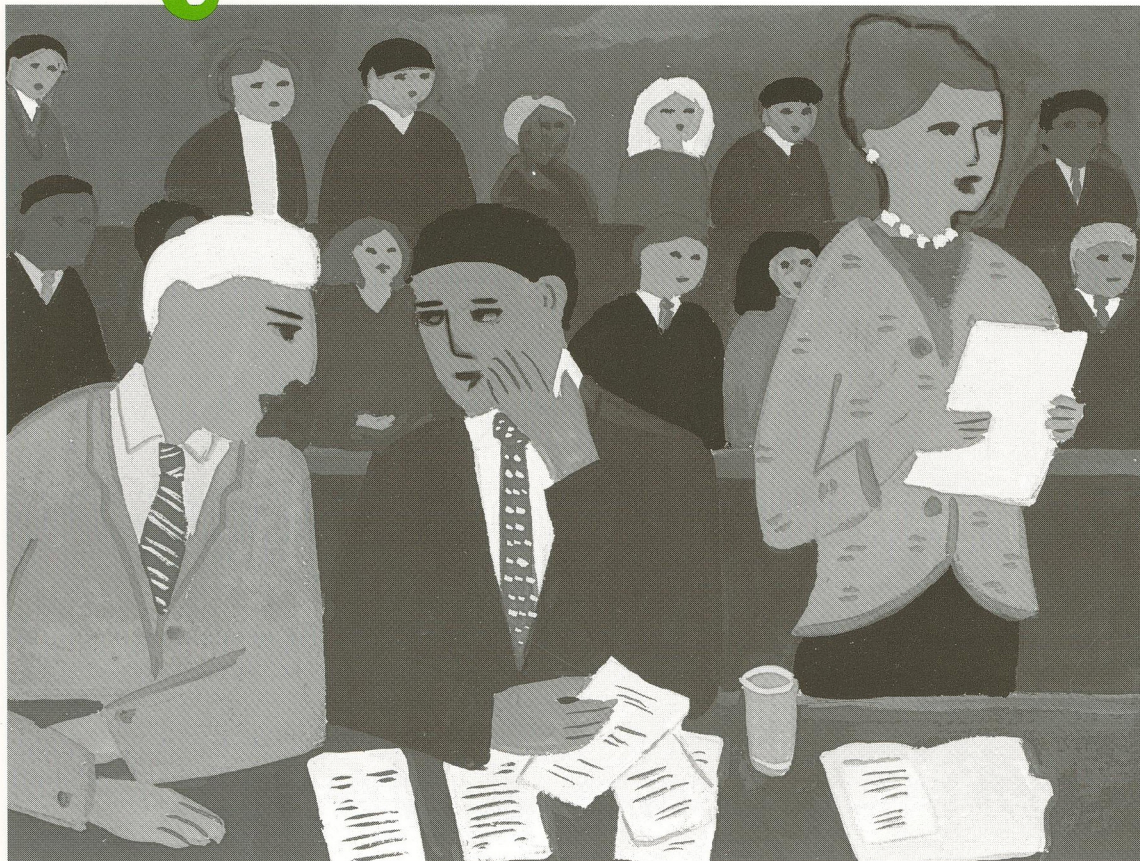


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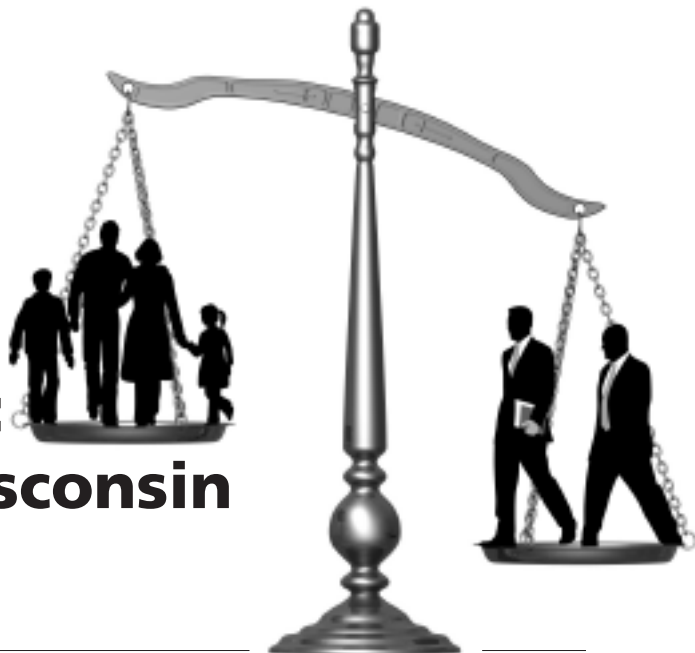
A RIGHT TO A LAWYER? MOMENTUM GROWS



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Sargent Shriver National Center on Poverty Law

To *Gideon* via *Griffin*: The Experience in Wisconsin



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Many lawyers in Legal Services Corporation–funded programs in Wisconsin have long realized that our clients cannot receive real equal justice without being represented in courts by attorneys. *Pro se* representation is completely inadequate, no matter how user-friendly the forms. The *pro se* approach can give clients access, can get them in the courthouse door, but they cannot obtain justice without the aid of counsel. In Wisconsin, during several moot courts for the cases discussed below, we came to focus on *Griffin v. Illinois* as the best road to a civil right to counsel.¹

Initially we considered a Wisconsin Constitution amendment that would guarantee the right to counsel in civil cases by adding the following language to the open courts clause:² “The right to obtain justice includes, for persons who are financially unable to pay for counsel, the right to have counsel appointed by the court at public expense in all civil actions except civil actions where the amount claimed is \$5,000 or less.” We chose to frame the right broadly, excepting only small claims court money actions because indigent suitors are in dire need of attorney representation in all lawsuits, and they really cannot obtain justice without the aid of counsel.

Former State Bar Pres. John Skilton pledged his support but warned us that the task would be Sisyphean. Indeed it would be, as a constitutional amendment in Wisconsin requires passage by two successive legislative sessions followed by submission of a ballot measure to the people during a general election. Thus we would have had to find a legislator and cosponsors, twice, and then find the non-Legal Services Corporation resources necessary to conduct a statewide proamendment campaign.

In the midst of the gloom brought on by this prospect, we reread the Wisconsin Constitution’s Declaration of Rights yet again and encountered the language of Article I, Section 21(2): “In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor’s choice.”³ This language raised the possibility that the right to counsel was already in the state constitution, making an amendment unnecessary.

¹*Griffin v. Illinois*, 351 U.S. 12 (1956) (holding a state law unconstitutional where the law required filing of a transcript to appeal a criminal conviction and indigent defendant could not pay for the transcript and had no other way to obtain it).

²The clause is Article I, § 9; Wisconsin courts have construed it not as an “open courts” provision but as an antibribery provision. See *Jadair Inc. v. U.S. Fire Insurance Co.*, 209 Wis. 2d 187, 205–7, 562 N.W.2d 401 (1997); *State ex rel. Baker v. County Court*, 29 Wis. 2d 1, 11–12, 138 N.W.2d 162 (1965); *Christianson v. Pioneer Furniture Co.*, 77 N.W. 174, 175 (1898).

³Six states have constitutional provisions with similar language: Alabama (Article I, § 10), Georgia (Article I, § 1, para. XII), Michigan (Article I, § 13), Mississippi (Article III, § 25), New York (Article I, § 6), and Utah (Article I, § 11).

Kelly v. Warpinski

When two mothers of small children came to Legal Action of Wisconsin offices in two counties with custody cases that we could not accept because of limited resources, we decided to seek attorneys for them through an original declaratory judgment action in the Wisconsin Supreme Court. One client had, without a lawyer, signed a stipulation which provided that, if she moved more than twenty-five miles from the city in which the father lived, the father would receive primary placement. When this client came to us, the father was vigorously seeking custody, and he had a lawyer.

The second client had joint custody and placement of a 5-year-old girl and a 2-year-old boy; she was tremendously concerned that the father was abusing the children during their visitation with him. In this case, too, the father was vigorously seeking custody and was represented by an attorney.

On November 17, 2004, we filed *Kelly v. Warpinski*, an original action for declaratory judgment in the Wisconsin Supreme Court.⁴ Since the court has complete discretion whether it takes jurisdiction of an original action, our petition and brief were directed primarily to the reasons the court should take jurisdiction rather than to the constitutional merits. We argued that jurisdiction was warranted because this was a matter of great public importance that ultimately only the supreme court would resolve. We argued that resolution through the regular appeals process would be unlikely where unrepresented litigants did not know how to appeal; that forcing people to represent themselves guaranteed unequal justice under law and substantially interfered with the administration of justice; that the action met the court's requisites for declaratory judgment; and that not only Section 21(2) of Article I but also Section 1 (our Equal Protection Clause) and Section 22 of Article I guaranteed a right to counsel.

Numerous amici supported our petition: the Wisconsin Coalition Against Domestic Violence; the Wisconsin Employment Lawyers Association; five individual civil rights attorneys; Wisconsin Judicare; the Wisconsin Trust Account Foundation (our Interest on Lawyers' Trust Accounts grantor); ten Milwaukee County judges, and one Dane County judge. We, of course, had contacted each of these groups to request amicus briefs. In most cases, one or two key people contacted others in the group and mobilized support. We appeared before the Wisconsin Trust Account Foundation, the State Bar of Wisconsin, and the Equal Justice Fund (our statewide fund-raising organization) to ask these organizations for support. The State Bar and Equal Justice Fund declined to file amicus briefs.

Much interest has been directed toward the judges' amicus brief, presumably because they spoke for at least some trial courts. In that brief, the judges stated that *pro se* litigants represented a significant and growing burden on a judicial system ill-equipped to deal with them; that courts' inherent power to appoint counsel had not been effective in addressing the problem; that original jurisdiction in the supreme court was warranted in matters *publici juris* or of great public importance; and the constitutional question of whether a right to counsel existed for indigent civil litigants was a matter *publici juris*.

The two trial court judges named as respondents in our petition argued that we had not satisfied the requisites for a declaratory judgment. They contended that their interests were not adverse to those of our clients and "they do not have an interest in contesting [petitioners'] claim of a constitutional right to court-appointed counsel in civil cases."

We then moved to join the Wisconsin Counties Association as a respondent since under Wisconsin law the counties pay court operation costs, including the cost of court-appointed counsel. The association opposed this motion even though it had sought leave to file an amicus brief.

⁴*Kelly v. Warpinski*, No. 04-2999-OA (Wis. Sup. Ct. filed Nov. 17, 2004) (Clearinghouse No. 55,816).

During our three moot court sessions in preparation for oral argument, *Griffin* loomed ever larger as the second in a one-two punch: first, that the Wisconsin Constitution provides a fundamental right to appear by counsel; and second, that if affluent suitors have this right, *Griffin*, in which the U.S. Supreme Court struck down a state law that had the effect of denying appellate review to the poor, requires that it be given to indigent suitors as well.

On April 6, 2005, the Wisconsin Supreme Court declined to take jurisdiction of the original action. The court said only that “the petition and motion are denied”; it gave no further explanation.

The *Garcia* and *Mendoza* Cases

Our next step was to assemble packets requesting counsel for *pro se* litigants to file with the trial courts. The packets consisted of a notice of motion, motion, affidavit of indigence, and memorandum in support of the motion. We put a notation on each item that Legal Action of Wisconsin had prepared the document to assist *pro se* litigants. We distributed these packets to our petitioners in the original action as well as to other clients. The judge granted the Milwaukee County petitioner’s motion and appointed counsel at county expense, at a rate of \$70 per hour.

Apart from this client, however, the *pro se* litigants began to return to us with news that the courts had denied their motions. Appeals of these denials are interlocutory, with a deadline of fourteen days, so we were forced to act quickly.

The first appeal, from a Milwaukee denial, was also a writ of prohibition.⁵ In response, the circuit court stated that “an indigent party in a civil suit, unlike an indigent party in a criminal case, does not have a right to the appointment of an attorney at public expense.” On August 16 a two-judge majority of the Wisconsin Court of Appeals denied the appeal, stating, *inter alia*:

The constitutional language upon which Garcia relies creates a constitutional right to prosecute or defend a suit on a *pro se* basis or by an attorney of the party’s choice that the party has retained This constitutional language has not been construed to create a fundamental right in indigent citizens to representation at public expense in civil suits when the indigent’s physical liberty is not at stake.

One judge dissented, stating:

I would grant the petition for leave to appeal on the issue of whether Wis. Const. Art. I, § 21(2), creates the right to the appointment of counsel at the public expense because this case, like a termination of parental rights case where appointment of counsel is required, involves fundamental and protected rights in marriage and family.

The court did not mention our equal protection claim.

Two other clients came to us after the trial courts rejected them. In early August 2005 we filed an interlocutory appeal and petition for a writ of prohibition for each in the court of appeals. We moved to supplement the record with the transcript of a July 15 trial court hearing during which the court, the opposing counsel, and the guardian *ad litem* joined forces against our client, Diana Mendoza.

Ms. Mendoza had to proceed through the July 15 hearing without a lawyer. A lawyer would have made a difference. Nearly a year earlier Ms. Mendoza had filed a motion to change her daughter’s physical placement to her own home from the home of the girl’s father, Mr. Parrish, due to her concern that the stepmother was abusing her daughter, her concern that her daughter lacked sleeping quarters in the father’s home, and her daughter’s express wishes. Ms. Mendoza intended to raise these issues at the July

⁵*Garcia v. Circuit Court of Milwaukee County*, 2005AP001696-LV and 2005AP001699-W (Wis. Ct. App. filed June 29, 2005).

15 hearing, and, although the daughter was present in the courtroom and ready to testify, the judge sent the girl into the hallway and did not allow her to testify. The questions of abuse, no sleeping quarters, and the girl's wishes were neither argued nor decided. To the contrary, most of the hearing was devoted to castigating Ms. Mendoza for failing to respond properly throughout a case in which the court and both lawyers were themselves confused. Mr. Parrish's attorney's arguments, the guardian *ad litem*'s arguments, and the court's decision were based not on the child's best interests but on Ms. Mendoza's alleged malfeasance or nonfeasance.

Ms. Mendoza had no opportunity at the hearing to make any kind of record as to abuse of her daughter or a basis for a change of placement, and, that opportunity having been foreclosed, the guardian *ad litem* made a recommendation based on that very lack of a record. Obviously Ms. Mendoza would have been much better off with an attorney, who could have protected her from this substantial and irreparable injury. The guardian *ad litem* implied that Ms. Mendoza was engaged in "shenanigans"; an attorney would have defended her against this accusation. Unrepresented as she was, the statement went un rebutted and might have adversely influenced the court.

Ms. Mendoza did attempt to speak for herself. The transcript shows that she began, "Can I say ...," before the guardian *ad litem* cut her off. Trying again, she asked, "Can I say one thing?" But she was not permitted to speak. A third time she said, "I called him and ...," before the court cut her off. The court stated: "Ms. Romfeldt [Mendoza], I will give you plenty of opportunity to speak, but when you're given the floor."

An attorney would have been highly unlikely accorded this treatment. The only subsequent "plenty of opportunity"

for Ms. Mendoza to speak was when the court asked, "[W]hat else would you like to say Ms. Romfeldt [Mendoza]?" She tried to explain her efforts to reach the guardian *ad litem* to discuss a change in placement and to tell him that her daughter had expressed the intent to run away if she went back to Mr. Parrish. The guardian *ad litem* then immediately moved the discussion away from the point Ms. Mendoza was attempting to make to complain that Ms. Mendoza had failed to keep an appointment with him. She responded that she had been unable to drive due to an injection. In effect, Ms. Mendoza had no real opportunity to make her case or to keep the hearing focused, as a lawyer would have, on the relevant issues of abuse and neglect and the daughter's wishes and best interests.

On September 20, 2005, the court of appeals granted the motion to supplement the record and denied the appeal. The court stated that interlocutory review is disfavored in Wisconsin and that petitioners had not persuaded the court that the issues they sought to raise would not be preserved for review through the standard appellate process.

The following month, on behalf of these two clients, we filed consolidated petitions for review and for writs of prohibition in the Wisconsin Supreme Court.⁶ In December 2005 the supreme court denied both consolidated petitions, but this time the appeal drew two dissents, one from the chief justice.

Meanwhile, earlier in December, the trial court in Richland County held another hearing in Diana Mendoza's case. On that bitterly cold day, Ms. Mendoza's truck broke down on the way to the hearing. She called the court three times to say that she could not get there and asked for an adjournment. Instead the court proceeded with the hearing in her absence, found her in default, denied all of her relief, and granted all the relief sought by her opponent, the

⁶The cases were *Paternity of K.J.P.: Jerome E.P. v. Diana R.M.*, No. 2005AP1957-LV (Wis. Supreme Ct. Oct. 19, 2005); *Paternity of K.J.P.: State ex rel. Diana M. V. Richland County*, 2005 AP 1958-W (Wis. Supreme Ct. Oct. 19, 2005); *Marriage of Olson*, 2005 AP 2087-LV (Wis. Supreme Ct. Oct. 19, 2005); *State ex rel. Olson v. Sauk County*, 2005 AP 2088-W (Wis. Supreme Ct. Oct. 19, 2005); and *State ex rel. Diana M. Lyle Olson v. Circuit Courts for Richland and Sauk Counties*, 2005 AP 2609-W (Wis. Supreme Ct. Oct. 19, 2005). (All these pleadings stem from two cases and have the same filing date.)

father, who was represented by an attorney. Although Ms. Mendoza is disabled, the court ordered her to pay child support or apply for ten jobs per week and report on those job searches *to her opponent's lawyer!*

The court rendered its oral decision as a written order in January 2006. Because the order was final, rather than interlocutory, Ms. Mendoza had a right to appeal; she did not need to seek permission. We filed her appeal on January 27; the following month, shortly after the clerk filed the record in the court of appeals, we filed a petition to bypass the court of appeals and go directly to the Wisconsin Supreme Court. On March 31, 2006, the supreme court, noting that all briefs on appeal had not yet been filed, dismissed the petition as premature. The case is now back in the court of appeals for briefing.

In the bypass petition we made a fuller argument on the constitutional issues than we had made in the original declaratory judgment action. That argument is, in essence, this:

1. Denying indigent litigants the fundamental right to counsel violates Article I, Section 1, of the Wisconsin Constitution, which requires equal protection of the law.
2. *Griffin v. Illinois* establishes, as a “principle of equal justice,” that if the state makes a court-access remedy available, it cannot deny that remedy to indigents solely because they are poor.

3. Article I, Section 21(2), of the Wisconsin Constitution guarantees the fundamental right to an attorney in civil actions to any suitor; this includes impoverished suitors.
4. Article I, Section 22, of the Wisconsin Constitution, read *in pari materia* with Section 1 and Section 21(2), gives impoverished suitors the right to court-provided attorneys.

Thus, if the right to appear by an attorney is a fundamental constitutional right that affluent suitors enjoy, *Griffin v. Illinois* and Wisconsin’s Equal Protection Clause require that indigent suitors be granted the same right in the form of court-provided counsel.

In addition to the litigation, in January 2006 we published a book, entitled *Toward a Civil Griffin in Wisconsin: Equal Justice Under the Wisconsin Constitution*, arguing for the right to counsel. Interested readers should contact me by e-mail to obtain a copy.

Through our litigation, we hope to find a way to get the case before the Wisconsin Supreme Court and, as part of the process, to secure as much support as possible for the judicial granting of this right. We trust that one day we will succeed and that impoverished suitors will no longer have to go it alone.