SUPREME COURT OF WISCONSIN

Pam M. Kelly and Crystol Dimick,

Petitioners,

v. **No. 04-2999-OA**

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

Respondents.

BRIEF *AMICUS CURIAE* OF ELEVEN COUNTY JUDGES IN SUPPORT OF PETITION REQUESTING SUPREME COURT TAKE JURISDICTION OF ORIGINAL ACTION

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INTRODUCTION

Eleven current and retired judges[1] from the Milwaukee and Dane County Circuit Courts move this Court for leave to appear *amicus curiae* for the limited purpose of supporting Petitioners' request that the Supreme Court take jurisdiction of an original action. The Movants do not take a position on the appropriate remedy, if any, for the complex issues raised by the Petitioners. Likewise, Movants do not suggest that any such remedy should cover all civil matters.[2] Rather, Movants have experienced first hand the burden caused by self-represented litigants on the Wisconsin court system, other litigants, and the *pro se* litigants' own causes and ask that this

[1] The Movants are Judges Carl Ashley, Thomas P. Donegan, Christopher R. Foley, Mark A. Frankel, Michael D. Guolee, Michael Malmstadt, Patricia D. McMahon, Marshall B. Murray, Richard J. Sankovitz, Mary E. Triggiano, and Joseph R. Wall.

[2] Small claims matters, for example, quite naturally involve high numbers of self-represented litigants. Having a right to counsel in these cases may not result in as significant of a reduction in the burden to the court system that doing so, for example, in family law matters may.

Court find that the Petitioners raise issues *publici juris* which warrant exercise of original jurisdiction.

ARGUMENT

I. *PRO SE* CIVIL LITIGANTS REPRESENT A SIGNIFICANT AND GROWING BURDEN ON A JUDICIAL SYSTEM WHICH IS NOT WELL-EQUIPPED TO DEAL WITH THEM.

A lawyer who represents herself is said to have a fool for a client. That problem is compounded – and the effects and burdens extend well beyond the disadvantaged lawyer/client – when the "fool" also lacks any legal training or experience. Yet, this predicament occurs every day in Wisconsin courts involving important and complicated matters vitally affecting the lives of the state's citizens. This memorandum analyzes the burden that the lack of representation for impoverished civil litigants has on the Wisconsin courts and its personnel, as well as other litigants in the system.

A. *Pro Se* Litigants Are a Significant and Growing Part of State Trial Court's Caseloads.

Every year, tens of thousands of civil *pro se* litigants file or defend actions in the state of Wisconsin. Statistics released by the Wisconsin Pro Se Working Group, a committee of the Office of the Chief Justice, reveal that 70% of Milwaukee County family law cases in recent years involved non-represented litigants, some 10,204 persons in this category alone. Wisconsin Pro Se Working Group, *Meeting the Challenges of Self-Represented Litigants in Wisconsin, Report to Chief Justice Shirley S. Abrahamson,* at 8 (December 2000). To provide context, more than 100,000 civil actions[3] were opened *statewide* last year, approximately half of which were family law cases. Office of Court Operations, *Yearend Caseload Summary – Statewide Report* (generated May 6, 2004), <http://www.courts.state.wi.us/

[3] Small claims cases are *not* included in this figure.

about/pubs/circuit/docs/caseloadstate03.pdf>. Moreover, the number of *pro se* litigants in civil matters has been increasing during the last decade, both in Wisconsin and nationally.[4] *Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra,* at 5, 7 (2000); Rebecca A. Albrecht *et al.*, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 Judges J. 1, at 16 (2003).

B. Unsophisticated and Inexperienced *Pro Se* Litigants Complicate the Process and Burden the Entire System.

Due to a fundamental lack of understanding of the process, in combination with a deficiency of access to resources and guidance in the face of their complicated legal

[4] Far from abating, this trend appears to be accelerating in the most recent years. Informal numbers from the Milwaukee County Office of District Court Administrator indicate that the percentage of family law cases involving at least one self-represented litigant has increased from 72% in 2002 to 74.4% last year. Preliminary year-to-date numbers for 2004 indicate that 76.6% of Milwaukee County family law cases have involved at least one *pro se* litigant. Likewise, excluding small claims cases, informal statistics in District 1 suggest a trend of increasing self-representation in non-family civil cases from 37.9% in 2002, to 38.3% in 2003, to 44.9% (preliminary) year-to-date. Telephone Conversation with Bruce M. Harvey, District 1 Court Administrator (Nov. 17, 2004).

issues, self-represented litigants produce time-consuming frictions at every level of the state court organization. The bulk of *pro se* litigants are demonstrably indigent, very few of whom have any legal experience or training that prepares them for the complexities of the adversarial system. In the context of custody hearings, this Court already has explicitly recognized the burden of poorly educated, frightened, and inexperienced litigants on the entire judicial process. *Joni B. v. State*, 202 Wis.2d 1, 11, 549 N.W.2d 411 (1996).

A multitude of specific burdens on the court system are caused by self-represented litigants. *See, Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra,* at 9. Principally, *pro se* litigants need assistance and seek it directly from the court staff, encumbering already strained resources by forcing personnel to instruct on the most common practices and procedure. *Id.* This also raises conflict issues for court personnel, who are charged with

remaining impartial in the litigation process, and places staff in an ethically precarious position related to unauthorized practice of law. *Id.* at 9, 17-18; State Bar of Wisconsin, *Commission on the Delivery of Legal Services – Final Report and Recommendations*, at 30-31 (June 1996). Judges likewise endanger violation of the judicial code by providing help to litigants. Albrecht, *et al., supra,* at 16. They must also personally expend an inordinate amount of time deciphering pleadings[5] and hearings, when properly scheduled, are slow and onerous. *Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra,* at 9.

C. *Pro Se* Litigants Complicate Not Only Their Own Cases But Can Increase the Burden and Transaction Costs of Other Parties, Represented or Not.

[5] Wisconsin courts commonly note that a pleading from a self-represented party, "like many *pro se* petitions, is difficult to understand." *See, e.g., Amek Bin-Rilla v. Israel*, 113 Wis.2d 514, 516, 519, 335 N.W.2d 384 (1983).

One self-represented party causes problems for all litigants in the action. It goes without saying that even the most determined self-represented individual finds herself significantly disadvantaged in the litigation by a typical inability to understand and clearly and properly assert her cause (or lack thereof). *Id.* at 18; *Commission on the Delivery of Legal Services*, *supra,* at 30, 35. However, *represented* litigants also experience problems arranging for depositions and other discovery, giving notice and being properly notified, and responding to poorly articulated but often colorable claims and defenses. These problems significantly increase the expense for the represented party. *Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra,* at 9.

D. A Telling Example.

Many of these difficulties are exemplified in the recent case of *In re Paternity of Demetrius A.Y. v. Ronnie J.*, 271

Wis.2d 242, 677 N.W.2d 684 (Ct. App. 2004). In this paternity action lasting over a dozen years in the Wisconsin court system, conclusive genetic testing, admissions from the mother, and other evidence made it clear that the appellant could not have been the father of the children. *Id.* at 249. That is, "all parties recognize[d] that a meritorious defense exist[ed] to the two false claims of paternity." *Id*. at 256. The appellant had launched repeated unsuccessful *pro se* attempts to open the default judgments of paternity against him, to no avail.[6] *Id.* at 247-48. After over a decade of litigation, appellant finally was able to retain counsel and comparatively quickly got the judgments expunged.

It is not surprising that it took a dozen years for the judgment to be reversed despite admittedly conclusive evidence supporting appellant's position. The case is full of

[6] Tellingly, the trial court had denied the appellant's most recent *pro se* attempt in part because he had failed to file his motion in a timely fashion *Id.* at 249.

inadequate notices, failures to respond, scores of appearances by only one party, "fundamental deficiencies in the record," and grossly inadequate attempts by the appellant to represent himself. *Id.* The court summarized the problem concisely: "[I]t is an understatement to say that Ronnie was a less than sophisticated *pro se* litigant." *Id.* at 255. Rather, it was "obvious that through most of his travail, Ronnie was the victim of his own uninformed knowledge of the intricacies of the judicial system." *Id.* at 256. The Wisconsin court system, including its judges, staff, attorneys, and other litigants were also obviously victimized by the years of unnecessary litigation[7] in the matter. Such cases are far too common.

[7]Astoundingly, after a dozen years in the court system, the Appellate Court noted that "[n]o judicial consideration of the merits has ever occurred." *Id.* at 256.

E. The Courts' Inherent Power to Appoint Counsel Has, For a Number of Reasons, Not Been an Effective Means of Addressing the Problem.

Wisconsin courts have an inherent power to appoint counsel for the representation of an indigent litigant. *State ex rel. Fitas v. Milwaukee* County, 65 Wis.2d 130, 134, 221 N.W.2d 902 (1974). However, while a circuit judge may act on an individual case basis, this remedy does not adequately meet the needs of the litigants and the court system because: (1) judges are mindful of limitations in funding for appointed civil counsel; (2) except in unusual situations, such appointments come only after an application for counsel by the *pro se* litigant, many of whom are not capable of properly making the request; (3) referral to, or appointment of, one of the independently operating legal clinics is not an alternative due to low funding and staffing levels and because *pro se* litigants likely have already been turned down by those

organizations for the same reasons; and (4) referral to private attorneys is sporadically used due to the inconsistencies in the *pro bono* commitments of the greater legal community. *See Meeting the Challenges of Self-Represented Litigants in Wisconsin, supra,* at 11-13 (2000); *Commission on the Delivery of Legal Services*, *supra,* at 43-44. The current approach is rife with inefficiencies and has resulted in a heavy burden on the lower courts and its litigants. *Id.*

II. ORIGINAL JURISDICTION IS WARRANTED IN MATTERS *PUBLICI JURIS.*

Petitioners have properly stated the need for this Court to accept original jurisdiction to consider matters fundament to the operations, fairness, efficiency, and effectiveness of the Wisconsin judicial system. This Court has an inherent heightened interest in resolving just such matters.

A. This Court Has Broad Discretion to Exercise Original Jurisdiction.

As an initial matter, the Wisconsin Constitution grants this Court virtually unlimited scope in its original jurisdiction. Wis. Const. Art. VII, § 3(2); *State ex rel. Swan v. Elections Bd.*, 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986) (original jurisdiction of this Court is "clearly plenary"). By 1912, this Court had already enumerated some eight categories of precedent for the application of original jurisdiction and ruled that the list was not exclusive. *See In re Bolens*, 148 Wis. 456, 457, 135 N.W. 164 (1912).

It is equally well established that this Court may exercise discretion in selecting cases warranting original jurisdiction. *State v. Shaughnessey*, 86 Wis. 646, 57 N.W. 1105 (1894) (the supreme court decides to accept jurisdiction on a case by case basis). Generally, the petitioner must seek leave of court, show there is no other satisfactory remedy, and

the matter must be of a nature sufficiently important to merit original jurisdiction. *In re Exercise of Original Jurisdiction*, 201 Wis. 123; 229 N.W. 643 (1930). Even if a remedy is not lacking in a lower court, the Supreme Court may still choose to invoke original jurisdiction where "a speedy, final, and conclusive determination . . . would be in the interest of the public." *State ex rel Time Ins. Co. v. Smith*, 184 Wis. 455, 468, 200 N.W. 65 (1924).

B. Matters Warranting Original Jurisdiction are Those Affecting the Community at Large or a Public Right.

Because this Court's discretion to exercise its original jurisdiction is broad, it generally limits it to those matters where its judgment "affects the community at large." *Wis. Professional Police Ass'n v. Lightbourn*, 243 Wis.2d 512, 529, 627 N.W.2d 802 (2001). Thus, for example, where a matter impacts "the fiscal responsibilities of the state of Wisconsin," the Court has exercised its original jurisdiction.

Id. Likewise, the Supreme Court routinely extends its original jurisdiction to matters involving state and national elections. *See, e.g.,McCarthy v. Elections Bd.*, 166 Wis. 2d 481, 480 N.W.2d 241 (1992); *Labor and Farm Party v. Elections Bd.*, 117 Wis.2d 351, 344 N.W.2d 177 (1984) (recognizing, among other factors, "the statewide importance of the issues raised"). In contrast, where the parole of a single prisoner was challenged, this Court rejected original jurisdiction, finding the matter as "not directly affect[ing] the rights of the people at large or of any such large number of people …" *In re Zabel, Dist. Atty.*, 219 Wis. 49, 51, 261 N.W. 669 (1935).

Put another way, this Court concentrates the exercise of its original jurisdiction on those matters *publici juris*. "Matters which are *publici juris* are, by definition, assumed to be of paramount importance. It is thus only logical, under our constitutional scheme, that questions *publici juris* must be

brought here unless a party is content to exercise the only constitutional alternative – the bringing of an action in the circuit court and then pursuing a time-consuming course of appeal and ultimate review in this court." *Swan*, 133 Wis. 2d at 94.

C. This Court Finds Issues Related to Judicial System Itself Especially Deserving of Exercise of Original Jurisdiction.

The question of what constitutes *publici juris* in Wisconsin has also been well circumscribed over the last century. One principal hallmark of an issue *publici juris* sufficient to merit original jurisdiction is a matter affecting the judicial system itself. That is, this Court " is primarily concerned with the institutional functions of our judicial system…" *Swan*, 133 Wis. 2d at 93-94. As such, where an dispute arose regarding an order affecting the practice of law, it was *publici juris* and could have been commenced as an original action in this Court. *Lathrop v. Donohoe*, 10 Wis. 2d

230, 234, 102 N.W.2d 404 (1960). Likewise, where the constitutionality of a statute creating a court of extensive powers was questioned, original jurisdiction was extended. *State ex rel. Richter v. Chadbourne*, 162 Wis. 410, 156 N.W. 610 (1916). This Court has even ruled that a question regarding the power of the County of Milwaukee to reduce salaries of circuit judges was sufficiently *publici juris* to demand exercise of its original jurisdiction. *In re Breidenbach*, 214 Wis. 53, 252 N.W. 366 (1934).

III. THE CONSTITUTIONAL QUESTION OF WHETHER A RIGHT TO COUNSEL EXISTS FOR INDIGENT CIVIL LITIGANTS IS A MATTER *PUBLICI JURIS.*

The question presented by the petitioners is whether the Wisconsin Constitution authorizes the right to counsel for impoverished *pro se* civil litigants. The matter is a question of a public right of sufficient consequence to justify the exercise of original jurisdiction.

First, as an initial matter, the issue raised by Petitioners is, by definition, a question of "public or common right" traditionally associated with exercise of original jurisdiction in this Court. That is, Petitioners are specifically asking whether a public right to counsel for indigent litigants in civil actions exists.

Second, the issue is one that affects *tens of thousands* of impoverished self-represented civil litigants across the *entire state*. As such, the right being questioned is "public" – not one limited to a handful of persons or a narrow geographic area. *See, e.g., McCarthy* 166 Wis. 2d at 485. As aptly pointed out by Petitioners, the question is also one that affects the "fiscal responsibility" of the state, traditionally considered a matter *publici juris* because issues affecting the state budget affect every Wisconsin tax payer. *See Wis. Professional Police Ass'n v. Lightbourn*, 243 Wis.2d at 529-30.

However, most importantly, the question falls within the understanding of '*publici juris'* by particularly having the hallmark of an issue affecting the judicial system that this Court is inherently and uniquely interested in addressing. *See, e.g.*, *Lathrop*, 10 Wis. 2d 230. This is also clear in the recent decision of *Joni B. v. State*, 202 Wis.2d 1, 549 N.W.2d 411 (1996), where this Court took original jurisdiction over a question of the constitutionality of a legislative provision barring appointment of counsel in certain situations. If the interpretation of a legislative provision to limit the ability to appoint counsel warrants exercising original jurisdiction, the interpretation of the *Constitution* to determine if a *right* to counsel by the public exists would as well. Since this Court has already found issues related to representation of indigents naturally suited for the exercise of its original jurisdiction, it should do so again.

Finally, as a general matter, the question before this Court addresses the Wisconsin Constitution. As the ultimate arbiter of the meaning of that instrument, this Court is uniquely situated to resolve the question presented. Moreover, having the highest court in the state resolve the constitutional issue avoids countless parallel track litigations through the "time-consuming course of appeal and ultimate review in this court" that is inevitable. *Swan*, 133 Wis. 2d at 94.

CONCLUSION

The Wisconsin judicial system is under a substantial and increasing strain caused by large numbers of self-represented civil litigants and decreasing availability of legal services for the indigent. The *status quo* procedure of appointing counsel on an *ad hoc* basis is failing. This Court should find that the question of whether the Wisconsin Constitution gives indigent civil litigants a right to counsel is

an issue *publici juris* warranting exercise of its original jurisdiction.

Dated this _____ day of November, 2004.

Respectfully submitted,

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