

COURT OF APPEALS OF WISCONSIN  
DISTRICT IV

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Appeal No. 2006AP000243

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

Jerome E. Parrish,

Petitioner-Respondent,

v.

Diana Romfeldt-Mendoza,

Respondent-Appellant.

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ON APPEAL FROM THE CIRCUIT COURT OF RICHLAND COUNTY,  
THE HONORABLE EDWARD E. LEINEWEBER, PRESIDING  
Case No. 1992PA000011A

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BRIEF OF *AMICUS CURIAE* WISCONSIN COUNTIES ASSOCIATION

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## I. INTRODUCTION

Appellant Diana Mendoza asks the Court to discard over 150 years of precedent and declare that an indigent civil litigant has a constitutional right to counsel. In order to reach Appellant's desired result, the Court would be required to: (1) determine that the right to be represented by an attorney in a civil proceeding at public expense, no matter the cause, is a fundamental right; (2) ignore the overwhelming precedent establishing that the right to appointed counsel at public expense in a civil proceeding is limited to only the extraordinary case; and (3) disregard the fundamental proposition that the legislature is the proper place for the Appellant's grievance. The Wisconsin Counties Association respectfully submits that the Court should not accept Appellant's invitation to recognize this novel constitutional right.

There is no debating the fact that an indigent *pro se* civil litigant faces many challenges. There is also little debate that society may be failing the financially underprivileged when it comes to assisting them with these challenges. Nonetheless, the problems indigent civil litigants encounter simply do not rise to the magnitude of a constitutional dilemma.

## II. ARGUMENT

Appellant's analysis of the issue confronting the Court is two-pronged. First, Appellant asserts that the right to appointed counsel in civil proceedings is a fundamental right guaranteed by Article I, Section 21(2) of the Wisconsin Constitution. Next, Appellant argues that the State's denial of publicly-funded

counsel to indigent civil litigants infringes upon the impoverished suitors' right to equal protection under the laws of the state. While Appellant's argument contains emotional appeal, there is simply no constitutional basis for the Court to hold that an indigent civil litigant has a right to publicly-funded counsel in civil proceedings.

**A. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE THE APPOINTMENT OF COUNSEL IN CASES SUCH AS THIS.**

Unlike others before her who relied upon the Due Process Clause, Appellant's argument for the appointment of counsel at public expense is based on the Equal Protection Clause. The guarantee of equal protection under the Wisconsin Constitution is substantially equivalent to the guarantee of equal protection under the Fourteenth Amendment to the United States Constitution. *Group Health Cooperative of Eau Claire v. Wis. Dept. of Revenue*, 229 Wis. 2d 846, 855, 601 N.W.2d 1, 6 (Ct. App. 1999) (citing *Treiber v. Knoll*, 135 Wis. 2d 58, 68, 398 N.W.2d 756, 760 (1987)). "The test to be applied in analyzing an equal protection challenge has been stated often: unless the challenged statute affects a 'fundamental right' or creates a classification based on a 'suspect criterion,' the standard used in reviewing the constitutionality of the statutory classification is the 'rational basis' test." *Id.* at 856.

According to Appellant, because Article I, Section 21(2) of the Wisconsin Constitution is an explicit recognition of the fundamental right to be represented by an attorney in civil proceedings, the Equal Protection Clause prohibits the State

from infringing upon that right by erecting financial barriers to the exercise of the right. Therefore, Appellant claims that an indigent civil litigant is constitutionally entitled to counsel, at public expense, in civil proceedings.

Appellant's argument is flawed, however, in that the right to counsel in civil proceedings is not a fundamental right, nor are indigent persons considered a "suspect class" for purposes of equal protection analysis.

1. Article I, Section 21(2) of the Wisconsin Constitution does not Create a Fundamental Right to Appointed Counsel at Public Expense in Civil Proceedings.

Appellant devotes a substantial amount of her brief to the argument that the Wisconsin Constitution provides a fundamental right to publicly-funded counsel in civil proceedings. The Constitution has never been interpreted in a manner similar to what Appellant advocates and the plain language of Article I, Section 21(2) belies Appellant's proffered interpretation.

Article I, Section 21(2) of the Wisconsin Constitution plainly states (in relevant part) ". . . any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice." This provision is disjunctive – a person has the right to proceed *pro se* **OR** by an attorney of the person's choosing. Appellant ignores the import of the word "or" and, instead, argues that if a person has the right to proceed *pro se*, that same person also has the right to proceed with publicly-funded counsel. Appellant's analysis is misguided.

In *Hlavinka v. Blunt, Ellis & Loewi, Inc.*, 174 Wis. 2d 381, 497 N.W.2d 756 (Ct. App. 1993), the court held that “every natural person in Wisconsin has an absolute right to appear *pro se*.” Likewise, a person has a right to appear in civil proceedings by counsel authorized to practice law in this state. However, to claim that Article I, Section 21(2) requires that a person be provided counsel at public expense in all civil proceedings is incorrect.

2. The Precedent Appellant Relies Upon does not Support Her Position that the Right to Counsel in Civil Proceedings is a Fundamental Right.

Appellant argues that several courts around the country have utilized an equal protection analysis in the context of the “civil *Gideon*” debate. The overwhelming majority of the cases Appellant cites in support of her position were actually due process cases. Further, none of the cases recognized, or even discussed, the proposition that there is a blanket constitutional right to publicly-funded counsel for indigent civil litigants.

Appellant relies heavily on *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963), for the proposition that “[i]f the state makes a court-access remedy available, it cannot deny that remedy to indigents solely because they are poor.” (Appellant’s Br. at 33) Appellant erroneously equates the right to access the courts, and the inability of a state to erect financial barriers to the exercise of that right, with the right to a publicly-funded attorney to prosecute or defend a civil action. Both *Griffin* and *Douglas* involved indigent persons involved in criminal proceedings where the Court struck down financial

barriers to an indigent's access to the full panalogy of judicial processes when a fundamental liberty interest was at stake. Moreover, all but one of the other cases Appellant cites in her appendix (*see* Appellant's Br. at 38; Appellant's App. at 92) involve recognition of a very limited right to counsel on due process or statutory grounds.<sup>1</sup>

The one case Appellant cites where equal protection was an issue bears no resemblance to the issue presented here. In *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976), the court held that once an individual qualifies for appointed counsel in a termination of parental rights proceeding (under a due process analysis), that person also qualifies for appointed counsel through an appeal of right. In this case, neither due process nor statute mandated the appointment of counsel at the trial court level. Therefore, unlike *Reist*, there is no equal protection issue on appeal.

There are many parallels between Appellant's argument and the argument advanced in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). In *Rodriguez*, the Supreme Court confronted the issue of whether the State of Texas' system of financing local schools through the local property tax levy violated the Equal Protection Clause because poorer school districts received significantly less funding than their wealthy counterparts in other regions of the

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<sup>1</sup> Space restrictions preclude an analysis of all the cases Appellant cites in her appendix as supporting her position. In summary, three of the cases involved a statutory right to counsel and the remaining cases involved either a due process right to counsel or recognition of the court's inherent authority to appoint counsel to ensure the fair administration of justice. None of the cases, with the exception of *Reist* noted above, are applicable to the Court's analysis here.

state. In addressing the issue, the Court was careful not to confuse public policy with the recognition of a fundamental constitutional right.

The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.

*Id.* at 23-24 (emphasis added).

Just as was the case in *Rodriguez* as it related to the indigent being impacted by a lack of adequate funding in the school system, the instant case does not involve impoverished suitors being locked out of the courthouse. Although an impoverished civil litigant may face challenges in navigating the contours of our justice system, there is no financial barrier to entry.

There are many compelling reasons to provide an indigent person with counsel in certain civil proceedings. But the decision ultimately lies at the feet of the legislature, not in the recognition of a constitutional right. The *Rodriguez* Court recognized the distinction when it held:

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. But the importance of a service must be regarded as fundamental for purposes of examination under the Equal Protection Clause.

*Id.* at 30.

The fact that an indigent litigant may not always fare well in a civil battle with a well-heeled party, while distressing, does not elevate the issue to constitutional proportions. As a result, the right to counsel in all civil proceedings is not a fundamental right and the Equal Protection Clause is inapplicable in the analysis.

3. Indigence Alone is not a Suspect Classification.

Equal protection under the law is guaranteed only in instances where a fundamental right is at issue or the State discriminates based upon a “suspect classification.” While Appellant chiefly relies upon the argument that the right to civil counsel is a fundamental right, she also seems to posit that indigent persons make up a “suspect class” for purposes of the equal protection analysis: “meaningful access to the courts cannot be denied solely because of indigency, especially where the court is the only forum in which the parties’ rights can be resolved.” (Appellant’s Br. at 37) However, Appellant ignores the vast body of precedent holding that indigence is not a suspect classification in an equal protection analysis.

The Supreme Court has repeatedly “rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny.” *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) (citing *Harris v. McRae*, 448 U.S. 297, 322-323 (1980); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973)). Therefore, Appellant’s argument concerning the disparate treatment of indigent civil litigants is subject

only to a rational basis test in the equal protection analysis – not the strict scrutiny standard Appellant seemingly advocates.

**B. THE LEGISLATURE HAS PROVIDED A STATUTORY RIGHT TO COUNSEL IN CERTAIN CIRCUMSTANCES.**

Opposition to Appellant’s argument should not be mistaken for a callous disregard of parents’ interest in the companionship, care, custody and management of their children, for it is agreed that such interest “undeniably warrants deference and, absent a powerful countervailing interest, protection.” *Joni B. v. State*, 202 Wis. 2d 1, 13, 549 N.W.2d 411(1996) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). But the Court should not levy the cost of such protection, ultimately borne by the taxpayers, in tacit disregard of the wisdom of both the legislature and, when called upon, the trial court.

The Wisconsin Legislature has granted the right to appointed counsel in several types of civil cases: proceedings under the Children’s Code, including proceedings involving the involuntary termination of parental rights (Wis. Stats. § 48.23); proceedings under the Juvenile Justice Code (Wis. Stats. § 938.23(1m)); involuntary commitment proceedings (Wis. Stats. § 51.20(3)); probation and parole revocation proceedings (Wis. Stats. § 304.06(3))<sup>2</sup>; and certain paternity proceedings (Wis. Stats. § 767.52).

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<sup>2</sup> The Wisconsin Legislature has recognized the court’s determination in *State v. Hardwick*, 144 Wis. 2d 54, 58, 422 N.W.2d 922, 924 (Ct. App. 1988), that an individual has a right to counsel in probation and parole revocation hearings where there is a potential for loss of liberty.

These examples show that the legislature has, over the years, acted to protect the rights of the indigent. Right, wrong or indifferent, the legislature has chosen not to extend the statutory right to all civil litigants.

**C. THE LEGISLATURE IS IN THE BEST POSITION TO DETERMINE WHAT, IF ANY, FUNDS SHOULD BE APPROPRIATED TO PROVIDE COUNSEL TO INDIGENTS IN CIVIL PROCEEDINGS.**

As set forth above, it is well-settled that an absolute constitutional right to counsel exists only in situations where an individual's liberty is at stake. While there can be no disagreement concerning the preference that all indigent individuals be represented in civil proceedings, the decisions concerning what representation is necessary to meet societal demands and how funds will be appropriated to pay for the representation are decisions for the legislature.

1. Only the Legislature Can Provide the Relief Appellant Seeks.

The Supreme Court has consistently recognized its hesitation to usurp the policy-making function of government vested in the legislature. In *Flynn v. Department of Administration*, 216 Wis. 2d 521, 576 N.W.2d 245 (1998), the court held:

Our form of government provides for one legislature, not two. It is for the legislature to make policy choices, ours to judge them based not on our preference but on legal principles and constitutional authority. The question is not what policy we prefer, but whether the legislature's choice is consistent with constitutional restraints.

*Id.* at 528-29 (emphasis added). It is only through the legislative process that a governmental body can declare, by statute, what is to be the public policy of the

state, which would necessarily embody “the community common sense and common conscience.” *Id.* at 541.<sup>3</sup>

2. Counties Are Incapable of Absorbing the Costs Associated with Providing Counsel to All Indigent Civil Litigants.

The costs associated with the Court’s potential recognition of a constitutional right to counsel cannot be ignored. For fiscal year 2002-03, the State Public Defender operated on a budget of \$73,088,200.<sup>4</sup> In 2003, there were 156,001 new criminal cases opened in Wisconsin courts, including felonies, misdemeanors and criminal traffic violations.<sup>5</sup> Therefore, it costs the State in excess of \$73 million annually to provide counsel to indigent individuals in a system that handles approximately 156,000 cases.

By contrast, in 2003, there were 264,048 new civil cases opened in Wisconsin courts.<sup>6</sup> If it costs \$73 million to provide indigent representation in a system involving 156,000 cases, it is not an exaggeration to suggest that it would

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<sup>3</sup> At page 13 of her Reply, Appellant argues that the legislature could “carve out” certain case classifications, which would not qualify for publicly-funded counsel. Notwithstanding the heightened scrutiny attendant upon the legislature “carving out” exceptions to a fundamental right, that is not the proper analysis here. Instead, the legislature should be the body addressing the societal concerns Appellant discusses.

<sup>4</sup> Wisconsin Legislative Fiscal Bureau, *Wisconsin Court System* (Informational Paper # 73, prepared by Christina D. Carmichael, Jan. 2003), p. 19. This figure does not include the millions of dollars counties spend annually in providing counsel in situations where the State Public Defender does not.

<sup>5</sup> See CCAP Yearend Caseload Summary – Statewide Report.

<sup>6</sup> *Id.*

cost at least this much, and likely much more, to provide indigent representation in a system involving over 264,000 cases.<sup>7</sup>

Under the current state of the law, counties would bear the entire financial burden of providing counsel to indigent civil litigants should the Court entertain the notion of recognizing such a right. Wis. Stat. Section 753.19 states:

[t]he cost of operation of the circuit court for each county, except for the salaries of judges and court reporters provided to be paid by the state, and except for the cost assumed by the state under this chapter and chs. 40, 41 and 230, and except as otherwise provided, shall be paid by the county.

In *Contempt in State v. Lehman*, 137 Wis. 2d 65, 403 N.W.2d 438 (1987), the court held that counties are required to fund the provision of counsel to indigents who were not eligible for assistance from the State Public Defender because, pursuant to Wis. Stat. Section 753.19, such costs would be considered an “operating cost of the court” for which counties are responsible.

The Wisconsin Counties Association is very concerned with the Court creating a constitutional right that has never before been recognized in any jurisdiction and even more concerned that the recognition of such a right would virtually bankrupt financially strapped Wisconsin counties. Counties today are asked to perform a multitude of functions on behalf of the State, for which they receive only partial reimbursement. For example, in calendar year 2001, counties

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<sup>7</sup> Appellant suggests that the cost of providing counsel to indigent civil litigants would be approximately \$40 million, but Appellant cites no study or resource in support of the figure. It is just as likely that the amount will be much higher.

spent in excess of \$126 million on circuit court operations and received only \$50.5 million in court-generated revenues.<sup>8</sup>

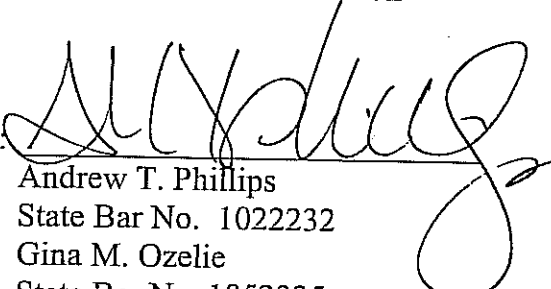
### III. CONCLUSION

Based upon the foregoing argument, the Wisconsin Counties Association respectfully requests the Court decline Appellant's invitation to recognize a novel constitutional right to publicly-funded counsel in all civil proceedings involving an indigent litigant.

Respectfully submitted this 7<sup>th</sup> day of July, 2006.

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<sup>8</sup> Informational Paper # 73 at p. 12, *supra*.

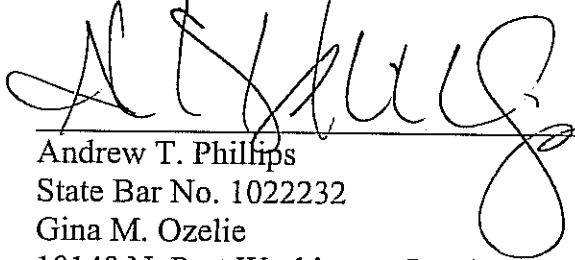
**CERTIFICATION**

I certify that this Brief conforms to the rules contained in *Rules*  
809.19 (8)(b) and (c) and that it is:

Desktop publishing or other means (proportional serif font  
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13 point type and the length of the Brief is 2991 words.

Dated this 7<sup>th</sup> day of July, 2006.

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A handwritten signature in black ink, appearing to read "A. Phillips", is written over a horizontal line. The signature is stylized and cursive.

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