y.*, 162 Wis. 2d 320, 330, 469 N.W. 2d 836 (1991), the Wisconsin Supreme Court broadly construed four elements of Section 21(2): 1) the meaning of “suitor”; 2) the meaning of “own proper

person”; 3) the right to represent oneself; and 4) the right to be represented by an attorney. Most important to the instant case, the Court held that Section 21(2) affords the right of *any person* to be represented by an attorney:

*Article I, sec. 21(2), Wis. Const. affords the right of any person to self-representation, as well as the right to be represented by an attorney.*

162 Wis. 2d at 330. The Court not only used the all-inclusive phrase “any person,” but used the phrase “as well as” preceding the right to counsel. It did not limit this right to suitors who could afford counsel.

**C. Mr. Parrish’s public policy arguments are irrelevant and erroneous.**

A public policy argument which runs throughout Mr. Parrish’s brief is that *pro se* suitors are not at a disadvantage. Proof of disadvantage to *pro se* litigants is not a prerequisite to their enjoyment of their right to counsel, and is therefore irrelevant. Moreover, few would agree with Mr. Parrish, and he offers only his opinion. The Wisconsin Supreme Court, in *Joni B. v. State*, 202 Wis. 2d 1, 15-16, described justice as most likely to be obtained through “an equal contest of opposed interests” in *counselled* adversary proceedings. And, 135 years before *Joni B.*, the Wisconsin Supreme Court

recognized the need for each party to have a lawyer in *County of Dane v. Smith*, 13 Wis. 585, 587 (1861).

Legal scholars and judges agree. Howard Eisenberg, Dean of Marquette Law School, characterized *pro se* in this way:

*In my remarks I refer to it as a no bono system. . . . By virtue of the fact that someone is pro se, they cannot evaluate what the case is really about and you place judges in very difficult positions when a case that's supposed to be uncontested and no problems turns out to have big problems and maybe some contest.*<sup>4</sup>

Dean Eisenberg's assessment was confirmed by trial judges, including Judge Moria Krueger.<sup>5</sup>

In the instant case, Diana Mendoza *was* disadvantaged. She did not receive equal justice. She was at a tremendous and insurmountable disadvantage in opposing Mr. Parrish's lawyer and the guardian *ad litem*. It is hard to conceive of a worse outcome, of less justice, for Ms. Mendoza than the Court's January 5, 2006 Order.

Mr. Parrish's second public policy argument consists of mere assertions unsupported by record facts or extrarecord authority. He states that "Pro se

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<sup>4</sup> Testimony before the State Bar of Wisconsin Commission on the Delivery of Legal Services (hereafter "Skilton Commission"), Milwaukee Hearing, August 15, 1995, pp. 161-166. (Hearing transcript located with the State Bar of Wisconsin.)

<sup>5</sup> Skilton Commission, Madison Hearing, August 14, 1995, p. 61.

litigants do not create a burden on our trial courts.” Parrish Brief at 13.

Chief Judge Patrick Sheedy of the Milwaukee County Circuit Court

testified to the contrary before the Skilton Commission:

*But what bothers me is in this sort of thing when people are representing themselves pro se, it slows down the entire process. When it slows down the process, it means less justice for people.<sup>6</sup>*

Mr. Parrish speaks of an “incredible” economic hardship on the justice system. Parrish Brief, p. 14. The right to counsel need not be unlimited, nor the cost infinite. Even fundamental rights can be “appropriately hedge[d] about,” *Griffin v. Illinois*, 351 U.S. at 24 (Justice Frankfurter, concurring). The legislature may be able to carve out *de minimis* cases, or personal injury plaintiffs, or prisoner litigants, in a way which constitutionally modifies their right to provided counsel. As an example, the federal and state Prisoner Litigation Reform Acts have thus far passed constitutional muster. What “hedges” there might be is for the legislature to enact. Whether those hedges are constitutional is for the courts to decide when appropriate cases are presented to them. For the present, suffice it to say that “all impoverished suitors in all civil cases” is not an appropriate

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<sup>6</sup> Skilton Commission, Milwaukee Hearing, August 15, 1995, p. 202. (Emphasis supplied.)

hedge.

This Court stated in *Joni B.* that the state's pecuniary interest was "... hardly significant enough to overcome private interests as important as those here." 202 Wis.2d at 15-16. The very same private interest is at issue here -- the right to counsel.

Wisconsin can afford equal justice. As Constitutional Convention Delegate James T. Lewis declared:

*... [B]ut now they are so monstrous poor they must dispense with justice, because the people are too poor. No sir, this is no argument at all.*<sup>7</sup>

Mr. Parrish complains that the poor would bring any claim regardless of the merits. Parrish Brief at 14. The rich are able to do this now. See Fox News' lawsuit against Al Franken, claiming the exclusive right to use the phrase "fair and balanced." The U.S. District Judge termed it "wholly without merit."<sup>8</sup> And, as the U.S. Supreme Court said in *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971), there is "... no necessary

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<sup>7</sup> Milo M. Quaife, *The Attainment of Statehood* 653 (1928).

<sup>8</sup> Three Little Words: Fox News Sues," <http://www.washingtonpost.com/ac2/wp-dy7/A46985-2003Aug11?language=printer>, August 12, 2003; "Fox Loses Bid to Stop Sale of Franken Book," <http://asia.reuters.com/newsArticle.jhtml?type=entertainmentNews&storyID=3324319>, August 22, 2003.

connection between a litigant's assets and the seriousness of his motives in bringing suit." In fact, attorneys would *lessen* such claims because they cannot ethically pursue frivolous cases.

**D. The Circuit Court Erroneously Exercised its Discretion.**

In *Guelig v. Guelig*, 2005 WI App. 212 (Ct. App. 2005), the Court of Appeals stated:

*Finally, even if we assume waiver on the father's part, the paramount concern in placement and custody decisions is the best interests of the minor child. Although the court may consider one party's uncooperative behavior a salient factor, it must clearly articulate how the parent's recalcitrance bears on the child's best interests.*

*Id.* at ¶ 1. Just so here. There is no attention at all to K.J.P.'s best interests in the January 5, 2006 order, or discussion of how Ms. Mendoza's alleged recalcitrance bears on those interests. Under *Guelig*, the trial court erroneously exercised its discretion.

**III. CONCLUSION**

Respondent-Appellant Diana Mendoza 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.

Dated: June 14, 2006

Respectfully submitted,

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