

WISCONSIN COURT OF APPEALS
DISTRICT 4

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

Jerome E. Parrish,

Petitioner-Respondent,

v.

Diana Ronnfeldt-Mendoza,

Respondent-Appellant.

Appeal No.

2006AP000243

Circuit Court Case No.

1992PA000011A

APPEAL FROM THE CIRCUIT COURT FOR RICHLAND COUNTY,
HONORABLE EDWARD E. LEINEWEBER, PRESIDING
BRIEF IN SUPPORT OF MOTION TO FILE AN AMICUS CURIAE
BRIEF IN SUPPORT OF RESPONDENT-APPELLANT DIANA
RONNFELDT-MENDOZA AND STATEMENT OF INTEREST OF
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INTRODUCTION

The interest of Wisconsin Judicare, Inc. (hereinafter WJ) in this appeal of the final order of the Circuit Court of Richland County, which denied Ms. Mendoza of all her requested relief, including her motion for court-appointed counsel, is that the need for counsel of low-income residents throughout Wisconsin is far greater than WJ can provide. In Wisconsin, legal service is grossly under-funded, resulting in only a fraction of low-income people obtaining the legal assistance they need. “We leave the poor unrepresented in the most crushing problems of life: divorce, child custody, domestic violence, housing and benefits disputes. What passes for civil justice among the have-nots is stunning.” Margaret Graham Tebs, *Lag in Legal Services*, ABA J. 67 (July 2002). *Amicus* believes it is imperative this Court of Appeals examines the Wisconsin Constitution, relevant case law, and supporting arguments to determine whether it provides a right to counsel to unrepresented, low-income litigants in custody cases.

ARGUMENT

I. THE INTEREST OF WJ IN THIS APPEAL PERTAINS TO THE NEED FOR COUNSEL OF WISCONSIN’S LOW INCOME RESIDENTS WHICH FAR EXCEEDS THE SERVICES WJ CAN PROVIDE

Wisconsin Judicare, Inc. (hereinafter WJ) is a non-profit, legal service corporation serving the civil legal needs of low-income clients in Wisconsin’s northern 33 counties and eleven federally recognized Native American Indian Tribes. WJ’s six staff attorneys and 267 participating private attorneys (on a contracted rate of \$45/hour) are dedicated to assisting low-income individuals with

civil legal issues primarily pertaining to family, social security and Indian Law. For 40 years, WJ has cultivated its mission of giving underprivileged persons an equal opportunity in civil litigation while maintaining the dignity of the client and attorney involved. Through this service, the low-income client keeps the freedom to choose her own attorney and does not receive a separate class of service just because it is rendered free. To increase access to justice for these most vulnerable residents, WJ staff attorneys conduct outreach visits to service agencies and meal sites, operate community legal clinics, and manage a legal advice hotline.

Future services to Wisconsin's residents will continue to be reduced as major funding sources diminish. Wisconsin Trust Account Foundation (WisTAF) and the Legal Services Corporation (LSC) primarily fund WJ. While these sources diminished funds from 2002-2005, the proposed budget reduction for 2007 will have the largest impact on indigent litigants. Time is of the essence. WJ must drastically cut direct services to clients and eliminate direct service staff positions. Only brief counsel and referrals will be provided to the majority of persons otherwise eligible for WJ's services.

WJ uses WisTAF dollars to provide direct services to clients and for general operating expenses. WJ received a grant of \$205,000 in 2004, funding an estimated 413 cases. The 2005 grant amount was \$80,000, a 61.07% decrease in funding, enough to cover the cost of only 161 cases. The WisTAF 2006 grant, including the funds generated through the \$50 lawyer assessment, provided for a

\$100,000 increase over the 2005 award. While the increase will modify case coverage, this new WisTAF grant level is still below the 1988 funding level.

WJ relies on a “Basic Field” grant from LSC to cover priority-item cases and a Native American grant for Indian Law issues. From 2002 to 2004, WJ lost approximately \$200,000 in its Basic Field grant alone. WJ’s current funding level is \$55,000 less than the amount granted by LSC in 1988, demonstrating that WJ’s federal funding level for 2006 is also the lowest it has been in nearly 20 years. LSC’s recent survey of legal needs concluded that at least 80 percent of the civil legal needs of low-income Americans are not being met. LEGAL SERVICES CORPORATION: DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (September 2005). Despite such documented need for increased legal services, the President's FY 2007 budget, proposed February 6, 2006, (OMB, Budget of the United States Government, Fiscal Year 2007, <http://www.whitehouse.gov/omb/budget/fy2007/budget.html> (last visited May 18, 2006)) represents a 4.9 percent reduction from the current appropriation.

Substantially fewer dollars from WisTAF and LSC translates to drastic cuts in direct client service. The case approval changes WJ has made reflect changed funding. For instance, WJ is able to fund client representation or services in divorce actions only if “there is significant recent, physical abuse and there are minor children of the parties who could be affected by the abuse.” If no minor children are involved in the recent physical abuse, the client is placed on a 90-day

waiting list. Post-divorce and post-paternity custody cases are too expensive, and thus, no longer approved for full representation.¹ WJ does not cover Guardian *ad Litem* fees, post-divorce periods of physical placement and visitation actions, contested guardianships, termination of parental rights, paternity, support actions, or juvenile cases.

Amicus believes it is imperative this Court of Appeals examines the Wisconsin Constitution, relevant case law, and supporting arguments to determine whether it provides a right to counsel to unrepresented, low-income litigants in custody cases. This Brief answers the right-to-counsel constitutional issue established under Article I, Sections 1, 9, 21(2), and 22 of the Wisconsin Constitution, and the Universal Declaration of Human Rights, under Articles 7, 10, 16(1), (3) and 25(2). G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

II. THE LIMITED ASSISTANCE AVAILABLE TO *PRO SE* LITIGANTS IN WISCONSIN IS NOT ADEQUATE TO PROTECT PARENTS' FUNDAMENTAL RIGHTS IN CUSTODY CASES²

Drastic changes in economic structure and social demographics have caused low-income residents to turn to the court for help resolving a variety of matters not previously encountered. Deborah J. Chase, *Pro-Se Justice and Unified Family Courts*, 37 FAM. L.Q. 403 (2003). The rising cost of legal representation relative to inflation and the dramatic decreases in funding for legal services for low-income people have generated an enormous number of litigants appearing

¹ An exception to this policy is granted only if a child is subject to severe physical abuse evidenced by: 1.) A child being removed in a ChIPS case; or 2.) Criminal charges for child abuse being filed against the non-custodial parent.

² The term "child custody" in this context refers to custody, placement and visitation.

without attorneys. In limited jurisdiction courts, especially in domestic relations cases, *pro se* litigants have become the majority. The growth of the *pro se* population in family law presents myriad procedural justice concerns for an adversarial system whose jurisprudential structure is premised on the assumption that litigants will have attorneys to protect them. 1 ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS (2003).

In 2004, WJ completed its own statistical evaluation of *pro se* divorces. WISCONSIN JUDICARE, INC.: EVALUATION OF PRO SE LITIGANTS IN DIVORCE AND DIVORCES INVOLVING CHILDREN IN NORTHERN WISCONSIN (October 2004). The study, focusing on court access and family composition of *pro se* litigants, found that in 72% of divorces at least one party to the action appeared without the assistance of an attorney. Over 50% of these divorce proceedings, with at least one party appearing *pro se*, involved children.³

In the past decade, the bench and bar of Wisconsin have made substantial efforts to accommodate this growing *pro se* population. The court's preferred approach to assisting self-represented litigants has consisted of referral programs to affordable sources of legal services. More recently, self-help programs have become a more economical means of providing relief. The scope and ability of these civil justice reforms, however, are extremely limited and have failed to address the problem that self-represented litigants create for the court. ACCESS at

³ Similarly, the State of Wisconsin reported 54% of all divorces in Northern Wisconsin affected children, with an average of 1.9 children affected by each divorce action. BUREAU OF HEALTH INFORMATION, WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES: WI MARRIAGES AND DIVORCES (2003).

3. The materials offered *pro se* litigants in Wisconsin advise *against* appearing *pro se* in contested custody cases.⁴ These alternative mechanisms of assistance are marginally successful and were never intended to substitute for counsel, especially in custody cases.

Self-represented litigants will always be “second-class” participants in a traditionally complex court process. ACCESS at 3. The Wisconsin Supreme Court recognized in *Durkee v. City of Janesville* (28 Wis.464, 471 (1871)) that under the Wisconsin Constitution’s Declaration of Rights, the state cannot constitutionally discriminate between the rights of different suitors or parties to the same suit, and that every person “ought to obtain justice freely, and without being obliged to purchase it, completely and without denial....” WIS. CONST. Art. I § 9. This authority, when coupled with the “suitor’s rights” clause of the Wisconsin Constitution, Article I, Section 21(2) builds the foundation for equality in access to the court. When appearing *pro se* denies the impoverished litigant of equal protection under the law, the court must enforce the only other right available to

⁴ See, e.g., Supreme Court of Wisconsin Website, Self-Help Center: Representing Yourself—Should I Represent Myself, *available at*: <http://www.courts.state.wi.us/services/public/selfhelp/selfrep1.htm> (instructing potential *pro se* litigants that,

Every case is important, but some cases may have a bigger effect on you because of...other people involved (like children). Cases with more money or people to consider are more complicated. Using a lawyer will make these cases less confusing and upsetting, and prevent mistakes that could be difficult or impossible to correct after the case is over.);

Supreme Court of Wisconsin Website, Self-Help Center: Representing Yourself—General Tips for Representing Yourself, *available at*: <http://www.courts.state.wi.us/services/public/selfhelp/selfrep3.htm>; St. Croix County Official Government Website, Divorce Forms for Wisconsin’s Tenth Judicial District, Divorce With Children—General Divorce Instructions for Self-Represented Citizens, *available at*: <http://www.co.saintcroix.wi.us/Departments/ClerkOfCourt/10thDistrict.htm>.

that litigant; the right to “prosecute or defend his suit ...by an attorney of the suitor's choice.” *Id.*

III. IT IS WITHIN THE INHERENT POWER OF THE JUDICIARY TO APPOINT LEGAL COUNSEL TO REPRESENT INDIGENT LITIGANTS

On at least three separate occasions, The Supreme Court of Wisconsin has found an inherent power of the judiciary is the right to appoint counsel. “The appointment of counsel ought to be made by a judge or under the aegis of the judicial system...the duty to furnish representation derives from constitutional provisions that place the responsibility upon the courts...[I]t is within the inherent power of the courts to appoint counsel for the representation of indigents.” *State ex rel. Fitas v. Milwaukee County*, 65 Wis. 2d 130, 134, 221 N.W.2d 902 (1974).⁵ In the case of *Joni B. v. State*, 202 Wis. 2d 1, 549 N.W.2d 411 (1996), the Court struck down a statute that unreasonably burdened and substantially interfered with the judiciary’s exercise of power, stating that the power to appoint counsel “is inherent to serve the interests of the circuit court.” *Chiarkas*, 160 Wis. 2d at 137-38 (citing *Lehman*, 137 Wis. 2d at 76).

Joni B. specifically addressed the special problems with unrepresented parents in ChIPS proceedings: they are often poorly educated and frightened, unable to fully understand and participate in the judicial process, and create exceptional problems for the trial courts. Regardless of the underlying cause of action, self-representation has had quantifiable consequences for state courts.

⁵ See also, *State ex rel. Chiarkas v. Skow*, 160 Wis. 2d 123, 137, 465 N.W.2d 625 (1991); *Contempt in State v. Lehman*, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987)(invoking same).

ACCESS at 2. The Court recognized in *Joni B.* that assistance of counsel is necessary to the integrity of the proceeding and avoids placing the judge in the untenable position of having to act as counsel for that parent. 202 Wis. 2d at 11. Courts often “tip the balance of these obligations [of access or neutrality] in favor of their ethical duty to remain impartial”—an ethical duty that assumes a justice system with two represented parties. Jona Goldschmidt, *The Pro-Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 37 (2002). Essentially, only the represented party, knowing the rules of the game, receives equal protection under the law. *Id.*

The Universal Declaration of Human Rights has long recognized the necessity of ensuring equal protection under the law to individuals and families. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). For centuries, England has provided counsel in civil cases. Other nations such as Canada, New Zealand, and Australia have provided attorneys to the indigent as a matter of right for decades. Jonathan M. Smith, *There Should Be No Price Tag on Justice, Mr. Chief Justice*, NLADA CORNERSTONE, Winter 2005/2006, at 5. “The concept that lawyers are essential to justice, and that it is the obligation of the government to ensure that they are available on equal terms is well accepted by the rest of the industrialized world.” *Id.* In *Airey v. Ireland*, the European Court of Human Rights found that the right to a fair hearing, also a guarantee under the European Convention, includes the right to counsel in certain civil cases. The court stated there was “no room to

distinguish between acts and omissions;” that fairness necessitated positive state action. 32 Eur. Ct. H.R. (ser.A) (1979), *reprinted in* 2 Eur. H.R. Rep. 305 (1979).

IV. A MEANINGFUL OPPORTUNITY TO BE HEARD ON FUNDAMENTAL RIGHTS EXISTS IN ALL CUSTODY PROCEEDINGS, AND THUS NECESSITATES COUNSEL

Fundamental fairness, a meaningful opportunity to be heard, and the fundamental rights and liberty interests of parents are factors for the court in making a “necessity” determination. A due process inquiry focuses on fundamental fairness, as the Fourteenth Amendment bars a state from denying any person a fundamentally fair trial. *Piper v. Popp*, 167 Wis. 2d 633, 650, 482 N.W.2d 353 (1992). In *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981), the U.S. Supreme Court addressed a due process claim by an indigent parent not afforded counsel in a termination of parental rights proceeding. Wisconsin adopted this language in *Piper*, holding the incarcerated indigent defendant in a civil tort action had no constitutional right to appointed counsel, but “due process required that he be given a meaningful opportunity to be heard.” *Piper*, 167 Wis. 2d at 658. This Court must agree that a meaningful opportunity to be heard on fundamental rights and liberty interests of parents in care, custody, and control of their children are overwhelming private interests, existing in all custody proceedings, and thus necessitates counsel.

The Fourteenth Amendment’s Due Process Clause, like the Fifth Amendment counterpart, guarantees more than fair process. It provides heightened protection against governmental interference with certain fundamental rights and liberty

interests. Failing to provide counsel to indigent litigants actively interferes with the parent's right to protect her children. In *Troxel v. Granville*, 530 U.S. 57, 65-66, the Court explained "There is a constitutional dimension to the right of parents to direct the upbringing of their children...[the parents'] primary function and freedom include preparation for obligations the state can neither supply nor hinder." In recognizing the essential right to raise one's own children the Court has invoked the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment to defend the integral family unit. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965). A parent's interest in the "companionship, care, custody and management of her children...undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley*, 405 U.S. 651.

While the state may have legitimate interests to economize proceeding expenses by not appointing counsel, it is hardly a significant reason to interfere with fundamental interests. The *Joni B.* Court concluded that "the State's pecuniary interests will not outweigh the interest shared by the State and the parent in a just and accurate result which will require the 'equal contest' of counseled adversary proceedings." *Joni B.*, 202 Wis. 2d at 16. The benefits and burdens of our constitutional system must be borne by society as a whole. *Pasqua v. Council*, 186 N.J. 127; 892 A.2d 663 (2006). The Wisconsin Supreme Court has recognized the interest of the legislature to manage public funds responsibly. "The

bottom line is that if the courts are to operate effectively for the public, the courts must be adequately funded. Along with the legislature's power to tax and spend comes the responsibility to ensure that the courts, as a co-equal branch of government, have sufficient funds to fulfill their responsibilities to the people of the state." Shirley Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996*, 12 ST. JOHN'S J.L. COMM. 69, 74-75.

When confronting a right to an attorney claim in custody cases, Justice Cathell of the Maryland Court in *Frase v. Barnhart*, 379 Md. 100, 840 A.2d 114, (2003) argued in his concurrence, "I think it can be agreed that the quality of justice received, even in our system...is impacted by the presence or absence, and the quality of, legal representation of the respective parties...[B]ut there is no acceptable reason to avoid doing what we can do, even if it is perceived that what we do may not be well received by other governmental entities that will have to address the impact of our ruling." *Id.* at 133. Otherwise, the issue remains what Judge Cathell calls "a bouncing ball"—passed among the three branches of government with each hoping the others will address it. *Id.* at 134. It is the duty of this court, under the separation of powers doctrine, to determine constitutional issues and not leave unrepresented parents in "limbo." *Id.*

CONCLUSION

One of the most important roles of the judiciary is to see that the laws equally protect all people—the poor as well as the wealthy. Cicero, in his *De Re Publica De Legibus*, I, xxxii, 49, (as translated by Keyes) raised questions, one of which remains partially unanswered today. As relevant here, he stated:

“Therefore, since law is the bond which unites the civic association, and the justice enforced by law is the same for all, by what justice can an association of citizens be held together when there is no equality among the citizens? For if we cannot agree to equalize men’s wealth, and equality of innate ability is impossible, the legal rights at least of those who are citizens of the same commonwealth ought to be equal. For what is a State except an association or partnership in justice?”

Frase, 379 Md., at 132.

For the foregoing reasons, the undersigned *Amicus* respectfully requests that this court overturn the final order of the Circuit Court for Richland County, in favor of Respondent-Appellant Ms. Ronnfeldt-Mendoza, considering the inadequacy of services available to such *pro se* litigants in custody disputes. *Amicus* urges this court to recognize the State’s obligation to afford *pro se* litigants full legal representation in order to protect the Constitutionally granted fundamental rights at issue.

Respectfully submitted this 24 th day of May, 2006.



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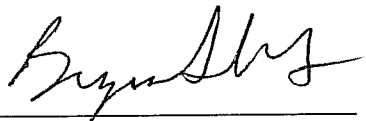


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FORM AND LENGTH CERTIFICATION

I Hereby Certify that this brief conforms to the rules contained in s. 809.19 (8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is (12) pages and consists of (2,890) words, as determined by the word-count function provided by Microsoft Word.

Respectfully signed this 24 th day of May, 2006.



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CERTIFICATE OF SERVICE

Pursuant to the applicable procedural rules, I certify that I am not a party to nor interested in the herein matter, and that on this date I caused to be mailed via certified U.S. Mail, a true and correct copy and appropriate number of the attached

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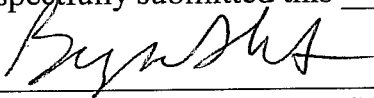
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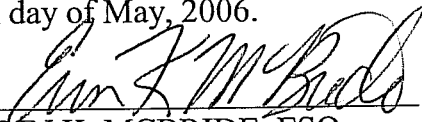
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