

Pam M. Kelly and Crystol Dimick

Petitioners,

v.

Dominic S. Amato, in his capacity
As Judge of the Circuit Court
For Milwaukee County and Mark A.
Warpinski, in his capacity as
Judge of the Circuit Court for
Brown County,

ORIGINAL ACTION FOR
DECLARATORY JUDGMENT

Respondents.

MOTION FOR LEAVE TO APPEAR AMICUS CURIAE IN SUPPORT
OF PETITIONERS' PETITION REQUESTING THE SUPREME
COURT TO TAKE JURISDICTION OF AN ORIGINAL ACTION FOR
DECLARATORY JUDGMENT AND STATEMENT OF INTEREST OF
WISCONSIN JUDICARE, INC.

Wisconsin Judicare, Inc., by and through undersigned counsel and pursuant to Wis. Stat. Section 802.01(2), respectfully moves the Court for leave to appear *Amicus Curiae* in support of Petitioners' petition requesting the Supreme Court to take jurisdiction of an original action for declaratory judgment, and requests that this Court grant the petition and take jurisdiction. As grounds for this motion, Wisconsin Judicare, Inc. states as follows:

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. 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. WJ's mission is to give un-

derprivileged persons an equal opportunity in civil litigation while maintaining the dignity of the client and attorney involved. The underprivileged client has freedom to choose her own attorney and does not receive a separate class of service just because it is rendered free. WJ recognizes the multiple barriers to justice faced by the poor, the disabled, the elderly, and the victims of domestic violence. WJ staff attorneys conduct outreach visits to service agencies and operate a legal advice hotline. WJ pays local private attorneys to provide free legal help to low-income persons in their communities.

1. The interest of WJ in the petition for original jurisdiction is that the need for counsel of low-income residents of northern Wisconsin is far greater than WJ can provide. Future services will continue to be reduced as funding sources diminish. Wisconsin Trust Account Foundation (WisTAF) and the Legal Services Corporation (LSC) primarily fund WJ. These sources diminished funds in 2002, 2003 and 2004. The proposed budget reduction for 2005 will have the largest impact; and as the Brief will show, time is of the essence. WJ must drastically cut direct services to clients and eliminate direct service staff positions. Specifically, WJ will cut monthly intake of clients in half, allocating \$7,500 monthly for private attorneys contracting with WJ. Only brief counsel and referrals will be provided. The only other alternative is to close intake altogether for a short time to reserve funds.

WJ uses WisTAF dollars to provide direct services to clients by volunteer attorneys and for general operating expenses. WJ received a grant of \$205,000 in 2004, funding an estimated 413 cases. The 2005 grant amount is \$80,000, a 61.07% decrease in funding. WJ will reduce its direct service by 252 cases, being able to fund only 161 cases in 2005. WJ receives a "Basic Field" grant from LSC to cover priority-item cases, and a

Native American grant for Indian Law issues. From 2002 to 2003, WJ lost approximately \$139,500 in its Basic Field grant alone. Through 2004, this primary funder had cut roughly \$200,000. Funding from LSC for 2005 is not secured at this point. As the legislation currently stands, LSC itself will not be funded at the 2004 level. In September of this year, the Senate Appropriations Committee marked up the spending bill that included LSC's FY05 appropriation, allocating \$335 million to LSC. The LSC appropriation in the Commerce, Justice, State and Judiciary bill is \$300,000 less than the amount passed by the US House of Representatives in July. The House figure of \$335.3 million is equal to LSC's final FY04 appropriation after two across-the-board rescissions. Similar cuts may yet be applied to LSC's FY05 budget. While appropriation levels are always uncertain, WJ's 2005 grant will be less than the 2004 award.

2. Substantially fewer dollars from WisTAF and LSC translates to drastic cuts in direct client service. The case approval changes WJ has had to make reflect changed funding. For instance, WJ will only cover divorces 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 no longer approved for full representation. 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. 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. The few cases WJ covers in full, including those stated above, are the “direct services” that will be cut in 2005.

Amicus believe it is important the WI Supreme Court examine the Wisconsin Constitution to determine whether it provides a right to counsel to unrepresented, low-income litigants in custody cases. The Supreme Court can take original jurisdiction under Article VII, Section 3 of the Wisconsin Constitution and Sec. 809.70, Wis. Stats., where the issue presented is one of great public importance. *Wagner v. Milwaukee County Election Commission*, 2003 WI 103, 263 Wis.2d 709, 666 N.W.2d 816 (2003); *Lister v. Board of Regents*, 72 Wis.2d 282,309, 240 N.W.2d 610,626 (1976). This brief answers the right-to-counsel constitutional issue established under Article I, Sections 21(2), 1, 9, 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). To that end, granting the instant motion to permit WJ to file this Brief would enable the Court to draw its attention to laws that might otherwise escape consideration.

3. The Brief is offered solely for the purposes of assisting the Court in analyzing the question of law presented—whether there is a right to counsel for unrepresented, indigent parties in custody proceedings. Participation of WJ as *Amicus Curiae* would assist the Court in making its decision regarding petitioners’ claim to the right of counsel. WJ is in the best position to articulate its interests and the interests of indigent litigants in northern Wisconsin. WJ’s unique perspective as a legal service corporation, given the daily exposure to these issues and their consequences, is invaluable as this Court considers the instant petition.

4. Undersigned legal counsel for WJ have not contacted the parties to this matter, but are filing the instant motion pursuant to Wis. Stat. Section 802.01(2).

WHEREFORE, WJ prays that the Court grant leave for it to file an *Amicus Curiae* brief supporting petitioners' request.

Respectfully submitted this _____th day of November, 2004.

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No. 04-2999-OA

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Respondents.

BRIEF IN SUPPORT OF MOTION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS' PETITION REQUESTING THE SUPREME COURT TO TAKE JURISDICTION OF AN ORIGINAL ACTION FOR DECLARATORY JUDGMENT AND STATEMENT OF INTEREST OF WISCONSIN JUDICARE, INC.

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INTRODUCTION

The interest of Wisconsin Judicare, Inc. (hereinafter WJ) in the petition for original jurisdiction is that the need for counsel of low-income residents of northern Wisconsin is far greater than WJ can provide. In northern Wisconsin, legal service is grossly under-funded, resulting in only a fraction of low-income people getting the legal assistance they need. As funds continue to be cut, “brief service and referral” is replacing full representation. “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* believe it is important the WI Supreme Court examine the Wisconsin Constitution, supporting documents, and 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 THE PETITION FOR ORIGINAL JURISDICTION PERTAINS TO THE NEED FOR COUNSEL OF NORTHERN WISCONSIN’S LOW INCOME RESIDENTS WHICH FAR EXCEEDS THE SERVICES WJ CAN PROVIDE

WJ is a non-profit, legal service corporation serving Wisconsin’s northern 33 counties. WJ’s six staff attorneys and 267 participating private attorneys are dedicated to assisting low-income individuals with civil legal issues primarily pertaining to family, social security and Indian Law. WJ’s mission is to give underprivileged persons an equal opportunity in civil litigation while maintaining the

dignity of the client and attorney involved. WJ recognizes the multiple barriers to justice faced by the poor, the disabled, the elderly, and the victims of domestic violence. WJ staff attorneys conduct outreach visits to service agencies, operate a legal advice hotline, and WJ pays local private attorneys to provide free legal help to low-income persons in their communities.

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II. THE LIMITED ASSISTANCE AVAILABLE TO *PRO SE* LITIGANTS IN WISCONSIN IS NOT ADEQUATE TO PROTECT PARENTS' FUNDAMENTAL RIGHTS IN CUSTODY CASES¹

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). Social, economic, and political fac-

¹ The term “child custody” in this context refers to custody, placement and visitation.

tors—namely 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 without attorneys. Wisconsin courts have experienced a dramatic increase in the number of filings by self-represented litigants. 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—EXECUTIVE SUMMARY (2003).

In 2004, WJ completed an evaluation of *pro se* divorce. 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. Similarly, the Wisconsin Department of Health and Family Services 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 DE-

PARTMENT OF HEALTH AND FAMILY SERVICES: WISCONSIN MARRIAGES AND DIVORCES (2003).

In the past decade, the bench and bar of Wisconsin have made substantial efforts to accommodate this growing *pro se* population. WJ has determined from its interactions with staff, *pro bono* legal service providers, courts, and bars that child custody cases are the most critically underserved category of cases in Wisconsin. Such cases cannot be handled in any substantial volume through *pro bono* services. Historically, 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 for the *pro se* litigant. 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. These alternative mechanisms of assistance are marginally successful and were never intended to substitute for counsel, especially in custody cases.

The materials offered *pro se* litigants advises against appearing *pro se* in contested custody cases. 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> (promulgated by the Supreme Court of Wisconsin and 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 con-

fusing 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>. Self-represented litigants will always be “second-class” participants in a traditionally complex court process. ACCESS at 3.

III. IT IS WITHIN THE INHERENT POWER OF THE JUDICIARY TO APPOINT LEGAL COUNSEL FOR THE REPRESENTATION OF INDIGENTS

On at least three separate occasions, this court has found that 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). *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). 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. This Court can equate the educational, economic, and social sophistication of unrepresented parents in ChIPS proceedings with unrepresented parents in custody proceedings. Regardless of the underlying cause of action, self-representation has had quantifiable consequences for state courts. ACCESS at 2. Self-represented litigants place "greater demands on the time and resources of judges and court staff than litigants who are represented by attorneys." *Id.* at 2.

Often, judges and court staff are put in the difficult position of trying to provide meaningful access to justice without violating the court's fundamental obligation to maintain neutrality toward all litigants. *Id.* This Court recognized in *Joni B.* that assistance of counsel is necessary to the integrity of the ChIPS proceeding and avoids placing the individual judge in the untenable position of having to act as counsel for that parent. *Joni B.*, 202 Wis. 2d at 11. A survey of judges found that they often encounter self-represented parties who expected the court's assistance, or believed the court would act as the *pro se*'s "defender." Jona Goldschmidt, *The Pro-Se Litigant's Struggle for Access to Justice: Meeting the*

Challenge of Bench and Bar Resistance, 40 FAM. CT. REV. 36-37 (2002). When judges did not fulfill either role, the self-represented litigant’s impression was that the system was fixed, unfair and futile. *Id.* 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. *Id.* at 37. Essentially, only the represented party, knowing the rules of the game, receives equal protection under the law. *Id.*

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 the parents are factors the court should consider when 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 United States 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 that although the incarcerated indigent defendant in a civil tort action had no constitutional right to appointed counsel, “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 necessitating 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. 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 custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*

The United States Supreme Court has consistently characterized as important, a parent's interest in the "companionship, care, custody and management of his or her children" that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Court recognized the essential right to raise one's own children and has invoked the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment to defend the integral family unit. *Id.*, 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).

The State shares a parent's interest in a just and accurate outcome where the welfare of the child is concerned. *Id.* The U.S. Supreme Court noted that this interest might be best served in an adversary setting where both the State and the

parents are represented by counsel because “just results are most likely to be obtained through the equal contest of opposed interests.” *Id.* at 28. While the state may have legitimate interests to economize proceeding expenses by not appointing counsel, it is hardly a significant reason to overcome private interests “as important as those here.” *Id.* “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. The Wisconsin Supreme Court has recognized the interest of the legislature to manage public funds responsibly. Even so, the *Joni B.* Court concluded, “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.

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, 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. In failing to determine the constitutional limits of the right to parent, 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.*

Why *this* civil *Gideon*? The right we are asking the Court to afford in the context of this case addresses the most fundamental of rights—more fundamental than “the nature of a speeding ticket, a civil violation of a zoning ordinance...or a breach of contract case.” *Id.* at 141. It is in the nature of the protection of the family. *Id.* Justice Blackmun made this same argument in his *Lassiter* dissent, when he noted the *Gideon* standard “...in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Lassiter*, 452 U.S. at 36, J. Blackmun, dissenting, quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). In a case involving the fundamental right of parents to rear their children, counsel should be provided for those parents who lack independent means to retain private counsel. 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?”

Fraser, 379 Md., at 132.

CONCLUSION

For the foregoing reasons, the undersigned *Amicus* respectfully requests that this Court grant the petitioners’ petition, considering the inadequacy of services in Wisconsin for *pro se* litigants in custody disputes. *Amicus* urges the Court to require the State to afford *pro se* litigants full legal representation in order to protect the fundamental rights at issue.

Respectfully submitted this _____th day of December, 2004.

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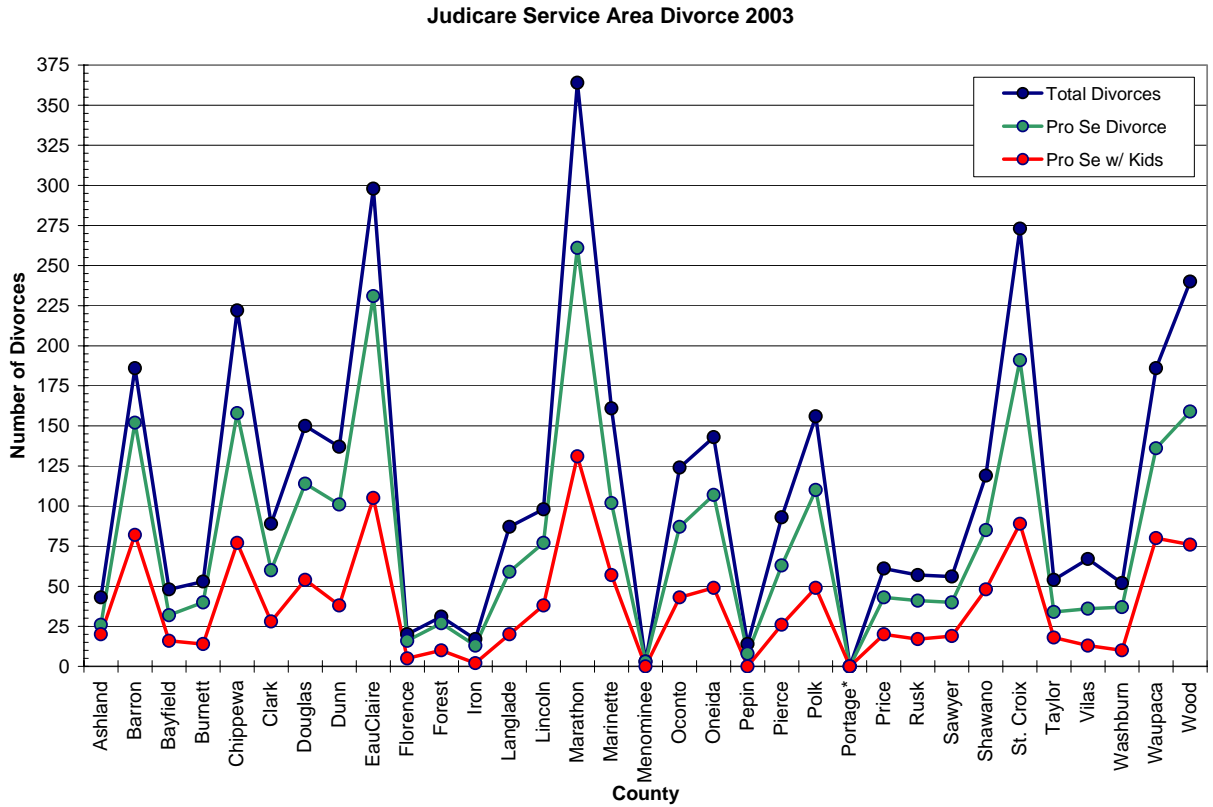
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Exhibit 1. WISCONSIN JUDICARE, INC.: EVALUATION OF PRO SE LITIGANTS IN DIVORCE AND DIVORCES INVOLVING CHILDREN IN NORTHERN WISCONSIN

Service Area:	HHS Evaluation:		Judicare Evaluation:		
	County	HHS Divorces	CCAP Divorces	At least one party Pro Se	Pro Se with Children
Ashland		44	43	26	20
Barron		190	186	152	82
Bayfield		48	48	32	16
Burnett		39	53	40	14
Chippewa		240	222	158	77
Clark		98	89	60	28
Douglas		149	150	114	54
Dunn		105	137	101	38
EauClaire		295	298	231	105
Florence		15	20	16	5
Forest		27	31	27	10
Iron		21	17	13	2
Langlade		84	87	59	20
Lincoln		104	98	77	38
Marathon		327	364	261	131
Marinette		136	161	102	57
Menominee		3	3	3	0
Oconto		130	124	87	43
Oneida		143	143	107	49
Pepin		10	14	8	0
Pierce		139	93	63	26
Polk		148	156	110	49
Portage*		0	0	0	0
Price		71	61	43	20
Rusk		60	57	41	17
Sawyer		66	56	40	19
Shawano		140	119	85	48
St. Croix		223	273	191	89
Taylor		47	54	34	18
Vilas		58	67	36	13
Washburn		54	52	37	10
Waupaca		184	186	136	80
Wood		272	240	159	76
TOTAL		3670	3702	2649	1254
Ave. per co.		118.3870968	115.6875	82.78125	39.1875
Percent of divorces where at least one party appears pro-se:					71.55591572
Percent of pro-se divorces involving children:					47.33861835

*Data not available for Portage County

Exhibit 2. WISCONSIN JUDICARE, INC.: EVALUATION OF PRO SE LITIGANTS IN DIVORCE AND DIVORCES INVOLVING CHILDREN IN NORTHERN WISCONSIN, PLOTTED BY COUNTY



Ex. 2

Certification of Service

I hereby certify that on the _____th day of December, 2004, a copy of the foregoing Amicus Curiae Brief in support of petitioners' petition requesting the Supreme Court to take jurisdiction of an original action for declaratory judgment and statement of interest of Wisconsin Judicare, Inc., was sent by mail first-class and postage prepaid to counsel of record as follows:

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Certification Regarding Length of Brief

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 12 pages, containing 2980 words (exclusive of the Table of Contents, Table of Authorities, Certificate of Service, and this Certification).

Dated: December 21, 2004

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