

WISCONSIN COURT OF APPEALS

DISTRICT IV

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

Jerome E. Parrish,

Appeal No. 2006AP000243

Petitioner-Respondent,

v.

Circuit Court Case No. 1992PA000011A

Diana Romfeldt-Mendoza,

Respondent-Appellant.

APPEAL FROM CIRCUIT COURT FOR RICHLAND COUNTY,
HONORABLE EDWARD E. LEINEWEBER, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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D.	<u>Piper v. Pop</u> , 167 Wis.2d 633, 482 N.W.2d 353 (1992) has no bearing on the case at hand.	9
E.	Article I, Section 21(2) does <i>not</i> require an impoverished suitor to represent herself, but rather creates the fundamental right of access to the court system.	9
III.	Article I, Section 1 of the Wisconsin Constitution is <i>not</i> violated when indigent litigants are denied government funded counsel.	9
IV.	Section 22 of Article I of the Wisconsin Constitution read in pari materia with Sections 1 and 21(2) do <i>not</i> provide impoverished suitors with the right to court provided attorneys.	13
V.	Section 21(2) of the Wisconsin Constitution should not be read to provide the fundamental right to counsel as a matter of public policy.	13
VI.	The circuit court's dismissal of Ms. Mendoza's motion based upon her non appearances was not an erroneous exercise of discretion.	14
VII.	The circuit court's order of January 5, 2006, was not an erroneous exercise of discretion by the Honorable Edward E. Leineweber.	15
	CONCLUSION	16
	CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(b) and (c)	17

TABLE OF AUTHORITIES

CASES

<u>Halvanika v Blunt Ellis & Loewi, Inc.</u> , 174 Wis.2d 381, 394, 497 N.W.2d 756 (Ct. App. 1993)	7
<u>Jadair, Inc. v United States Fire Ins. Co.</u> , 209 Wis.2d 187, 202, 205, 562 N.W.2d 401 (1997)	7
<u>City of Sun Prairie v. Davis</u> , 217 Wis.2d 268, 278, 579 N.W.2d 753 (Ct. App. 1998)	7
<u>Tennessee v Lane</u> , 541 U.S. 509, 124 S. Ct. 1978 (2004)	7
<u>State v Martin</u> , 191 Wis.2d 647, 652, 530 N.W.2d 420, 423 (Ct. App. 1995)	7
<u>Powell v Alabama</u> , 278 U.S. 45 (1932)	7
<u>Carpenter v County of Dane</u> , 9 Wis. 249 (1859)	7
<u>Piper v. Pop</u> , 167 Wis.2d 633, 482 N.W.2d 353 (1992)	9
<u>State v Neave</u> , 117 Wis.2d 359, 344 N.W.2d 181 (1984)	10
<u>Lassiter v Dept. of Servs. of Durham Co.</u> , 452 U.S. 18, 25, 101 S. Ct. 2153, 2158 (1981)	10
<u>Ray v Gault</u> , 387 U.S. 1, 41, 87 S. Ct. 1428, 1451 (1967)	10
<u>Vitek v Jones</u> , 445 U.S. 480, 496-7, 100 S. Ct. 1254, 1265-6 (1980) ...	10

<u>Gagnon v Scarpelli</u> , 411 U.S. 778, 783-91, 93 S. Ct. 1756, 1760-4 (1973)	10
<u>State ex rel. Cresci v H & SS Dep't</u> , 62 Wis.2d 400, 409-14, 215 N.W.2d 361 (1974)	10
<u>State v Hart</u> , 89 Wis.2d 58, 277 N.W.2d 843 (1979)	11
<u>State v Annala</u> , 168 Wis.2d 453, 468, 484 N.W.2d 134 (1992)	11
<u>Griffin v Illinois</u> , 351 U.S. 12, 76 S. Ct. 585 (1956)	11
<u>M.L.B. v S.L.J.</u> , 519 U.S. 102, 117 S. Ct. 555 (1996)	12
<u>Williams v Illinois</u> , 399 U.S. 235, 90 S. Ct. 2018 (1970)	12
<u>Johnson v Allis Chalmers Corp.</u> , 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991)	15
<u>Lawrence v MacIntyre</u> , 48 Wis.2d 550, 556, 180 N.W.2d 538, 541 (1970)	15
<u>Taylor v State Highway Comm.</u> , 45 Wis.2d 490, 173 N.W.2d, 707 (1970)	15

STATUTES

Wis. Stat. § 767.01(2)	4-5
Wis. Stat. § 769.101(1)	4-5
Wis. Stat. § 805.03	15

WISCONSIN CONSTITUTIONAL PROVISIONS

Article I, Section 21(2) 6

Article I, Section 1 9

Article I, Section 22 13

ISSUES PRESENTED FOR REVIEW

Respondent Jerome E. Parrish (hereinafter "Jerome") agrees with Appellant Diana Ronnfeldt-Mendoza's (hereinafter "Diana") summary of the issues presented for review.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This party does not believe that oral argument, nor publishing are necessary.

STATEMENT OF THE CASE

Jerome does not agree with Diana's statement of the case in that it is an inappropriate argument which misleading attempts to interpret the transcripts and includes Diana's opinion as to the state of mind of all counsel and The Honorable Edward E. Leineweber. The record speaks for itself in its entirety. Of little importance, Diana's counsel misspelled her previous last name which is in fact "Ronnfeldt."

Jerome agrees with Diana's statement of the case in as much as it accurately presents the following:

Jerome was granted primary physical placement of K.J.P. on December 15, 2003. On March 17, 2004, Jerome filed a Petition to Enforce Physical Placement because one or more of his periods of physical placement had been denied and substantially interfered with by the Diana (App. 1). Diana was personally served with notice of the same on March 22, 2004, at 1514 University Ave, Green Bay, Wisconsin (App. 5).

Issues arose regarding venue. The Honorable Edward E. Leineweber ordered on June 3, 2004, that the venue of the action concerning custody and placement of the minor child was to be Richland County (App. 7-8).

On or about August 4, 2004, the trial court issued a Notice of Hearing for a status conference to be held on November 9, 2004, at 9:30 a.m. with the following admonition that the parties were to appear in person: "IN PERSON STATUS!" (App. 9). Diana appeared at a status conference on November 9, 2004 (Res-App's Br. 8).

In January of 2005, mediation was unsuccessful (App. 13). On February 3, 2005, Judge Leineweber issued an Order Appointing Guardian Ad Litem and ordered that each party deposit \$1,000 with the Richland County Clerk of Court unless waiver was granted by the Court after hearing (App. 10).

A status conference was held on April 4, 2005, but Diana failed to appear. Pursuant to said hearing, Jerome's counsel prepared an Order for the court and sent the same on April 5, 2005 (App. 14). The Order stated that Diana's Motion for Change in Placement would be dismissed for lack of prosecution 20 days from April 4, 2005, unless within that time, Diana showed cause for her failure to appear at the status conference on April 4, 2005 (App. 15).

Diana obviously received a copy of the Order, because she responded on or about April 10, 2005 (App. 16). It was only at this date that she informed the court and parties of her change in address. In the materials that accompanied her correspondence, she indirectly admits having knowledge of the April 4th status conference because the letter from her physician states "She did miss her court date on April 4, 2005, because of the above." (App. 19).

However, Diana did not inform the court nor the opposing party of the fact that she would not be attending the April 4, 2005 status conference until she received the

proposed Order regarding dismissal. Additionally, her own doctor report states that she should be allowed to change physical position every half an hour (App. 20). There was nothing preventing Diana from driving to her court appearance, but taking a break from driving every half hour. More importantly, there was absolutely nothing preventing Diana from calling the court to appear on April 4, 2005.

On May 23, 2005, Diana was served by mail with a copy of the Notice of Motion and Motion for child support of Jerome at her current address. The hearing on that motion was set for July 15, 2005, at 1:00 p.m. On July 6, 2005, Diana was personally served with a Petition to Enforce Physical Placement and Notice of Hearing regarding the same set for July 15, 2005, at 1:00 p.m. (App. 24-26).

On July 15, 2005, Diana appeared for the hearing regarding child support and enforcement of physical placement, and presented the trial court with a motion and brief which, by the trial court's estimate, exceeded thirty pages. The court advised that the matter was scheduled for thirty minutes so there was insufficient time. The court set Diana's motions regarding indigency and placement, along with the child support motion for hearing on December 6, 2005 (App. 27-8).

Diana failed to appear on December 6, 2005. Subsequently, her motions were dismissed for failure to prosecute (App. 11-12).

STANDARD OF REVIEW

Jerome agrees with Diana's summary of the issues presented for review.

ARGUMENT

I. **DIANA MENDOZA DOES *NOT* HAVE A CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL IN THE CIRCUIT COURT.**

Diana's brief is replete with attacks on attorneys, judges, the State of Wisconsin and federal government. She makes it seem that the entire nation is against pro se defendants. She does not provide proof for her allegations, but rather makes lofty accusations and groundless conclusions.

Diana provides no evidence that pro se litigants are harmed or do not receive equal justice. The fact is that they are not harmed. Wisconsin's family law statutes are very clear and directive as to what the trial court should consider in making determinations. Likewise, our trial courts are tremendously fair and unbiased in their wise application of the law to the facts in the case. Additionally, our trial courts are specially careful for the rights of pro se litigants.

To argue that pro se litigants do not receive equal justice is to argue that our trial courts are ineffective and biased toward those represented by counsel. This is simply not true and Diana has presented no evidence of the same.

In the opening paragraph of her argument, Diana claims "as one would expect, without a lawyer, she lost everything." (Res-App's Br. 24). This assertion is false on its very face. Diana's Motion for Modification of Placement was dismissed for her failure to prosecute (App. 11-12). She had and still has remaining legal remedies. There is no law barring her from bringing the motion again. She could have sought to reopen the judgment or brought a motion to reconsider. Additionally, the trial court will retain jurisdiction over the minor child until she reaches at least 18 years of age. Wis. Stats. §§

767.01(2) and 769.101(1).

Finally, all of this could have been prevented had Diana simply appeared for scheduled court appearances, in person or by telephone, and followed the trial court orders. Diana failed to appear before the trial court on both April 4, 2005 and December 6, 2005. She failed to communicate with the guardian ad litem. She repeatedly failed to comply with court orders.

On July 15, 2005, Diana appeared at a hearing for child support amongst other issues, and presented the trial court with a motion and brief which, by the trial courts estimation, exceeded thirty pages. The court advised that the matter was scheduled for thirty minutes so there was insufficient time. The trial court set that motion and the child support motion over for another date. Diana did not appear.

Importantly, Diana's counsel, John F. Ebbott and Kevin G. McGee were aware of this hearing as a result of previous appeal attempts. Neither of them appeared on her behalf as well. It is entirely possible that Diana did not appear in order to create facts which made the constitutional issues she claims ripe for appeal.

Diana further claims that "equal justice under law is seldom realized . . . because of the tremendous differences in wealth among those who use and are hailed into our justice system." (Res-App's Br. 24). However, she provides no evidence of the same.

Diana goes on to call our national allocation of resources "shameful" and claim that Wisconsin "funds everything but equal justice." (Res-App's Br. 26). She cites amounts spent on the Iraq war and also Wisconsin tourism but *does not compare* that to amounts spent on "equal justice".

This baseless reasoning is just a beginning of the continued faulty arguments of Diana throughout her Brief.

II. Article I, SECTION 21(2) OF THE WISCONSIN CONSTITUTION DOES NOT GUARANTEE THE FUNDAMENTAL RIGHT TO AN ATTORNEY IN CIVIL ACTIONS TO ALL SUITORS AT PUBLIC EXPENSE.

A. The plain meaning of Section 21(2) does *not* guarantee the fundamental right to be represented by an attorney to impoverished suitors.

The foundation of *all* of Diana's arguments is that Article I, Section 21(2) of the Wisconsin Constitution provides a right to counsel. This is a leap of interpretation for which Diana provides no basis.

Article I, Section 21(2) of the Wisconsin Constitution provides:

Rights of suitors. Section 21.

...

(2) in any court of the State, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice. (emphasis added).

This language is clear. It is not ambiguous. Litigants *may* participate in a lawsuit pro se. They do not need a law license to do so. They also *may* have an attorney of their choice represent them. The Section does not state that the litigant has the *right to counsel* provided at public expense.

The Diana cites no precedent, state or federal, that supports her interpretation. She makes many unverified interpretations of case law, but none of the cases cited even remotely support her arguments.

On its face, this constitutional language simply permits a suitor to choose whether

to appear pro se or to choose to have an attorney of the suitor's choice. See Halvanika v Blunt Ellis & Loewi, Inc., 174 Wis.2d 381, 394, 497 N.W.2d 756 (Ct. App. 1993); Jadair, Inc. v United States Fire Ins. Co., 209 Wis.2d 187, 202, 205, 562 N.W.2d 401 (1997); City of Sun Prairie v. Davis, 217 Wis.2d 268, 278, 579 N.W.2d 753 (Ct. App. 1998).

B. There is no fundamental right to counsel granted by the Wisconsin Constitution.

Diana argues that Section 21(2) creates a fundamental right to counsel because counsel is an essential element of meaningful access to the courts (Res-App's Br. 40). However, Diana cites no authority for this conclusion.

She does cite Tennessee v Lane, 541 U.S. 509, 124 S. Ct. 1978 (2004) and State v Martin, 191 Wis.2d 647, 652, 530 N.W.2d 420, 423 (Ct. App. 1995) for the proposition that access to the courts is itself a fundamental right. This is, in fact, the holding of Lane and Martin. However, no where in these two cases or any other case cited by Diana does a court find that "access to the courts" *requires* counsel for all civil litigants.

Diana cites Powell v Alabama, 278 U.S. 45 (1932) and Carpenter v County of Dane, 9 Wis. 249 (1859) for the assertion that "... the right to have counsel appointed, when necessary is a logical corollary from the constitutional right to be heard by counsel." (Res-App's Br. 40). However, both of these cases involved *criminal charges* in which the defendant faced the deprivation of liberty and even possibly life and had the right to counsel under the 14th Amendment of the United States Constitution. The Diana vehemently points out that her arguments **do not** fall under due process but rather are equal protection arguments (Res-App's Br. 43-4). She specifically claims that cases

regarding due process do not apply to this analysis. Jerome agrees. Therefore, Powell and Carpenter are not applicable by Diana's own admission.

Diana argues several times that suitors have a fundamental right to counsel because it appears in the Declaration of Rights. However, she cites no authority for this averment.

C. The constitutional history is evidence that Section 21(2) does *not* guarantee the fundamental right to an attorney.

Diana points out that the language that is now Section 21(2) began as follows:

Section 22. Any male citizen residing in the state, the age of 21 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.

It was later amended to read as follows:

"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 choice."

Diana argues that this change in language "establish[es] a broad right of representation in favor of suitors." (Res-App's Br. 42).

This amendment is actually evidence that the purpose of Section 21(2) was not to grant all persons the right to counsel, but rather *allow them to appear pro se*. It does not provide the fundamental right to counsel, but rather the fundamental right to access the courts. Suitors can access these courts by appearing pro se or with counsel should they so choose. The Section was clearly amended to allow a suitor to appear *without* licensed counsel.

- D. **Piper v. Pop, 167 Wis.2d 633, 482 N.W.2d 353 (1992) has no bearing on the case at hand.**

The Diana argues that Piper has no legal bearing on this case because it was decided on due process grounds rather than the equal process grounds asserted by Diana. Jerome agrees.

- E. **Article I, Section 21(2) does *not* require an impoverished suitor to represent herself, but rather creates the fundamental right of access to the court system.**

Diana obtusely argues that if every litigant has an absolute right to appear pro se under Jadair, Inc., then they also have the absolute right to appear by an attorney. This is a correct reading of Section 21(2) because it provides access to the courts to all litigants whether representing themselves or represented by an attorney. The Diana had the absolute right to appear by an attorney at the trial court hearings in this matter. However, she did *not* have the right to do so *at public expense*.

Diana's arguments attempting to create fundamental right to counsel from the fundamental right to access the court systems fail based on the plain language of Section 21(2) and for lack of precedent.

III. ARTICLE I, SECTION 1 OF THE WISCONSIN CONSTITUTION IS *NOT* VIOLATED WHEN INDIGENT LITIGANTS ARE DENIED GOVERNMENT FUNDED COUNSEL.

Article I, Section 1 provides:

Equality; inherent rights. Section 1. All people are born equally free and independent, and have certain inherent right; 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.

Diana argues that Article I, Section 21(2) of the Wisconsin Constitution guarantees every suitor the fundamental right to be represented by an attorney of her choice at public expense. This argument fails for all of the reasons put forth in Section II above. Therefore, the remainder of this Section III is set forth by Jerome, assuming *arguendo*, that Diana's fundamental right argument succeeds.

Even if the fundamental right at issue is the access to courts through counsel at public expense, it has only been established in cases where a person's *due process rights* are at issue. See State v Martin, 191 Wis.2d 647, 652, 530 N.W.2d 422 (Wis App. 1995); State v Neave, 117 Wis.2d 359, 344 N.W.2d 181 (1984); Piper v Popp, 167 Wis.2d 633, 482 N.W.2d 352 (1992); Lassiter v Dept. of Servs. of Durham Co., 452 U.S. 18, 25, 101 S. Ct. 2153, 2158 (1981). In Ray v Gault, 387 U.S. 1, 41, 87 S. Ct. 1428, 1451 (1967); Vitek v Jones, 445 U.S. 480, 496-7, 100 S. Ct. 1254, 1265-6 (1980). The Diana specifically states that the argument set forth in this case are *not* the same as those in Piper and Lassiter under due process, but rather are as a matter of equal protection.

Even so, our courts have denied counsel to litigants in civil actions with much more at stake than the Diana. As an indigent's interest in personal freedom decreases, so does the constitutional necessity to appoint counsel. Lassiter, 452 U.S. at 26, 101 S. Ct. at 2159. Despite the fact that probation revocation results in a loss of personal freedom, courts have found that a probationer has only a diminished interest in physical liberty and an indigent probationer's right to appointed counsel in a civil probation revocation hearing is to be decided on a case by case basis. Gagnon v Scarpelli, 411 U.S. 778, 783-91, 93 S. Ct. 1756, 1760-4 (1973); State ex rel. Cresci v H & SS Dep't, 62 Wis.2d 400,

409-14, 215 N.W.2d 361 (1974). The Wisconsin Supreme Court found that indigent unrepresented prisoners are not entitled to appointed counsel in civil actions. The presumption is that an indigent litigant has no right to appointed counsel in a civil case in the absence of at least a potential deprivation of physical liberty. Lassiter, 452 U.S. at 31, 101 S. Ct. at 2161.

The Diana argues that her flawed equal protection argument is subject to strict scrutiny review. However, the Diana has not stated a fundamental right nor does she even allege that the state is *imposing a law* upon its citizens which denies equal protection.

Strict scrutiny review is applied to statutes that are alleged unconstitutional. State v Hart, 89 Wis.2d 58, 277 N.W.2d 843 (1979); State v Martin, 191 Wis.2d 646, 530 N.W.2d 420 (1995). If a statute affects a fundamental right or creates a classification based on a suspect criterion, then the court reviews the statute with strict scrutiny. State v Annala, 168 Wis.2d 453, 468, 484 N.W.2d 134 (1992). Diana does not allege that any certain statute is unconstitutional. Her argument seems to be that the plain meaning interpretation of Article I, Section 21(2) is unconstitutional, but such an argument is illogical and not supported by any precedent.

The Diana goes on to compare Griffin v Illinois, 351 U.S. 12, 76 S. Ct. 585 (1956) in which the United States Supreme Court found that where a state grants the right to Diana review of a criminal conviction, it may not discriminate against some convicted defendants on account of their poverty by denying an appeal to those unable to afford a transcript. This case is distinguishable. First, a state law required payment for a

transcript *before* one could appeal. In this case, there is no such law at issue and no statute denying Diana the right to access the courts. She was not required to pay a filing fee. She was not required to pay any fees to the court which she could not afford therefore denying her access to the courts. Second, Griffin involved criminal matters where personal liberty was at stake invoking due process rights.

Diana further argues that Griffin was extended to civil cases in M.L.B. v S.L.J., 519 U.S. 102, 117 S. Ct. 555 (1996). Again, the litigant in M.L.B. was being denied *access to the courts* because she could not afford the \$2,352.36 record preparation fee required before she could access the court system. The Court in no way held that civil litigants have a right to counsel without fee.

Diana also cites Williams v Illinois, 399 U.S. 235, 90 S. Ct. 2018 (1970) for the proposition that a law nondiscriminatory in its face may be grossly discriminatory in its operation, and is particularly offensive when it affects only indigents. Again, this was a criminal case that involved a defendant's personal liberty where the application of a statute caused the defendant to be incarcerated for involuntary non-payment of fines and court costs. Williams, 399 U.S. at 242, 90 S. Ct. at 2023.

The Diana's argument under the equal protection clause is amiss. She first argues that Section 21(2) provides the fundamental right to counsel and then alternatively argues that any other interpretation would be a violation of equal protection. It is the interpretation however that determines whether or not a fundamental right to counsel exists and in turn, whether the equal protection clause applies.

Diana's argument is inherently flawed. She cites no case in which a state

examined a provision of its own constitution for being unconstitutional under another provision of the same *state* constitution. Further, Diana has not proven that indigency prevents a person from appearing with counsel. There are many agencies and even for-profit attorneys who will and do take cases pro se.

IV. Section 22 of Article I of the Wisconsin Constitution read in pari materia with Sections 1 and 21(2) do *not* provide impoverished suitors with the right to court provided attorneys.

Diana's argument is again based on the fact that the right to counsel is the fundamental principal. This argument fails for the reasons set forth in the previous Sections of this Brief. The Diana is throwing every frail argument possible at the Court, but they all resound from the non-existent right to counsel in civil cases. The bottom line is that there is not a fundamental right to counsel provided by the Wisconsin Constitution.

V. Section 21(2) of the Wisconsin Constitution should not be read to provided the fundamental right to counsel as a matter of public policy.

Diana has not shown in any way that pro se litigants *need* counsel in order to have equal access to the courts. Equal protection demands that our courts treat all litigants fairly, regardless of whether they are represented by counsel. The Wisconsin courts are profoundly unbiased and seek to protect the rights of pro se litigants.

Pro se litigants do not create a burden on our trial courts. Some parties make the decision to proceed pro se because they feel comfortable and confident without representation. Not all pro se litigants are indigent. If financially stable litigants believe that they will get equal justice without an attorney, what is different for pro se litigants who are indigent. The answer is that nothing is different. Our legal system is specifically

designed to be fair to all persons. There is no need to be represented to receive equal justice.

If this Court were to determine that all civil litigants have a fundamental right to counsel, it would create an unmanageable policy not currently mandated by the state or federal constitution. It would create an incredible economic hardship on the justice system at a time when our state and counties are already being forced to tighten their budgets.

Likewise, it would impose a burden on the justice system because any person would have the right to bring any claim regardless of the merits without incurring any expense of their own. This would not only increase the case load of our courts, but eventually put our government in the unfavorable position of determining which civil cases had merit and which did not lending the state to lawsuits as a result.

While it may be convenient and ideal for all litigants to have experienced counsel, it certainly will not relieve the trial court system of any burden.

VI. The circuit court's dismissal of Diana's motion based upon her non appearances was not an erroneous exercise of discretion.

Diana cites case law regarding *default judgments* as support for her argument that the trial court erroneously exercised his discretion when he dismissed her motions on December 6, 2005. However, *no* default judgment was ever entered in this case. To the contrary, Diana's Motion to Change Placement was dismissed because she failed to prosecute the same (App. 11-12). Since Diana did not claim in her original brief that the trial court's dismissal of her motions for failure to prosecute was an erroneous exercise of

the court's discretion, any alternative arguments put forth by her in her Reply Brief should not be considered.

A trial court's dismissal of a civil litigant's action for either the violation of a court order or for failure to prosecute is a matter that is appropriately largely left within the trial court's discretion. See Johnson v Allis Chalmers Corp., 162 Wis.2d 261, 273, 470 N.W.2d 859 (1991). The trial court has the power to prevent unwarranted delay and the proliferation of stale lawsuits. See Wis. Stat. § 805.03; Lawrence v MacIntyre, 48 Wis.2d 550, 556, 180 N.W.2d 538 (1970). A court's decision to dismiss an action will not be disturbed unless the party claiming to be aggrieved by the decision establishes that the trial court abused its discretion. Taylor v State Highway Comm., 45 Wis.2d 490, 173 N.W.2d 707 (1970).

Based upon the happenings in the trial court proceedings as set forth in the Statement of the Case above, the trial court had just cause to dismiss Diana's motions for failure to prosecute.

VII. The circuit court's order of January 5, 2006, was not an erroneous exercise of discretion by the Honorable Edward E. Leineweber.

Again the Diana misrepresents the Order. Diana was not denied primary placement, but rather her motion was dismissed for failure to prosecute. Since Diana did not claim in her original brief that the trial court's dismissal of her motions for failure to prosecute was an erroneous exercise of the court's discretion, any alternative arguments put forth by her in her Reply Brief should not be considered.

The trial court's Order of January 5, 2006, was not an erroneous exercise of

discretion for the reasons set forth in Section VI above.

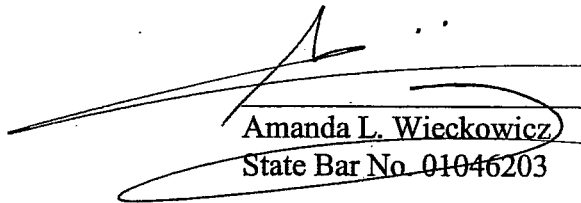
CONCLUSION

Article I, Section 21(2) of the Wisconsin Constitution does not provide a fundamental right to counsel. The circuit court did not find Diana in default on December 6, 2005, nor deny her primary placement.

Petitioner, Jerome E. Parrish, respectfully requests that this Court affirm the findings of the trial court in this matter.

Dated this 30th day of May, 2006.

Respectfully submitted:



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